Neutral Citation Number: [2020] EWHC 100 (Comm)

Case No: CL-2016-000095

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 23/01/2020

Before:

THE HON. MR JUSTICE BRYAN

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Between:

NATIONAL BANK TRUST **(a company incorporated in Russia)**	**Claimant**
- and –	
(1) ILYA YUROV **(2) SERGEY BELYAEV** **(3) NIKOLAY FETISOV** **(4) NATALIYA YUROVA** **(5) IRINA BELYAEVA** **(6) ELENA PISCHULINA**	**Defendants**

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Nathan Pillow QC, David Davies and **Anton Dudnikov** (instructed by **Steptoe & Johnson UK LLP**) for the **Claimant**
Paul Stanley QC, Tom Poole and **Alexander Halban** (instructed by **Gresham Legal Limited**) for the **First and Fourth Defendants**
Tim Penny QC and **Tara Taylor** (instructed by **Fried, Frant, Harris, Shiver & Jacobson LLP**) for the **Second and Fifth Defendants**
James Willan (instructed by **Byrne & Partners**) for the **Third and Sixth Defendants**

Hearing dates:
1, 2, 3, 4, 5, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 26, 29, 30 and 31 October 2018,
1, 5, 6, 7, 8, 12, 13, 14, 15, 19, 26, 27, 28, 29 and 30 November 2018
Further written representations:
9, 11 and 15 July 2019, 6, 9 and 12 September 2019, 21 and 23 October 2019

Approved Judgment

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

THE HONOURABLE MR JUSTICE BRYAN**:**

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A. INTRODUCTION

A.1. The parties and the claims

1. In this trial the Claimant, National Bank Trust (the "Bank"/"NBT") brings claims under Russian law against its former majority owners, Mr Yurov, Mr Belyaev and Mr Fetisov (the First, Second and Third Defendants) (the "Shareholders"/"YBF"), who were members of its Supervisory Board. The Bank's case is that Mr Yurov, Mr Belyaev and Mr Fetisov orchestrated a massive fraud over many years which it says involved, amongst other things, the Shareholders procuring the Bank to "loan" around US$1 billion (the experts have agreed a figure of US$1.062 billion of which US$854 million is the outstanding loan principal) to what are said to be their own companies as part of a scheme which it was said was intended deliberately to falsify the Bank's accounts, conceal bad debts and related-party lending, and deceive the Central Bank of Russia (the "CBR"), the Bank's auditors, and ordinary Russians savers who were persuaded to deposit their funds with the Bank. It is said that the fraud led to the Bank's collapse in December 2014, when it was rescued by a bailout of more than US$1 billion funded by the Russian taxpayer.

2. The Bank's case is that the money received by the Shareholders' companies was in large part swiftly transferred away to a myriad of further companies, also beneficially owned and controlled by the Shareholders, in what were said to be deliberately complex chains of fake or artificial transactions, often involving sham and/or back-dated documents, before ultimately being used for purposes such as making interest payments or repaying principal on other "loans" from the Bank as well as (in certain instances) for the personal benefit and enrichment of the Shareholders themselves. Much of the money lent to the Shareholders' network has simply disappeared. Whilst the Shareholders had previously indicated an intention to prove that all funds were "returned" to the Bank, Mr Yurov and Mr Fetisov's accountancy expert has not been able to do so set against the backdrop of the complexity of the web of transactions and transfers that took place over a ten-year period.

3. Some of those companies (the "Borrowers") were, or had originally been, associated with an underlying business project (e.g. Stivilon and Priangarskiy) and did provide some security to the Bank; but the Bank says that these were generally failures and these companies owed large sums to the Bank at the time of its collapse. The exceptions to this are Willow River ("WR") and Retail Chain Properties ("RCP"), two offshore companies which the Shareholders admit they own, and which own valuable and profitable commercial property in Russia. The Shareholders say that they always beneficially owned these profitable companies, but disavow any such interest in the vast majority of other (debt-ridden and insolvent) companies that the Bank says were established, held and managed in exactly the same way. The Bank says that there is a wealth of contemporaneous material, much actually signed by the Shareholders, confirming they owned <u>all</u> of the companies. The Bank submits that following the trial, the Defendants still have no credible explanation in respect of such evidence.

4. The Bank's claim is based on the outstanding debt owed by the Borrowers, taking into account any recoveries. That outstanding debt is well over US$1 billion, reflecting (says the Bank) the facts that the Borrowers: (a) were generally offshore shell entities with no independent business or means to repay; and (b) in many instances gave no security for

the loans and had no (or few) assets. There is a large measure of agreement between the accounting experts as to the outstanding balances owed by the Borrowers.

5. The Bank identifies that the problem with a scheme that involves repaying or servicing loans with what are said to be sham loans is that it is self-perpetuating: if a shell company, A, "borrows" money from the Bank, which is actually used to repay loans to B, C and D, then A has no money to repay its own loan, and a yet further loan has to be made to E to enable A to repay. Such a scheme therefore becomes more and more complicated as those involved in the scheme have to juggle more and more (re-)payment obligations, as to both interest and principal, and have to enter into more and more transactions to (as the Bank puts it) *"keep the house of cards from collapsing"*.

6. The scheme in its ultimate form involved hundreds of companies (many of which were offshore), thousands of transactions, and what the Bank characterises as a team of people engaged full-time in devising the individual schemes, planning the money transfers and managing their implementation, through what the Bank describes as a sophisticated fake document factory and money-laundering machine, with all of this being funded with more funds said to have been extracted from the Bank in what are characterised as further fake transactions by the same network of Shareholder companies.

7. The Bank poses the question why, if such schemes were honest, was it necessary to create fake and backdated documents; recruit dozens of "nominee UBOs" and conceal the Shareholders' beneficial ownership of any companies (including those that they admit they owned)? The Bank's answer is that it was not – they say it involved lending real money deposited by ordinary Russian savers to offshore shell companies secretly owned by the Shareholders personally, much of which cannot be accounted for, and submitting knowingly false accounts to the CBR to cover up the fact that this was being done.

8. The Bank's case, in short, is that the "balance sheet management" (a phrase coined by Mr Yurov) is fundamentally dishonest, not in the Bank's best interests, and unreasonable; and it says the Shareholders were in serious breach of duty in procuring, facilitating, approving or acquiescing in it, and are liable to the Bank in respect of it.

9. The effect of "balance sheet management" led to a very large increase in the size (or apparent size) of the Bank's corporate loan portfolio and therefore the (apparent) asset base between 2008 and 2014. The unchallenged evidence of the Bank's expert Mr Allen was that the corporate loan portfolio more than doubled from about RUB 24.8 million in 2008 to about RUB 58 billion in the first half of 2014 (Table 3.1 to Allen 1).

10. That it was "balance sheet management" involving the Borrowers that led to the large apparent increase in the Bank's corporate loan portfolio is apparent from the fact that as at 30 June 2014, RUB 45.3 billion of the Bank's loan portfolio consisted of loans to just the Borrowers at issue in these proceedings (Table 3.2 to Allen 1). As the Bank points out, that was, in itself, a significantly greater sum than the size of the Bank's entire corporate loan portfolio in 2008 (c. RUB 24.8 billion). As at 31 December 2013, the Bank's total reported capital was just RUB 17.5 billion. Thus, says the Bank, this was not a "closed loop" in which a fixed amount of money was recycled round and round in a series of loans, with the hole in the balance sheet at the end of the process being the same as an original "loss" at the start.

11. An illustration of how the "balance sheet management" required more and more loans to be taken out to service existing loans is provided by the use of Erinskay and Baymore which, despite being Cypriot shell companies, became by far the Bank's largest corporate borrowers – a table to the CBR's 2014 Audit Report in relation to the Bank's largest corporate borrowers at that time records that they had, between them, borrowed over RUB 9 billion (about US$230 million), as at 1 October 2014. That table also illustrates that the Borrowers in this case dominated the corporate loan portfolio.

12. The source of the funding was mainly small-scale retail depositors, i.e. ordinary Russian savers, who deposited money with the Bank. The Bank's principal business in the relevant period was retail banking; and by 2014 it had over 400 branches across Russia holding the deposits of some 1.5 million individual customers, totalling around US$1.9 billion. The Bank pursued an expensive, and highly successful, advertising campaign (that included the hiring of the Hollywood actor, Bruce Willis, who was paid around US$2 million a year) to bring in retail depositors – and such advertising emphasised the Bank's name (i.e. Bank TRUST to imply that the Bank could be trusted with depositors' money). In the event the depositors' savings were saved by a taxpayer-funded deposit scheme in Russia in the form of the Deposit Insurance Agency (the "DIA").

13. In this regard, the size of retail deposits was not matched by the size of the retail loan book. Mr Allen's Appendix 5a shows that the customer deposits were consistently larger than the (growing) retail loan portfolio: e.g. customer deposits in 2012 were RUB 142.5 billion, whereas the retail loan portfolio was only RUB 98.1 billion. It was, says the Bank, customer deposits that constituted the only real money coming into the system from the outside world.

14. Mr Allen's evidence (at Allen 3.17-3.20), which was not challenged in cross-examination was that:

> "3.17 The large increase in the asset portfolio was not financed through equity: the total capital of NBT reported in its IFRS financial statements increased by only RUB 4.5 billion in the period between 2005 and 1H 2014, compared to an increase in the total asset portfolio of RUB 145.4 billion.
>
> 3.18. Instead, the increase in total assets appears to have been largely funded by an increase in liabilities, primarily the "amounts due to customers" (including mainly customer deposits and current accounts) which increased by RUB 114.2 billion (or some 4 times) between 2005 and H1 2014.
>
> 3.19. When the Bank entered administration, and a shortfall between assets and liabilities of some USD 1.9 billion was exposed, these and other external liabilities had to be covered, inter alia, by the DIA financing of USD 2.3 billion referred to in paragraph 2.2 above."

15. It is the Bank's case that had the CBR known about the true nature of the Bank's lending and the Bank's true financial position it would have stepped in to protect depositors by revoking the Bank's licence – instead of which the Bank says the Shareholders continued

to be (handsomely) paid and continued to derive personal benefits for themselves (including as shareholders through the continuance of the Bank).

16. The Bank submits that the Shareholders' true state of mind was summarised in a memo Mr Yurov sent on 28 June 2015 in Russian to Mr Belyaev and Mr Fetisov (though only disclosed in these proceedings by Mr Fetisov) to their private email addresses, set against a backdrop of Russian criminal proceedings concerning two of the companies involved in the scheme (Erinskay and Baymore) and which the Bank says was Mr Yurov's attempt to defend themselves against allegations of criminality. As addressed in due course below Mr Yurov seeks to distance himself from this document asserting that it had been prepared by his Russian lawyers EPAM (which the Bank says is, itself, a dishonest suggestion in the light, amongst other matters, of the associated metadata). Neither Mr Fetisov nor Mr Belyaev responded stating that they disagreed with what was said. In relation to Bank losses, the memo provided, amongst other matters that:

> "If such losses had been recorded in the bank's books back in 2008, the CB would have had to revoke NBT's banking licence as the reduction in capital would have been over 20%. As a rule, as soon as a bank's licence is revoked, it becomes bankrupt because the depositors have the right to withdraw their deposits. Since no share capital could be attracted after NBT's shares were unlawfully attached in 2008 on the grounds that they allegedly belonged to Khodorkovsky (the attachment is still in force regardless of 12 complaints and petitions), **a decision was made to start submitting false accounts to the CB (which, in my understanding, was only an administrative offence punishable at most by a fine and licence revocation (in any case, the risk of licence revocation already existed)) and focus on providing loans to individuals instead (as the most profitable transactions) in order to offset the previous years' losses by the received profits, recover the bank's capital over time, and stop submitting false accounts to the CB.** This business logic had failed as NBT incurred new losses, this time on loans to individuals, and had to file for rehabilitation proceedings to avoid bankruptcy." (emphasis added)

17. A Worldwide Freezing Order ("WFO") was made against the Shareholders in these proceedings by Leggatt J at an *ex parte* hearing on 11 February 2016. Mr and Mrs Yurov sought to discharge it at a three-day hearing in July 2016 (the Fourth, Fifth and Sixth Defendants are the First to Third Defendants' wives, sued in respect of monies said to have been received by them). That application was dismissed by Males J in a judgment dated 28 July 2016 ([2016] EWHC 1913 (Comm)) (the "Males Judgment").

18. In his challenge to the WFO, Mr Yurov's response to the Bank's case was not to dissociate himself from the allegations of the deliberate manipulation of the balance sheet by secret, uncommercial and artificial related-party lending, but rather to accept and aver that it had happened and that he knew of and had been involved in it, but to argue that it was in fact honest, legitimate and in the best interests of the Bank. A similar line of defence is advanced on Mr Fetisov's behalf.

19. In describing that case, Males J referred to this recycling of funds through offshore shell companies to give the impression to depositors and regulators that all was well with the Bank as *"dishonest"* and *"a Ponzi scheme with a fancy name".* The "*fancy name*" is a reference to Mr Yurov's description of this process as "balance sheet management" – which the Bank says is no more or less than a euphemism for the deliberate falsification of the Bank's balance sheet to create the misleading impression that existing debt was being serviced when in truth it was bad and the Bank was in a dire financial position. Mr Yurov's case before, and at, trial was that such "balance sheet management" was carried out in good faith and in the best interests of the Bank and was common practice in Russian banks at the time.

20. It was not, however, contended that such practices were lawful, and in his Second Affidavit Mr Yurov acknowledged that (a) they were *"not strictly in accordance with Russian banking regulations"* (which the Bank says is something of an under-statement); and (b) the purpose of the exercise was to stop the CBR from revoking the Bank's licence (i.e. that it would have done so had it known the truth about the Bank's financial position) – as is also reflected in Mr Yurov's 2015 memo.

21. In Mr Yurov's witness statement for trial (at paragraph 39) he criticises the views expressed by Males J, suggesting that Males J.'s criticism of his case was *"misplaced"* and that there had been a *"misunderstanding of the background"* on the part of the Judge, who had failed to understand how the *"rigid and formalistic"* Russian regulatory system meant that it was (according to Mr Yurov) both *"lawful and honest"* to *"apply the rules formally, and to use techniques such as off-balance sheet structures to achieve commercially sensible results".*

22. At the trial before me, none of the Defendants has adduced expert evidence (for example from their Russian law expert, Mr Gerbutov) to the effect that the "balance sheet management" was lawful. I have also heard evidence, on behalf of the Bank, from Ms Olga Podstrekha, the Deputy Head of Banking Supervision at the CBR who states that the CBR were unaware of such "balance sheet management" which she regarded as *"fraudulent and dishonest".*

23. For his part Mr Yurov maintained at trial that he did nothing wrong, whether in relation to "balance sheet management" or otherwise and that he was not under any liability to the Bank. His stance can be seen, in particular, from what was submitted at paragraphs 8 to 11 and 14 of his Closing Submissions:-

> "8. The overall activities of the Defendants (and the many Bank employees, including many senior employees) could not fairly be described as any sort of embezzlement, or as a fraud on the Bank. The Bank was not an intended victim of it. Had it been a fraud at all (which it was not, and which it is not open to the Bank to say it was), it would have been a fraud by the Bank, involving not just the Defendants but more or less its entire senior management team, and the Bank would have been not its intended victim but its intended principal beneficiary. Mr Yurov participated in it in the same way as he participated in the Bank's activities generally: as Chairman of the Supervisory Board he had a general strategic

knowledge about the direction the Bank was taking, and approved it. As with the rest of the Bank's activity, the details were left in the hands of the Bank's management and the closely-related teams at Columba and Iona.

9….
[the Bank] remains entitled to say, on its pleaded case, that the Loans and Transactions by which the scheme was carried out were not reasonable ones to engage in, because the nature of the scheme in its essence was improper. Mr Yurov does not accept that it was improper, and invites the Court to conclude that it was not. The essential reasons for that stance are (a) that he does not accept that it was impossible that balance sheet management would succeed in its objective of buying the Bank time to turn its business around and unwind the various schemes and (b) that he does not accept that the various schemes required breaches of the law (in so far as any are pleaded), and could not be lawfully carried out. In his understanding, there are lawful and unlawful ways to achieve a favourable presentation of a company's financial position, particularly vis-a-vis the CBR, and he reasonably assumed that those adopted by the Bank's management fell the right side of what may have been a rather unclear line.

10. At any rate, the various schemes (in outline and in detail) were well-known within the Bank. When the DIA was appointed, they were not hidden. The DIA and the Bank's new management from Otkritie was told about them by employees, and by Mr Yurov. Mr Yurov openly offered to transfer the off balance sheet companies to Otkritie, or as it might direct, and was ready to do so. In those circumstances, the Bank knew about the alleged wrongful acts, not just as a matter of suspicion but as a matter of positive knowledge, by early 2015. Because that was more than a year before the relevant claims were made, the Bank is out of time.

11. In fact, even if they are wrongful, the various schemes caused very little actual loss. They probably inflated the apparent assets of the Bank, as interest accumulated, but they did not involve the expenditure of any real cash or any new liability or loss. The biggest loss suffered was in bond trading by Erinskay and Baymore, but that was not a loss caused by the scheme but by the market and would not have been significantly higher if the Bank had held the bonds itself. Otherwise, apart perhaps from the very small amount that went to Merrill Lynch and for the Kolyada litigation, and apart from the significant but not high costs of maintaining and operating the network (which together amount to around 2 or 3 percent of the money lent), the money all returned to the Bank and the Bank is not thereby worse off than it would have been if the various Loans and Transactions had not been made.

> 12. In those circumstances, if a fair and adequate assessment of the sum required to compensate the Bank were required to be made, it would arrive at a figure representing a very small fraction of the total amount of the Loans.
>
> 13. In any event, if the Bank did suffer loss, that was not Mr Yurov's intention. Mr Yurov did not desire to cause loss to the Bank; nor was he indifferent to it. He positively desired that the Bank would benefit from the Loans and Transactions. Even if he was negligently wrong about that, the Bank's claim is limited under the Labour Code based on Mr Yurov's salary.
>
> 14…
> The prosaic reality is that Mr Yurov played a conventional role, as Chairman of the Supervisory Board, in giving high level approval to a variety of methods by which the Bank struggled and muddled through a succession of economic shocks, in the face of a legal and regulatory system that was in turns pedantically formal and in turns arbitrarily lawless. The claim against him should be dismissed."

24. The Bank disagrees, and joins issue, with all such submissions, submitting in particular, that the submission that *"the money all returned to the Bank and the Bank is not thereby worse off"* is absurd, being it is said wrong in principle, wrong in law, and unproven on the facts, whilst the suggestion that Mr Yurov played a conventional role as Chairman of the Supervisory Board is, so it is said, both absurd and indeed tasteless.

25. Mr Fetisov adopts a similar line of defence to Mr Yurov (and indeed adopts the arguments set out in Mr Yurov's Closing Submissions). He submits, as reflected in paragraphs 1 and 2 of his own Closing Submissions:-

> "1. Mr Fetisov explained in his opening submissions that the use of the off-balance sheet structures was not intended to cause harm to the Bank; that it was neither in bad faith nor unreasonable; and that it did not, in any event, cause loss to the Bank. To the contrary, his actions were intended to benefit the Bank, in particular by giving it the opportunity to realise the value of certain assets and investments following the 2008 financial crisis.
>
> 2. The evidence given at trial supports Mr Fetisov's defence. That evidence is also inconsistent with the Bank's case that the Loans were part of a dishonest and knowingly unlawful scheme for the Defendants' own ends and/or their personal benefit. In particular, the evidence has shown that:
> (1) the Borrowers were, and were understood to be, used for the benefit of and under the control of the Bank (save for the Priangarskiy 'group' and Willow River/RCP, which were personal investments and known to be such);

(2) the Bank's senior management, who were experienced and professional bankers with no reason whatsoever to participate in any dishonesty, used the off-balance sheet structures as an integral part of the Bank's infrastructure and in its best interests; and

(3) the monies lent to the Borrowers were, with very limited exceptions which do not undermine the general rule, used for the purposes of balance sheet management, investments on behalf of the Bank and associated expenses. Even if the off-balance sheet structures should not have been used, the Bank has not suffered any significant loss as a result."

26. The Bank again joins issue with such matters and denies that the evidence is to the effect alleged.

27. Mr Belyaev's defence is, and has always been, somewhat different. He essentially denies all knowledge of the matters pleaded by the Bank including in relation to "balance sheet management" and denies being party to any dishonest scheme. He goes so far as to plead (at paragraph 3 of his Defence) that*, "save as expressly admitted below, Mr Belyaev was entirely unaware that he had any interest, whether direct or indirect, in any of the Borrowers until after the commencement of the proceedings. Even now, he does not admit that he has an interest and the Bank is required to prove the accuracy of the structure charts in the Particulars of Claim"*. Mr Belyaev submits that the only properly pleaded allegations against him relate to 7/8 Credit Committee ("CC") decisions in which he participated. He says that he did not act unlawfully in relation to any of these decisions, and in respect of other CC decisions he did not vote and cannot be held liable in respect thereof.

28. The Bank submits that in fact, the contemporaneous documents, many signed by the Shareholders themselves, establish beyond any doubt that all of such companies were owed jointly by Mr Yurov, Mr Fetisov and Mr Belyaev, in the same proportions as they held their interests in the Bank itself (3/7 Yurov, 2/7 Fetisov and 2/7 Belyaev). The Bank also points out that each of Mr Yurov, Mr Fetisov and Mr Belyaev were the settlor and sole beneficiary of their respective purported discretionary trusts established in the Isle of Man which, from 2014, held their respective interest in the network of companies.

A.2 Russian law

29. All the claims against the Defendants are made under Russian law. In relation to Russian law the Bank relied upon the expert evidence of Dr Rachkov, the Defendants relied upon the expert evidence of Dr Gerbutov, and each witness was cross-examined at length in relation to the issues that arise. There were numerous differences between them as identified in the Agreed Facts and Issues (Issues 39 to 47, 3 and 18A), and addressed in Section M below. However, as recorded in the Joint Memorandum of Experts on Russian Law (the "Russian Law Joint Memo") there were also a number of matters of common ground that related to liability under civil legislation, and under the Labour Code, in particular Article 53(3) of the Russian Civil Code ("RCC"), the new Article 53 of the RCC (effective from 1 September 2014) and Articles 71(1) and 81-84 of the Joint-Stock Companies Law (the "JSC Law") which applied to the Shareholders (as directors' duties

and/or labour law obligations). These are at the heart of the case. In this regard the ultimate issue on liability is Issue 42 which asks:-

> "In view of the findings made on the issues identified above in relation to the nature of the Loans and Transactions and the Shareholders' knowledge and involvement in them, were the Shareholders in breach of Article 71 of the JSC Law and/or Article 53 of the RCC in respect of the Loans and Transactions? As set out above, it is common ground that, if the Shareholders were in breach of these obligations, they would also be in breach of their Labour Code obligations."

30. In this regard:-

(1) Article 53 provided (before amendment):

> **"Article 53. Bodies of a Legal Person (prior to amendments made on 29 June 2015)**
> …
> 1. A legal person acquires civil law rights and assumes civil responsibility through the actions of its bodies, which operate in accordance with the law, other legal acts, and the foundation documents…
> …
> 3. A person who, by operation of the law or the foundation documents of a legal person, acts in its name, shall act in good faith and reasonably in the interests of the legal person which he represents. He shall, upon demand of the founders (participants) of the legal person, compensate any damages inflicted by him upon the legal person, unless otherwise specified by law or contract." (emphasis added)

(2) Article 71(1) of the JSC Law provides:-

> **"Article 71. Liability of Members of Company's Board of Directors/Supervisory Board, Sole Executive Body (Director/General Director) and/or Members of the Company's Collective Executive Body (Management Council/Directorate), Managing Organization or Manager**
>
> 1. Members of the company's board of directors/supervisory board, the company's sole executive body (director/general director), temporary sole executive body and members of the company's collective executive body (management council/directorate), as well as the managing organization or manager shall, in exercising their rights and performing their duties, act in the company's interests, exercise their rights and perform their duties with respect to the company in a bona fide and reasonable manner." (emphasis added)

31. In relation to such provisions, the following, amongst other matters, is common ground (paragraphs 14 to 16 of the Joint Memo on Russian Law):-

> "14. It is agreed that under the Initial Article 53(3), the New Article 53(3), and under Article 71(1) of the JSC Law, members of the board of directors were obliged to act in the interests of the company when performing their rights and obligations of members of the board of directors and to perform their rights and obligations in relation to the company in good faith and reasonably.
>
> 15. It is agreed that with respect to liability under the Initial Article 53(3), the New Article 53(3), and under Article 71(1) of the JSC Law:
>
> (1) the claimant must prove the bad faith and/or unreasonable actions (or omissions) of the director which caused damages to the company, existence of damages, as well as the causal link between the behaviour of the director and the damages suffered by the company.
>
> (2) the amount of damages has to be established with reasonable certainty. However, when the amount of damages cannot be established with reasonable certainty (although it is clear that certain losses were suffered), the damages claim cannot be dismissed on that basis. In such a case, the amount of damages awarded by the court is to be determined by the court given all the circumstances of the case and proceeding from the principles that the compensation should be fair and adequate.
>
> (3) the causal link between the behaviour of the director and the damages suffered by the company must be immediate (direct).
>
> (4) the claimant has a duty to mitigate its damages and a violation of that duty is a ground to reduce liability of the defendant
>
> 16. It is agreed that paragraphs 2 and 3 of Resolution No. 62 list situations establishing rebuttable presumptions of bad faith and/or unreasonable actions of the director." (emphasis added)

32. A central issue is accordingly whether, in relation to the findings made on the properly pleaded issues, the Shareholders were in breach of Article 71 of the JSC Law and/or Article 53 of the RCC. As addressed in Section D.4, there is an issue between the Bank and the Defendants as to what matters have been properly pleaded against the Defendants in this regard, and so go not only to credit, but as to the merits.

A.3 The History of the Bank and the Defendants' historic roles

33. The history of the Bank is largely common ground, but it forms part of the backdrop to events that followed. In this regard two banks, Trust Investment Bank ("TIB") and Bank Menatep SPB ("MSPB") were part of the Menatep Group, owned by Mr Khodorkovsky and a number of his business associates.

34. Mr Yurov graduated from the Faculty of Economics of the Moscow Institute of Aviation and has a diploma in money market and treasury management from the TRESOFI Business School in France. He worked in the banking sector in France before joining Bank Menatep in Moscow in 1995 and subsequently moved to TIB. He initially served as the deputy chairman of TIB's Management Board and in 2000 was promoted to chairman of TIB's Management Board and CEO of TIB. In September 2003 he was appointed chairman of the Supervisory Boards of both TIB and MSPB.

35. Mr Belyaev's professional background is in financial markets and he is a former Head of the Treasury Department of AvtoVAZbank and later Rosestbank. He joined TIB in 1999 as Deputy Head of the Management Board with responsibility for treasury and financial markets operations. During 2001, TIB began to specialise in investment banking, and Mr Belyaev and Oleg Kolyada ("Mr Kolyada") were appointed Mr Yurov's deputies at TIB.

36. In 2003, Mr Belyaev was appointed to the Supervisory Boards of both TIB and MSPB and he also became the CEO of TIB.

37. Mr Fetisov has a background in mathematics and an MBA from the University of Minnesota. He has experience in fixed income securities and derivatives and was invited by Mr Yurov to join TIB in August 2001, Mr Fetisov accepted an offer to become executive vice president of the structured products team at TIB. His role included managing TIB's bond trading and debt capital markets business. In 2003 he was appointed to the Supervisory Boards of both TIB and MSPB.

38. Whilst TIB was part of Group Menatep, it serviced other companies in the Group, including Yukos Oil Company ("Yukos"). In late 2003, Mr Khodorkovsky was arrested. Yukos was forcibly broken up and returned to State control. It has been widely reported that such actions were part of a State-orchestrated campaign against Mr Khodorkovsky, who was at that point one of Russia's wealthiest men.

39. In late 2003, Mr Yurov led a management buyout of TIB and MSPB, together with Mr Fetisov, Mr Belyaev, Mr Kolyada and Artashes Terzyan and a dozen other-top level managers at the Banks. This resulted in the purchasers paying some US$100 million for a 63.38% holding in TIB and a 99.35% holding in MSPB. These shares were owned through a holding company called TIB Holdings Limited ("TIBH"). It is the Bank's case that in fact the Shareholders borrowed money to buy the shares, and then put the debt onto the Bank's own balance sheet.

40. The Defendants maintain that the management buy-out was an attempt to distance TIB from the controversy surrounding Mr Khodorkovsky. Despite the change in ownership, they allege that they continued to suffer politically-motivated interference by the Russian Government (as well as entities said to be aligned to the Russian Government). This is said to have included:

    (1) The harassment of management, including the interrogation of Mr Yurov;

(2) Freezing the shares of the Bank in 2007/2008, as part of an ongoing criminal investigation into Yukos/Mr Khodorkovsky by the Investigation Committee of the Russian General Prosecutor's Office;

(3) The commencement of allegedly arbitrary civil claims against TIB by Yukos (which came to be owned by Rosneft), resulting in a US$75 million judgment against the Bank in 2009;

(4) The frustration of potential mergers and investments.

However, at the time of the events the subject matter of this action the Bank was a privately owned and managed entity, and indeed by the time of this action, it was more than 10 years since Mr Khodorkovsky's involvement in it.

41. Following the management buy-out, MSPB changed its name to National Bank Trust and in late 2008 merged with TIB to form OJSC Trust National Bank. The merged bank changed its name to National Bank Trust i.e. the Bank, and the Claimant in these proceedings. When TIB merged with MSPB in 2008 Mr Belyaev became the "President of the Investment Block" and his employment contract was amended accordingly. His witness evidence was that around this time he was *"also overseeing the Bank's corporate banking business"*.

42. The Bank's holding structure was complex and varied over time. The immediate majority owner of the Bank was CJSC Management Company Trust ("MC Trust"), a Russian company. Mr Yurov, Mr Belyaev and Mr Fetisov were at all material times the majority beneficial owners of MC Trust, through holding companies including TIBH and TIB Investments Limited ("TIBI").

43. In August 2006, TIB recruited Mr Eggleton (formerly of Credit Suisse) as its CEO, replacing Mr Belyaev who became President of TIB and continued to be involved in its investment banking business. Part of Mr Eggleton's strategy was for the Bank to open additional retail branches. Another part of his strategy involved financing lower quality real property and fixed assets, such as real estate developments in Glukhovo Village and Gelendzhik (which form the subject matter of part of the Bank's claim in these proceedings). Mr Eggleton stayed at the Bank until 2009 when he resigned. Mr Belyaev's evidence was that after the departure of Mr Eggleton, "*the Bank's management board fell much more under the control of Mr Fetisov*".

44. In 2006 it was suggested that Mr Kolyada, one of the minority shareholders of the Bank, was involved in a fraud connected with Yukos and its subsidiary Tomskneft. He was later prosecuted for fraud and imprisoned. Towards the end of 2006, a decision was taken by YBF to buy out Mr Kolyada's shareholding, which they claim was designed to disassociate him from the Bank. The acquisition of Mr Kolyada's shares was funded by a loan from Credit Suisse acting together with a number of other international lenders. In March 2007 US$40 million was paid to MC Trust. YBF personally guaranteed the loan and pledged some of their shares in TIBH and other Bank entities to Credit Suisse. Immediately following the payment, YBF borrowed US$40 million from MC Trust. Mr Yurov used the funds to purchase Mr Kolyada's shareholding in TIBH, subsequently transferring shares to Mr Belyaev and Mr Fetisov.

45. The loan facility with Credit Suisse was subsequently increased by an additional US$100 million, which was also personally guaranteed by YBF. The Defendants claim that this

part of the Credit Suisse facility was advanced to the Bank as financial support. In November 2007, the Bank attracted the interest of Merrill Lynch, which acquired a 8.92% stake in MC Trust for a sum of US$85 million.

B. THE ISSUES THAT ARISE FOR DETERMINATION

46. The written Opening Submissions of the parties were lengthy (permission having been given at the pre-trial review for such Skeleton Arguments to exceed 50 pages each). In the event the Opening Submissions for the Bank totalled some 200 pages, for Mr Yurov some 66 pages, for Mr Belyaev some 70 pages and for Mr Fetisov some 78 pages – over 400 pages in total.

47. From a consideration of the same, and the parties' respective oral opening submissions, it was readily apparent that there was a necessity for the parties to clarify, in a common document, precisely what facts were agreed and what issues arose for determination at trial so that all parties could focus their evidence, and in due course their submissions, in closing, by reference to a common document. This led to the parties producing a "List of Agreed Facts and Issues to be Determined at Trial" (the "Agreed Facts and Issues"), which was agreed by the parties during the course of the trial. Due to the distinctions between the case of Mr Belyaev and that of Mr Yurov and Mr Fetisov, a number of qualifications as to the Agreed Facts and Issues were made by Mr Belyaev, as recorded on the face of the document.

48. It has proved to be a useful document, and all the parties addressed the issues arising, in their Closing Submissions, by reference to the Agreed Facts and Issues. The Agreed Facts and Issues did not, however, lead to a shortening of the length of the written closing submissions. In the event the Bank's Closing Submissions ran to 388 pages (Volume 1) and 203 pages (Volume 2 – the Borrower Specific Schedules), Mr Yurov's to 424 pages, Mr Belyaev's to 186 pages and Mr Fetisov's to 151 pages – over 1350 pages in total.

B.1 The Agreed Facts and Issues

49. I set out below the Agreed Facts and Issues other than those that relate to the particular Loans and Transactions (which are addressed in Section R below). The footnotes are an integral part of the Agreed Facts and Issues, and accordingly they are also set out in full. The Issues themselves are highlighted in Bold for ease of reference.

B.1.1 The Shareholders/Structure of the Bank[1]

1. It is agreed that:

   1.1. The Shareholders were, at all material times, the majority indirect/beneficial owners of the Bank's share capital (although their precise interests changed over time).

   1.2. The Bank's immediate parent company was a Russian company called Management Company Trust ("MC Trust"). TIB Holdings Limited

[1] Mr Belyaev is prepared to agree these facts as common ground strictly without prejudice to his case that, contrary to the allegations made against him in the Bank's Part 18 Further Information, during the material period of time the Shareholders did not act as a collective unit, nor were they perceived as so acting. As a minority shareholder in the holding company, Mr Belyaev maintains that he could not control or direct the activities of the Bank.

("TIBH") and TIB Investments ("TIBI") were companies involved in the Bank's holding structure.

1.3. The Bank had two boards: the Supervisory Board (also known as "the Board of Directors") and the Management Board.

1.4. The Supervisory Board was elected on a yearly basis by the Annual General Meeting of Shareholders (the "AGM"). It is responsible for the general or overall governance[2] of the Bank. Individual lending transactions were not approved at Supervisory Board meetings.

1.5. The Management Board is a collegiate executive body, which was overseen by the Chairman of the Management Board (the "CEO").[3]

1.6. The Bank also had an Audit Commission.[4] The members of the Audit Commission were elected on an annual basis by the AGM. [5]

1.7. The Shareholders were, at all material times: (i) Supervisory Board Members of the Bank (which had at least seven members) and (ii) members of the Credit Committee (the "CC"). None of the Shareholders was at any time a member of the Bank's Management Board.

1.8. The CC reviewed and approved individual lending transactions. At least one of the Shareholders was present at each of the CC meetings at which the pleaded Loans and Transactions were considered by the CC. Mr Yurov acted as the chair of the CC at every meeting he attended and, when Mr Fetisov was present and Mr Yurov was not present, Mr Fetisov acted as the chair.

1.9. Mr Yurov was an employee of the Bank until at least 15 October 2003 (the Bank disputes that Mr Yurov was an employee between 15 October 2003 and 22 December 2014). Mr Yurov and the Bank executed contracts of employment dated 8 February 1999, 15 October 2003, 18 January 2010 and 18 January 2013 (but the Bank puts Mr Yurov to proof of the validity of the 2010 and 2013 contracts as a matter of Russian law).

1.10. Mr Fetisov was an employee of the Bank until at least 2 June 2014 (the Bank disputes that Mr Fetisov was an employee between 2 June and 22 December 2014). Mr Fetisov and the Bank executed contracts of employment dated 1 June 2005, 18 January 2010 and 18 January 2013

[2] The precise role of the Supervisory Board is in issue between the Russian law experts. See also Article 17 of the Bank's Articles of Association (although the Defendants contend that the phrase "general management" in Article 17.1 is a mistranslation and should read "overall governance").
[3] See also Article 18 of the Bank's Articles of Association.
[4] See Articles 19.3 – 19.9 of the Articles of Association and the Audit Commission Regulations.
[5] The members of the Audit Commission were:
(i) 2008-2009: Marat Iskandyrov, Dmitry Postnov, Igor Chudakov
(ii) 2010-11: Marat Iskandyrov, Dmitry Postnov, Yuliya Melnikova
(iii) 2012-13: Dmitry Postnov, Yuliya Melnikova, Dmitry Serebrennikov
(iv) 2014: Marat Iskandyrov, Dmitry Postnov, Yuliya Melnikova

(but the Bank puts Mr Fetisov to proof of the validity of the 2010 and 2013 contracts as a matter of Russian law).

1.11. Mr Belyaev was an employee of the Bank until at least 1 January 2009 (the Bank disputes that Mr Belyaev was an employee between 1 January 2009 and 22 December 2014). Mr Belyaev and the Bank executed a contract of employment dated 26 April 1999 and further contracts of employment dated 18 January 2010 and 18 January 2013 (but the Bank puts Mr Belyaev to proof of the validity of the 2010 and 2013 contracts as a matter of Russian law).

The Issues

2. **What were the Defendants' respective roles and responsibilities at the Bank during the relevant period (2008 to 2014)?**

3. **What was the legal effect of a resolution of the CC approving the entry into a particular transaction and, in particular, did a resolution constitute a mandatory instruction to the Bank's management to enter into a transaction? Was there, as a matter of fact, any further independent consideration of whether or not to enter into a proposed transaction after it had been approved by the CC and what (if any) relevance does this have?**

B.1.2 The Borrowers and other companies in the network[6]

Common Ground[7]

4. The companies in the network were originally managed by Mr Drozdov (the Bank's Head of Legal) and others. In about December 2009, Mr Worsley was engaged for this purpose. During 2011, Columba took over the administration of the network.

5. Willow River, RCP, SiberianKD, Business Group, Priangarskiy, Taransay and Moscow River were beneficially owned by the Shareholders.

The Issues

5A **What was Mr Belyaev's contemporaneous knowledge and belief of the facts set out in paragraphs 4 and 5 above.**

[6] The use of this terminology is intended to be neutral. Other terms such as "off-balance sheet structures" have also been used by the parties.

[7] Mr Belyaev is prepared to agree the facts in paragraphs 4 & 5 as common ground from the case materials he has seen in the course of preparation for trial and during the trial. This agreement is strictly without prejudice to his case that (i) as regards para 4, he was unaware of these facts and matters at the material time; (ii) as regards the companies listed in para. 5, he was aware that he had an economic interest in all of the underlying commercial projects barring Taransay, and in respect of Taransay he was entitled to and did split profits from its trading with Mr Yurov and Mr Fetisov; but he was unaware at the material times that he owned a beneficial interest in the companies and was unaware of how his precisely his economic interest was held.

6. **Were the following companies beneficially owned and/or controlled by the Shareholders (as contended by the Bank)[8] or by the Bank itself (as contended by Mr Yurov and Mr Fetisov): Erinskay, Baymore, LBCS, Mourija, LLC5, Gofra, Stivilon, Stroyecologiya, Belenfield, Wave, Edenbury, Black Coast, Oldehove, Crylani and NRT/Yaposha? (the "Disputed Companies")[9]**

7. **Did the Shareholders believe, contemporaneously, that the Disputed Companies were beneficially owned and/or controlled by the Bank?[10] What was Mr Belyaev's contemporaneous knowledge and belief of the beneficial ownership of the Disputed Companies?**

8. **Were the Disputed Companies held and/or used for the benefit of the Bank and, if so, what if any relevance does this have for the pleaded claims?**

B.1.3 The Loans and Transactions

Common Ground

9. It is common ground between the Bank and Mr Yurov and Mr Fetisov that, throughout the period under consideration, the Bank engaged in "balance sheet management"[11] by, amongst other things, making loans to companies that were not recognised or accounted for as Bank subsidiaries on the Bank's balance sheet in order to service and/or repay debts owed to the Bank by existing borrowers.

10. In relation to personal benefits received by the Defendants (Accountancy Issue 2), the accounting experts have agreed that: [12]

    10.1. $900,000 of the funds advanced to Erinskay and Baymore were transferred to Mishcon de Reya in respect of Mr Yurov's legal fees in the Kolyada litigation;

    10.2. the end recipient of RUB 50 million (approximately US$1.52 million) out of a RUB 1.1 billion loan provided to LB Collection Services

[8] Mr Belyaev does not admit that he was beneficially interested in these companies at all and puts the Bank to strict proof of this allegation. The issue is framed sufficiently widely as to require the Court to determine who beneficially owned each of the Dispute Companies at the material times.

[9] It is also disputed whether other companies in the network were also owned by the Shareholders, particularly companies that were part of the ownership structure of the Disputed Companies and companies which received monies from the Disputed Companies.

[10] It being noted that that is not the case advanced by Mr Belyaev

[11] Mr Belyaev does not accept or recognise and in fact rejects the term "Balance Sheet Management", and his agreement to the agreed facts set out herein and his agreement of the issues between the parties as set out herein is strictly without prejudice to his case in this regard which is that (i) he was not involved in what is referred to by this term by the Bank and Mr Yurov and Mr Fetisov, (ii) save for those occasions in which he participated in Credit Committee decisions, he did not have any detailed knowledge of the Loans and Transactions, and (iii) he was unaware of what happened to the Loan monies.

[12] It is not, however, accepted that the Shareholders knew these matters at the time. It is noted that Mr. Belyaev did not instruct any accounting experts and he agrees to the proposed common ground strictly without prejudice to his case. Mr Belyaev notes that no allegations are made against him individually in respect of personal loans in the accounting reports or in the statements of case.

("LBCS") was Merrill Lynch, for the purpose of the "*purchase of 265,511 shares (8.95% of the share capital) in Management Company Trust (majority shareholder of NBT) by TIB Holdings* [TIBH], *Neaspal, Winsala and Zaploma for USD 7.5 m (approx. RUB 245.8m)*".

11. When present at or participating (for the relevant item) in the CC meetings at which the Loans/Transactions were approved and/or their terms amended, the Defendants:

    11.1. did not cause to be recorded in the minutes any personal interest in the relevant companies or transactions (if such interest existed, which they deny);[13]

    11.2. did not recuse themselves or abstain from voting (if the Defendants were required to do so, which they deny);

    11.3. in each case voted in favour of the relevant proposal.

12. In relation to the Central Bank of Russia ("the CBR"), it is common ground that:

    12.1. the CBR regulates the Russian banking sector.

    12.2. the CBR has rules regulating capital adequacy (commonly referred to as "N1"), liquidity (commonly referred to as "N3"), and exposure to a single borrower or group of related borrowers (commonly referred to as "N6"). Rules relating to N6 were contained in:

        12.2.1. Instruction 110-I; and

        12.2.2. Instruction 139-I (together, the "Instructions".)

13. Pursuant to the Instructions, the maximum permissible exposure to a single borrower or group of related borrowers is 25% of a bank's capital.[14]

The Issues

Nature of transactions/Shareholder involvement

14. **Did companies in the network take over certain assets using financing from the Bank following the 2008 financial crisis and defaults on previous loans/investments secured on them and, if so, what were those assets? If and to the extent that this happened, for what purpose and for whose benefit was it done? What was Mr Belyaev's knowledge of these facts and matters at the relevant time, and what is the consequence of such knowledge or the absence of such knowledge?**

[13] Mr Belyaev does not accept that any obligation existed to record in the minutes of the CC meetings or announce/disclose in any other way the fact that a member of the CC committee was a person "interested in [a] transaction" as defined in the CC Regulations.
[14] RAPOC 60-61; Yurov Defence 52-53; Belyaev Defence 71-72; Fetisov Defence 63-64.

15. **Did each of the Loans and Transactions have one or more of the characteristics identified in paragraph 18 of the Re-Amended Particulars of Claim ("RAPOC") and, if so, did each of the Shareholders know that?**

16. **Was the "balance sheet management" exercise[15]:**

    16.1. **dishonest and not *bona fide*, reasonable or in the best interests of the Bank, because *inter alia* each "balance sheet management" loan increased the overall indebtedness to the Bank and thereby caused the Bank immediate loss in circumstances where, on the Bank's case, the borrowers provided little or no security for the loans and had no genuine or legitimate commercial business to generate funds to make repayment; and/or (insofar as it occurred) substituted secured loans with unsecured loans to entities with no means to repay? or**

    16.2. **undertaken in good faith, in the Bank's best interests and reasonably *inter alia* (a) as part of an effort to restructure non-performing loans on the Bank's books with arm's length borrowers, as a result of which the Bank had taken over underlying assets/collateral for its own benefit through off-balance sheet structures so as to salvage the maximum value from those failed loans/investments and with the aim of avoiding or reducing the risk of greater losses to the Bank; (b) to conduct treasury activities, such as investing in securities and to generate liquidity; (c) holding and developing interests in real estate investments; (d) to avoid the immediate crystallisation of substantial losses; (e) to avoid the Bank's funders enforcing against the failed investments, which would have led to poor realisation for such assets; and/or (f) holding and collecting in underperforming retail loans?**

17. **Did the Shareholders cause or procure, or agree amongst themselves that one or more of them should cause or procure, each of the Loans and Transactions? Alternatively, did the Shareholders deliberately or recklessly acquiesce in and fail to question or prevent the making of each of the Loans and Transactions? In particular:**

    17.1. **What power, influence or control did each of the Shareholders exercise at the Bank and, specifically, over the CC? Did each of the Shareholders use such power, influence or control to cause, procure or arrange the making of the Loans and Transactions; or the approval of the Loans and Transactions by the CC in circumstances where (insofar as it is relevant), they would not otherwise have been approved?**

    17.2. **To what extent (if at all) did each of the Shareholders procure or direct the entry by the Bank into the Loans and Transactions or have knowledge of them? To what extent were those Loans and Transactions entered into on the direction of Bank executives (as**

[15] See footnote 12 above

opposed to the Shareholders) and/or without the Shareholders' involvement or knowledge?

17.3. **To what extent (if at all) did the Shareholders cause, procure or arrange the steps necessary for the Borrowers to enter into the Loans and Transactions; the disbursement by the Borrowers of monies received from the Bank; and the purchase by the Borrowers of assets?**

17.4. **Were the Loans and Transactions ones which would not have been made but for the Shareholders' exercise of power, influence or control?**

18. **What was the extent of knowledge of the Bank's management of the true nature and purpose of the Loans and Transactions (including the ownership of the relevant companies); and what, if any, significance does any such knowledge have for the pleaded claims?**

18A What (if any) disclosure requirements do the CC Regulations impose on the members of the Credit Committee. Is the definition of "party interested in [a] transaction" in the CC Regulations to be interpreted in materially the same manner as Art. 81 of the JSC Law, and if not how is it to be interpreted?

***Personal benefit*[16]**

19. **Did the Shareholders stand to, or in fact, benefit personally from the making of each of the Loans and Transactions? If so, was it each of the Shareholders' intention to personally benefit from the proceeds of the Loans and Transactions and/or did they intend such proceeds to be used for the benefit of the Bank?**

20. **Did the Shareholders benefit from the "balance sheet management" exercise itself including by way of:**

20.1. **continuing receipt of salary and bonuses from the Bank;**

20.2. **the Loans and Transactions; and/or**

20.3. **other benefits pleaded at paragraph 14 of the Yurov Reply, paragraph 10 of the Belyaev Reply and paragraph 13 of the Fetisov Reply.**

which, on the Bank's case, would not have accrued to the Shareholders had the "balance sheet management" not occurred because the Bank would have collapsed and/or entered into the DIA rehabilitation scheme if its true financial position (on the Bank's case) had been disclosed to the

[16] The Shareholders also rely on certain contributions of capital made by them or on their behalf to the Bank but the Bank takes issue with whether these were truly donations of capital as opposed to loans that were repaid with the Bank's funds.

CBR and/or publicly known? If so, what (if any) relevance does this have for the pleaded claims?

21. **Is the Bank entitled to rely on the following additional alleged personal benefits to the Shareholders[17] that have been addressed in the accountancy reports served on behalf of the Bank and the First and Third Defendants, specifically (i) the Menatep Transaction; (ii) the Kolyada Transactions; (iii) Willow River and RCP; (iv) Yurov House Purchase; (v) Yurov and Fetisov Personal Loans; and (vi) the Merrill Lynch Transaction. If so, have such matters been established?**

CBR

22. **Was the CBR aware (or did Mr Yurov and/or Mr Fetisov believe that the CBR was aware) of the fact that the Bank was lending money to off-balance sheet companies in order to service or repay debts owed to the Bank by other borrowers, and, if so, did it tacitly approve and/or not require the Bank to cease such practices?**

23. **Is the Bank entitled to advance a case that the lending caused the Bank to be in breach of the Instructions and, if so (i) has that case been made out and (ii) to what extent did the Shareholders have knowledge of such breaches?**

Mr Yurov and Mr Fetisov contend[18] that, if the Bank is entitled to advance this case, it will be necessary for the Court to consider: (a) what was the Bank's capital on each relevant date and (accordingly) what was the "N6" limit, (b) what is the test for whether borrowers form part of a group of related borrowers for the purposes of the Instructions and did the Borrowers (or any of them) constitute a group or groups of companies, (c) what was the total amount lent to a group of related borrowers on each relevant date, (d) were the Loans and/or Transactions in breach of those Instructions, and (e) were the Defendants aware of this fact?

Erinskay, etc.

24. **As to Erinskay, Baymore, LBCS, Mourija, Edenbury, Black Coast, Oldehove and/or Crylani:**

    24.1. **did they carry out any genuine or legitimate commercial business with a view to making a profit, or were they, as alleged by the Bank, vehicles for the recycling of funds and/or the concealment of the scheme described in the Particulars of Claim and to what extent did the Shareholders know that;**

    24.2. **was false and misleading documentation prepared to create the impression that they these companies had <u>or</u> were genuine and legitimate commercial businesses and were looking to borrow**

[17] The Defendants' position is that, save for Willow River/RCP, which is specifically pleaded as an alleged benefit in the Replies, these matters are not specifically pleaded and cannot be relied upon by the Bank.
[18] And Mr Belyaev agrees with this contention

money from the Bank to make genuine investments? If so, did the Shareholders direct, and/or were they aware of, the production of such documentation so as to deceive the Bank's auditors?

Nature of the "balance sheet management" exercise/Alleged dishonest scheme

25. **In view of the Court's findings on the issues set out above, were the Loans and Transactions the result of a dishonest scheme, directed and/or implemented by the Shareholders for the knowingly unlawful and improper use of the Bank's money, contrary to the Bank's best interests, for their own ends and/or for their personal benefit, as summarised at paragraphs 20 and 21 of the Particulars of Claim?**

26. **Was the making of the Loans and Transactions in bad faith and/or contrary to the Bank's best interests and/or unreasonable and/or and in breach of (a) the Bank's Charters, (b) the Credit Committee Regulations, (c) the CBR Instructions relating to "N6" and if so, did each of the Shareholders know that?**

Entitlement to rely on specific matters

27. **As to the following alleged facts, is the Bank entitled to rely on each or any of them in support of its case that each of the Shareholders acted in breach of duty and/or dishonestly, as well as going to the credit of the relevant Shareholder(s); and, if so, are they proven:**

    27.1. **the purchase of bonds and use of REPO transactions was intended by the Shareholders to conceal the "balance sheet management" exercise;**

    27.2. **the fiduciary lending arrangements involving EWUB and Donau were inherently dishonest;**

    27.3. **the CBR was misled, to the knowledge or at the direction of the Shareholders;**

    27.4. **improper influence was exercised over the CBR in return for money, to the knowledge or at the direction of the Shareholders;**

    27.5. **banks and corporate service providers of companies within the network were misled, to the knowledge or at the direction of the Shareholders;**

    27.6. **monies were moved between companies within the network in large sums and/or using sham, fraudulently generated and/or backdated transactions, to the knowledge or at the direction of the Shareholders;**

    27.7. **steps were taken (including through the provision of false information in interviews) to deceive the Bank's auditors, to the knowledge or at the direction of the Shareholders;**

27.8. **companies in the network used dishonest auditors and/or accountants, to the knowledge or at the direction of the Shareholders;**

27.9. **employees of the Bank concealed their communications with Mr Worsley and Columba, to the knowledge or at the direction of the Shareholders;**

27.10. **the Bank's IFRS accounts were deceptive and/or fictitious, to the knowledge or at the direction of the Shareholders.**

28. The Bank's case was that all the above matters are relevant both to the credibility of the Shareholders as witnesses and the substantive issues. It was agreed as between the Bank and Mr Yurov and Mr Belyaev that the question of whether the Bank is entitled to rely on such matters in relation to the substantive issues is a matter to be dealt with in the parties' closing submissions but Mr Fetisov reserved his rights in relation to seeking a ruling prior to closing submissions in relation to that issue.

B.1.4 Russian Law

Common Ground[19]

29. The obligations established by Article 53(3) of the Russian Civil Code (the "RCC"), the new Article 53(3)[20] and Articles 71(1) and 81-84 of the Joint-Stock Companies Law (the "JSC Law") applied to the Shareholders (as directors' duties and/or labour law obligations).

30. With respect to liability under the Initial Article 53(3), the New Article 53(3) and Article 71(1) of the JSC Law, that the Shareholders, as members of the Supervisory Board, were obliged to act in the best interests of the Bank when performing their rights and obligations as members of the board and to perform their rights and obligations in relation to the Bank in good faith and reasonably (although it is in issue whether these duties only apply when the Shareholders were exercising their rights and performing their duties as members of the Supervisory Board).

31. The claimant must prove the bad faith and/or unreasonable actions (or omissions) of the director which caused damages to the company, existence of damages, as well as the causal link between the behaviour of the director and the damages suffered by the company. The causal link must be immediate (direct).

32. The amount of damages has to be established with reasonable certainty. However, when the amount of damages cannot be established with reasonable certainty (although it is clear that certain losses were suffered), the damages claim cannot be dismissed on that basis. In such a case, the amount of damages is to be determined by the court given all the circumstances of the case and

[19] This does not list all the matters of common ground agreed by the experts in the Joint Memo.

[20] Effective from 1 September 2014.

proceeding from the principle that the compensation should be fair and adequate.

33. Paragraphs 2 and 3 of Resolution No. 62 of the Plenum of the Supreme Arbitrazh Court dated 30 July 2013 list situations establishing rebuttable presumptions of bad faith and/or unreasonable actions of a director.

34. A proposed transaction would be an interested party transaction under Articles 81-84 of the JSC Law if:

    34.1. the borrower was an affiliated person of any of the Shareholders or any of the Shareholders and/or his affiliated persons held 20% or more of the shares of the borrower; and/or

    34.2. any of the Shareholders and/or his affiliated persons (other than the borrowers) were themselves parties, beneficiaries, intermediaries or representatives in the transaction.

35. If a proposed transaction is an interested party transaction in the required sense, Article 82 of the JSC Law requires the director concerned to notify the company's supervisory board, audit commission/internal auditor and external auditor.

36. When a claim is made against an employee of a company who has a labour contract with that company and is simultaneously a member of the Supervisory Board of the company for his/her activity in their capacity as employee of the company (and not in their capacity as a member of the Supervisory Board), the Labour Code (and not civil legislation) will apply to such claim.

37. In relation to liability under the Labour Code:

    37.1. The conditions of the employee's liability for harm caused to the employer under the Labour Code include, in particular: (i) unlawfulness (or illegality) of the employee's behaviour (actions or omissions); (ii) the employee's fault in causing the harm; (iii) a causal link between the employee's behaviour and the harm caused; and (iv) the presence of direct material harm, and it is for the employer to prove that all these conditions have been met.

    37.2. The behaviour of the employee is considered to be unlawful under the Labour Code if the employee violates his labour duties established by the Labour Code, employment contract, internal labour rules (provided that they are consistent with federal law), other federal laws and/or statutes containing labour norms.

    37.3. The Shareholders were obliged both by virtue of their employment contracts (as employees) and by virtue of their positions as the members of the Bank's Supervisory Board to comply with all duties imposed on directors by the JSC Law, and owed the Bank a duty to perform their labour duties in good faith and to comply with the Bank's internal working regulations under Article 21 of the Labour Code.

37.4. Lost profits are not recoverable under Article 238 of the Labour Code and there is no joint and several liability under the Labour Code; rather, liability is 'shared'.

38. The requirement of "intentional" harm under Article 243 of the Labour Code is satisfied where (i) the employee deliberately commits actions aimed at inflicting direct harm to the employer and (ii) either knew that such consequences would occur and desired their occurrence or was indifferent to whether or not they would actually occur. It is agreed that, absent reckless indifference, the mere fact that an employee (objectively) should have known that harm would be suffered as a result of his actions does not suffice to constitute intentional harm.

The Issues

What claims can be brought?

39. **Were the Shareholders employees of the Bank as a matter of Russian law after 15 October 2003 (Mr Yurov), 1 January 2009 (Mr Belyaev) and 2 June 2014 (Mr Fetisov) (it being common ground that the Shareholders were employees up to those dates)? In particular, does Russian law recognise a contract by which a person is purportedly employed act as a member of the company's Supervisory Board as creating an employment relationship?**

40. **Is the Bank estopped from alleging the Shareholders were not employees of the Bank at all material times?**

41. **Is the Bank entitled to bring claims against the Shareholders under the RCC and/or JSC Law, or (as the Shareholders contend) is the Bank required to bring any claim against them solely under the Labour Code as a matter of Russian law? In particular:**

    41.1. **does the Labour Code apply and prevail over the Civil Code, so that any liability of the employee is governed exclusively under the Labour Code;**

    41.2. **is there a Russian law principle against "competition of claims" that operates to prevent a company from bringing non-contractual claims against directors under the RCC and/or the JSC law when those directors have employment contracts;**

    41.3. **do the claims relate, in whole or in part, to activity in the Shareholders' capacity as employees (as opposed to as members of the Supervisory Board), in respect of which it is common ground that the Labour Code applies;**

    41.4. **what presumptions arise under the Civil Evidence Act in light of the *Fiona Trust* judgment and have any relevant presumptions been rebutted by the Bank?**

Articles 53 and 71

42. **In view of the findings made on the issues identified above in relation to the nature of the Loans and Transactions and the Shareholders' knowledge and involvement in them, were the Shareholders in breach of Article 71 of the JSC Law and/or Article 53 of the RCC in respect of the Loans and Transactions? As set out above, it is common ground that, if the Shareholders were in breach of these obligations, they would also be in breach of their Labour Code obligations.**

Related-Party Transactions

43. **When will parties to the Loans and Transactions be regarded as related for the purposes of Article 81 of the JSC Law and/or for the purposes of the Credit Committee Regulations? In particular:**

    43.1. **Can a person be recognised as an affiliate of another on the grounds that its activity could be influenced by that other person in the absence of the specific formal criteria of affiliation listed in the relevant Russian laws?**

    43.2. **Is a person who, through one or several layers of companies, subsequently receives funds derived from a party to the transaction a "beneficiary" of the transaction?**

    43.3. **In what circumstances is an indirect interest and/or an interest derived through a trust capable of giving rise to affiliation?**

44. **Was each of the Loans and Transactions a related-party transaction for the purposes of Articles 81-84 of the JSC Law and/or for the purposes of the Credit Committee Regulations? If so:**

    44.1. **In relation to Articles 81-84:**

        44.1.1. did the Shareholders make the disclosure required by Article 82 of the JSC Law in respect of each relevant transaction; and

        44.1.2. was the approvals procedure under Article 83 of the JSC Law followed in respect of such transactions?

    44.2. **In relation to the Credit Committee Regulations, did the Shareholders comply with the provisions thereof.**

***Liability under the Labour Code*[21]**

[21] The following issues arise only in respect of the Labour Code claims - if and to the extent the Bank is able and/or required to bring its claims under the Labour Code.

45. **Did the Shareholders act in breach of the express terms of their employment contracts and/or Article 21 of the Labour Code (including by acting in breach of the Bank's Charter and/or the CC Regulations)?** [22]

46. **Did the Shareholders act unlawfully under the general law in that:**

    46.1. **The making of loans to service bad debts owed to the Bank by other companies was a breach of and/or caused the Bank to be in breach of CBR Regulation 254-P because, in particular, the making of such loans was intended to have and had the result that the Bank's publicly stated accounts were misleading in that bad debts that should have been recorded on the Bank's balance sheet were concealed;**

    46.2. **they ensured or procured that false information was submitted by the Bank to the CBR on the special forms which the Bank was required to submit, in breach of CBR Instruction 2332-U, in order to avoid the CBR taking action to prevent any further recycling of funds through offshore loans and falsification of the Bank's balance sheet;**

    46.3. **as a result of the "balance sheet management", the Bank's capital adequacy ratio was calculated on a false basis contrary to CBR Instruction 139-I;**

    46.4. **the Shareholders falsified accounts and deceived the CBR contrary to Article 172.1 of the Criminal Code (as amended on 21 July 2014); and/or**

    46.5. **the Shareholders committed an abuse of authority contrary to Article 201 of the Criminal Code because they falsified the Bank's accounts for personal gain in that it artificially inflated the perceived value of the Shareholders' shares and/or allowed them to continue to receive salaries and bonuses from the Bank?**

47. **Is the Bank entitled to advance the allegations set out in paragraph 46 above on its statements of case and expert evidence? In particular: (a) has the Bank sufficiently particularised the allegations, including alleging and particularising the primary facts on which it relies, and (b) has the Bank adduced proper expert evidence of the content, meaning and effect of the CBR Instructions/Regulations and Criminal Code on which it relies?**

[22] Mr Belyaev has pleaded that the Bank is not entitled to rely upon Art. 21 of the Labour Code, and that issue remains live

B.1.5 Causation / Quantum

Common ground[23]

48. It is agreed that the total principal sums outstanding (as between the Bank and the Borrowers) in respect of the Loans and Transactions as at 31 December 2015 (excluding the Erinskay and Baymore derivative transactions) are as set out in the table in the Accounting Joint Memorandum at **{C3/6A/5}**, but the rows entitled "Costs incurred under the investment contracts" and "Other receivables" no longer form part of the sums claimed by the Bank.

49. The Bank does not pursue any claim in respect of:

    49.1. the derivatives entered into between the Bank and Erinskay, Baymore and Belenfield;

    49.2. the investment contracts; and

    49.3. the interest and penalties said to be due to the Bank from the Borrowers.

50. The experts have not undertaken a full transactional analysis of the back-to-back lending through EWUB or Donau. (The Shareholders contend that no issues have been raised by the Bank in its statements of case as to the lending through EWUB or Donau whereas the Bank contends that EWUB and Donau are a relevant part of the factual background to the Loans and Transactions and is also relevant to the issue of personal benefits.)

The Issues

51. **To the extent that there were breaches of rules requiring particular procedures to be followed, disclosure to be made and/or approvals to be obtained: (i) is it legally relevant whether the Loans would have been made even if the relevant procedures *etc.* had been followed, and (ii) would the Loans have been made even if those procedures had been followed? In particular, would the CC and/or Supervisory Board have been able lawfully to approve transactions that were:**

    51.1. **designed to hide facts, which would have led the CBR to cause a takeover of the Bank by the DIA;**

    51.2. **not reported to the CBR, which would cause money to leave the Bank and into the control of 'controlling persons' thereby reducing the Bank reserves below that required by law; and/or**

    51.3. **which amounted to a fraud on the Bank's depositors by the falsification of the Bank's publicly available accounts,**

[23] Mr Belyaev does not take issue with para 48, but reminds the Court that he is not a party to the instruction of the accounting expert reports of Mr Davidson

and is it the case that the transactions were in fact of that nature?

52. **If the Shareholders were in breach of duty, what financial loss has the Bank proven was directly (immediately) caused to the Bank by such breaches of duty? In particular has the Bank suffered loss in an amount representing the difference between (i) the amount of the outstanding principal owed by the Borrowers and (ii) the value of collateral and other assets held or recovered in respect of such debts (as the Bank contends)?**

53. **What findings or assumptions should be made about what happened to funds that were advanced to the Borrowers that have not been specifically traced by the accounting experts? (The Bank relies on the table at {L1/4/1} as being an accurate summary of Mr Davidson's evidence in relation to tracing, but this table is not agreed by the Defendants.)**

54. **Is the Bank's loss to be calculated taking into account any of the following matters:**

    54.1. **the extent to which the proceeds of a Loan or Transaction were paid on to another company for it to make repayment to the Bank (including, insofar as applicable, companies beneficially owned by the Shareholders);**

    54.2. **the extent to which the proceeds of a Loan or Transaction were used to restructure a non-performing loan or investment, if the net effect of such transactions was to defer the recognition of a loss that had been or would have been suffered on the original loan or investment;**

    54.3. **the extent to which the proceeds of a Loan or Transaction were used for "treasury" purposes and/or to make an investment on behalf of the Bank.**

55. **If so, what impact do such matters have on the Bank's loss? In particular:**

    55.1. **to what extent were those monies directly or indirectly returned to the Bank?**

    55.2. **to what extent were the monies used for the benefit of the Bank?**

    55.3. **what (if any) financial or other benefits did the Shareholders receive from the Bank as a result of the Loans and Transactions?**

In considering these questions, the parties disagree as to the identification of the relevant issue (*e.g.* are these matters relevant to the Bank proving its loss or to the Shareholders proving an entitlement to a credit), which party bears the burden of proof, whether the beneficial ownership of the company making the repayment is relevant, and as to what (if any) inferences can be drawn from the evidence as to the (probable) use of funds which have not been specifically traced by the accounting experts.

56. **What credit is to be given in respect of the Bank's recoveries, collateral and other assets held and/or recoverable?**[24]

57. **Are the Shareholders entitled on their statements of case to advance a positive case that the Bank has failed to mitigate is loss in the specific respects now relied upon? If so, has the Bank failed to mitigate its losses as regards (a) the price agreed in the settlement agreement between the Bank and Belenfield, (b) the prices agreed for the acquisition of interests in land as between the Bank and Crylani and/or Oldehove, (c) the acquisition of the interests in land from Stivilon and Lazurnaya Bukhta through bankruptcy auctions at a significant discount to their appraised market price, and (d) the sales of the Bank's rights under loans and associated security in respect of Stroyecologiya and Priangarskiy/SiberianKD to parties with existing interests in the projects and without proper marketing?**

57A. If it is the case that liability between the Defendants has to be 'shared' (i.e., apportioned between them), how should such apportionment be made, and should any account be taken in this regard of any acts of the other employees of the Bank?

B.1.6 Limitation of Liability under Russian Law

Common Ground

58. It is agreed that according to Article 401(1) of the RCC, an agreement governed by civil (as opposed to labour) law which purports to eliminate or to limit liability in advance for the intentional violation of an obligation is void. Accordingly, if and insofar as the claim can be brought under the RCC/JSC Law without reference to the Labour Code, the limitation of liability provisions in the 2010 and 2013 Employment Contracts would be void in the event that they purported to apply to intentional wrongdoing.

59. It is agreed that (i) unless otherwise provided for in the Labour Code or other federal laws, an employee's material liability for the harm caused to the employer is limited to the employee's average monthly salary but that (ii) there is "full financial liability" under Article 243 of the Labour Code where an employee has intentionally caused harm.

The Issues

60. **Insofar as the Bank is only entitled to bring claims against the Shareholders under the Labour Code:**

[24] The Shareholders contend that, for the purposes of calculating the loss actually suffered by the Bank, the Bank's recoveries, collateral and other assets must be taken into account at their actual (market) value and not the value agreed or determined as between the Bank and the relevant borrower. The Bank contends *inter alia* that there is no pleaded case by the Shareholders as to what the true market value is said to have been and no expert valuation evidence.

60.1. **Does the limitation of liability provision in the 2010 and 2013 Employment Contracts {D1/196/5} apply, as a matter of construction, to intentional wrongdoing?**

60.2. **Did the Shareholders intentionally cause harm to the Bank within the meaning of Article 243 of the Labour Code?**

60.3. **Can "full financial liability" under Article 243 of the Labour Code be limited by a contractual clause in the employee's contract of employment?**

B.1.7 Time-bar

Common Ground

61. The limitation period for claims under the RCC and JSC Law (if such claims are not required to be brought under the Labour Code) is 3 years and the claims against the Shareholders are not time-barred if a 3-year limitation period applies.

62. Article 392 of the Labour Code establishes a limitation period of 1 year for individual labour disputes.

63. It is further agreed that:

63.1. time starts running under the Labour Code from the moment that the harm is revealed to the employer; and

63.2. a missed one-year limitation period can be restored if there were valid reasons for missing it namely exceptional circumstances not dependent on the will of the employer and beyond the employer's control that prevented it from bringing a claim.

The Issues

64. **Does the 1-year limitation period in the Labour Code apply to the Bank's claims against the Shareholders?**

65. **Had the harm been revealed to the Bank for the purposes of Article 392 of the Labour Code more than one year before the relevant date of commencement? In particular:**

65.1. **Was the alleged harm known to the senior management of the Bank, including members of the Management Board, prior to the Bank entering administration? If so, what, if any, legal relevance does that fact have?**

65.2. **When did the temporary administration of the Bank (that is, the DIA and Ms Dolenko) discover the alleged harm in the relevant sense?**

66. **What is the relevant date for the commencement of the Labour Code claims? In particular, is it:**

66.1. **12 February 2016;**

66.2. **8 April 2016;**

66.3. **12 July 2016; or**

66.4. **some other date, and if so, what date?**

67. **If the Labour Code claims are *prima facie* time-barred are there 'valid reasons' why the claims were not brought in time and, if so, should the Court restore the limitation period and allow the claims to be brought?**

B.1.8 Assets held in the name of the Shareholders' wives

68. **Are the Shareholders the true beneficial owners of the assets referred to at paragraph 100 of the RAPOC on the basis that the Shareholders' wives hold the assets nominally, or as trustee, for the relevant Shareholder?**

69. **Alternately, insofar as the beneficial ownership of the relevant assets was transferred to the Shareholders' wives, should such transfers be set aside pursuant to s. 423 of the Insolvency Act 1986? In respect of each transfer:**

69.1. **was there a relevant transaction,**

69.2. **was the transaction at an undervalue, and, if so,**

69.3. **did the transferor intend to put the relevant asset beyond the reach of a person who may at some time make a claim against him or otherwise to prejudice the interests of such a person?**

70. **Are Mr and Mrs Yurov entitled to advance a case by reference to Russian or any other foreign law on the basis of the matters pleaded in their Defence? If they are so entitled, or if they are given permission to amend their Defences to advance such a case, is the effect of Russian law that Mr and Mrs Yurov jointly own the relevant assets as matrimonial property and that none of the transfers referred to at paragraph 100 of the RAPOC had any effect on such joint ownership?**

C. THE WITNESSES AND THEIR EVIDENCE

C.1 THE APPROACH TO THE EVIDENCE

50. In *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [41]-[92] I set out the relevant principles in relation to issues that arise when pleading and proving fraud, and making associated factual findings. All parties were content to adopt what was there stated as a useful summary of the key principles, and authorities, and had nothing to add in that regard. I have given careful consideration to, and borne well in mind, those principles. What follows is a headline overview for ease of reference only. The applicable principles are as addressed in the identified paragraphs in *Kekhman*:-

(1) Pleading and proving fraud (*Kekhman* [41]-[45]). The leading authority remains *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 AC 1. As stated by Lord Millett in that case, fraud or dishonesty must be distinctly alleged and distinctly proved; it must be sufficiently particularised; and it is not sufficiently particularised if the facts pleaded are consistent with innocence. This means that a claimant who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and facts, matters and circumstances which are consistent with negligence do not do so (per Lord Millett at [184]-[186]) – see also Lord Millett at [189], Lord Hope of Craighead at [55]-[56] and Lord Hobhouse at [160]. I address the applicable principles in relation to pleadings, and what has been pleaded in the present case, in Section D.4 below.

(2) The burden and standard of proof (*Kekhman* [46]-[50]). In relation to a claim raising allegations of fraud, the burden of proof is upon the claimant as in an ordinary civil claim, and the fact that fraud is alleged does not change the standard from being on the balance of probability – see *In Re B (Children)* [2009] 1 AC 11 at [13] per Lord Hoffmann. As was said by Lord Hoffman in *In Re H (Minors)* [1996] AC 563, 586E-G (per Lord Hoffmann):-

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

In *In Re B (Children)* the House of Lords emphatically re-iterated that there is only one civil standard emphasising that any logical or necessary connection between the seriousness of an allegation and its inherent probability is to be rejected; inherent probabilities are simply something to be taken into account as a matter of commonsense in deciding where the truth lies (see Lord Hoffmann at paras [13] to [15]).

(3) Inherent probabilities (*Kekhman* [51]-[66]). In applying the civil burden of proof on the balance of probabilities, inherent probabilities can be weighed alongside or against specific evidence from a particular case. But care must be taken in working out what in a particular case is inherently probable or improbable. It is generally correct that, absent other information, the more serious the wrongdoing, the less likely it is that it was carried out, because most people are not serious wrongdoers. The standard of proof remains the same, but more cogent evidence is required to prove fraud than to prove negligence or innocence because the evidence has to outweigh the countervailing inherent improbability. See, in particular *Fiona Trust v Privalov* [2010] EWHC 3199 (Com) at 1438 (Andrew Smith J); *Jafari-Fini v Skillglass Ltd.*, [2007] EWCA Civ 261 at [73] (Moore-Bick LJ); *Markel v Higgins*, [2009] EWCA 790 at [50] (Rix LJ); *In re Dellow's Will Trusts*, [1964] 1 WLR 415,455 (Ungoed- Thomas J) (cited by Lord Nicholls in *In re H*, [1996] AC 563 at p.586H); *R(N) v Mental Health Review Tribunal (Northern Region)*, [2005] EWCA 1605 at [62]; *Three Rivers District Council v Bank of England* [2001] UKHL16 at [181] (Lord Millett); *JSC BTA Bank v Ablyazov & Zharimbetov & Others* [2013] EWHC 510 (Comm) at [76] and *Mullarkey v Broad* [2007] EWHC 3400 (Ch) at [47].

(4) Documentary evidence (*Kekhman* [67]-[77]). It is now widely accepted that memories are fallible, people can convince themselves of the veracity of false recollections of events and retain confidence in their false recollection, and a judge's ability to evaluate honesty and reliability merely from a witness's demeanour is also fallible, and therefore where possible a court should rely on documentary evidence and any other objectively provable facts: see for example the comments of Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyd's Rep (HL) at 432 column 2, Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyds Rep 1 (CA) at 57, and Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at paras 15-22, and see *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [76] and [80].

(5) Circumstantial evidence (*Kekhman* at [78]-[81]). The nature of circumstantial evidence is that its effect is cumulative, and the essence of a successful case based on circumstantial evidence is that the whole is stronger than individual parts. In relation to circumstantial evidence, and the drawing of inferences see what was said by Teare J in *JSC BTA Bank v Ablyazov & Others* [2013] EWHC 510 (Comm) at [197] – [198]:

> "197. So far as Mr Zharimbetov's own liability for the Bank's losses is concerned it is necessary to determine whether, when he signed the "minutes", he knew that Mr Ablyazov was, by means of the Original Loans, misappropriating the Bank's money for his own purposes.
>
> 198. Mr Zharimbetov said that he did not know this. He is not a reliable witness but I have to decide whether the Bank has established that he did not know. The bank must do so on the balance of probabilities but the allegation is

extremely serious and exposes Mr Zharimbetov to a personal liability of over US$1 billion. The evidence must therefore be of a cogency commensurate with the seriousness of the allegation. The Bank's case is based upon inference from circumstantial evidence. In this regard it is helpful to recall what Rix LJ said about circumstantial evidence in his judgment on the occasion of Mr Ablyazov's appeal against the finding of contempt at [2012] EWCA Civ 1411 at para 52:

> "It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case: *R v Hillier* (2007) 233 ALR 63 (HCA), cited in Archbold 2012 at para 10-3. Or, as Lord Simon of Glaisdale put it in *R v Kilbourne* [1973] AC 729 at 758, 'Circumstantial evidence . . . works by cumulatively, in geometrical progression, eliminating other possibilities'. The matter is well put in *Shepherd v R* (1990) 170 CLR 573 (HCA) at 579/580 (but also passim):
>
> 9.
>
> '. . . the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.'"
>
> (emphasis added)

(6) Hearsay evidence (*Kekhman* at [82]-[88]). Hearsay evidence of a witness who has not been cross-examined is generally given less weight than the evidence of a witness who has been called and cross-examined and had their evidence tested in cross-examination.

(7) Challenging a witness's evidence (*Kekhman* at [89]-[91]). As stated by the editors of *Phipson on Evidence*, 18th edn state at paragraph 12-12:

> "In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point… This rule serves the important function of giving the witness the opportunity of explaining any contradiction

or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."

See also in this regard what was stated by Peter Smith J in *EPI Environmental Technologies Inc v Symphony Plastic Technologies Inc* [2005] 1 WLR 3456 at 3471, and *Markem Corp v Zipher Ltd* [2005] EWCA Civ 67.

C.2 WITNESSES CALLED BY THE BANK

51. I comment on particular aspects of the evidence of the Bank's witnesses when addressing particular issues below. In this Section I identify the witnesses called by the Bank and focus on them as witnesses and how I found their evidence.

C.2.1 MR POPKOV

52. Mr Popkov graduated from the St. Petersburg State University of Economics and Finance in 1996 after which he has had over 20 years' experience in the banking industry first with the Industrial and Commerce Bank, then from 2006-2009 as Financial Markets Director at Petrocommerz Bank, before being appointed Deputy Head of Capital Markets and Investment Banking at Otkritie Capital where he was appointed as director responsible for distressed assets, and continues to be employed by Otkritie Bank with responsibility for distressed assets. Between 25 December 2014 and 22 June 2015 he was employed as an Advisor to the temporary administration of the Bank. Between 23 June 2015 and 22 February 2018 he was a member of the Supervisory Board of the Bank and employed as an Advisor to the CEO of the Bank.

53. I found him to be a careful and measured witness who gave honest evidence, although on the second day of his evidence he, on occasions, gave rather long answers to questions asked of him. I bear well in mind that he acted as an Advisor to the Bank but I did not consider him to be partisan or untruthful in his evidence generally. I address particular aspects of his evidence, as relevant, in due course below. He was not challenged on much of his written evidence. He was cross-examined in relation to the (truncated) transcript of the meeting in Cyprus on 26 May 2015 which he exhibited to his second affidavit but I do not consider it to be fair to suggest that he presented evidence unfairly. It is clear that he provided the recording to the lawyers who afterwards gave him the transcript which did not purport to be verbatim. His second affidavit was prepared for the purpose of Mr Yurov's discharge application and Mr Yurov himself had the opportunity to, and did, comment on the transcript in his third affidavit. In relation to the settlement agreement with Mr Worsley, I have had regard to its terms, and did not find Mr Popkov's evidence of particular assistance in that regard.

C.2.2 MS PODSTREKHA

54. After graduating from the Leningrad Institute of Finance and Economics with a degree in economics in 1985 Ms Podstrekha has worked since 1996 for the CBR, being appointed in May 2000 to the position of Chief Banking Supervision Administration, and in April 2012 she was appointed Deputy Director of the Banking Supervision Department.

55. She gave her evidence in a precise and open manner, and I formed the view that she was genuinely attempting to assist the Court in her evidence. I bear in mind that the CBR itself has a position to protect as a regulator, but I do not consider this impacted on the worth of her evidence.

C.2.3 MR ISKANDYROV

56. In 2000 he was employed at the Moscow Branch of Menatep Saint Petersburg Bank as a customer service manager, thereafter being promoted to become Chief Specialist of the Planning and Economic Department and later Deputy Head thereof and Head of the Planning and Economic Unit. Following the change in name of Menatep Saint Petersburg Bank to National Bank Trust he was initially employed as Deputy Director of the Finance and Economics Department, and employed in various positions latterly as Deputy Chief Financial Officer, his immediate supervisor being Ekaterina Krivosheeva, the Bank's CFO. In 2011 he was appointed by Mr Yurov as General Director of Columba (which, at one point, Mr Yurov described as the Shareholders' "family office"), before he returned to the Bank to become head of financial control direction.

57. I consider that Mr Iskandyrov under-played his involvement in relation to the offshore network in his written evidence and that he was also indiscriminate in his reference to "Shareholders" in his written evidence when (often) that did not include Mr Belyaev (as Mr Penny, on Mr Belyaev's behalf, demonstrated at some length during cross-examination). I bear well in mind that he was very much involved in what forms the subject matter of the Banks' criticism of the conduct of the Shareholders (and so is himself subject to that criticism to the extent that it is justified), but ultimately I consider that he gave truthful evidence before me and was not, as was suggested on Mr Belyaev's behalf, *"hopelessly compromised by the position in which the Bank placed him"*. The documentary trail as to Mr Iskandyrov in any event largely speaks for itself. He was proved right in his evidence that he provided regular reports to the Shareholders before and after 2008 – something that Mr Belyaev presumably denied given the line of questioning advanced by Mr Penny in cross-examination, but which the documentation showed did occur.

C.2.4 MR MYLNIKOV

58. After graduating with a degree in law from St. Petersburg State University in 2001, he worked from 2003-2008 at Investment Bank KIT Finance as Head of Legal and then from 2008-2010 as a Vice Director at that bank. He joined Otkritie Bank in 2010, and between 2015 and 2016 was Director of the Non-Core Assets Unit of the Bank and later Director of the Special Projects Unit before being appointed to the position of Chairman of the Management Board on 26 April 2016. Prior to that appointment he was responsible for distressed assets including the loans to the 18 Borrowers and as Chairman had oversight of the recovery efforts.

59. I consider that he was an honest, though not particularly impressive, witness who tended to give long answers and at times became argumentative in his answers. Nevertheless, I do not consider the criticism of him, in terms of his dealings with the Borrowers to be fair, and do not consider that he gave a misleading impression relating to his dealings with the Borrowers as was alleged. His evidence related to the discrete areas of recovery strategies and recoveries that were made by the Bank. That evidence is relevant to Issues 56 and 57, as addressed in due course below. Suffice it to say at this point that notwithstanding his

short-comings as a witness I see no reason not to accept his evidence as to recovery strategies and recoveries made. Equally I do not consider there can be any criticism in the Bank effectively controlling both sides of the litigation against Baymore in the context of the inquisitorial model followed by the Russian courts and the need for expedition when seeking to make recoveries.

C.2.5 MR ZAVADSKY

60. Mr Zavadsky has a Master's degree in Applied Mathematics from the Oil & Gas University of Moscow and certificates in relation to accounting including International Financial Reporting Standards (IFRS). He joined the Bank in 2005 initially working as an economist in the department responsible for IFRS reporting and from 2007 was in charge of the department dealing with IFRS reporting, reporting to the Bank's Deputy Chief Financial Officer (initially Ms Krivosheeva and then after her departure Mr Romakov).

61. When cross-examined, Mr Zavadsky admitted being involved in back-dated securities documentation in the months before the Bank's collapse. He also (ultimately) accepted that he knew that the Bank could request that companies managed by Columba enter into transactions connected with the Bank. Whilst such matters do impact upon his credibility, and whilst I also bear in mind that he was a relatively junior employee, he was in a factual position to comment on how the IFRS accounts were, as a matter of fact, put together, and what was, and was not, included in the category of "related-party" transactions. He was not challenged in that regard, and I accept his evidence in relation to that. In large part, in any event, the documents speak for themselves (for example, in terms of the size of loans to WR and RCP which were, and remained, around US$110 million (at least RUB 3 billion), and so they cannot have been included in the related-party lending figures in the accounts). I also bear in mind that he was a factual witness and that there was no permission to call an expert on IFRS accounting. Nevertheless, from his knowledge and involvement in the preparation of such accounts, he was in a position to give factual evidence in relation to the Bank's IFRS accounts and the associated IFRS requirements.

C.2.6 MS DOLENKO

62. After graduating from the Finance Academy in Moscow in 1993 she worked in the banking industry specialising in bank rehabilitation. In 2012 she was hired by Otkritie Commercial Bank OJSC to the position of Chief Financial Officer, and in 2013 transferred to the position of Deputy Chairman of the Management Board. Following the DIA taking control of the Bank on 2 December 2014, on 13 January 2015 she was employed by the DIA as the temporary administrator of the Bank between 13 January 2015 and 22 June 2015, after which she was appointed Chairman of the Management Board of the Bank, resigning in late August 2015. She is now the Director of the Financial Planning and Control Department of the DIA.

63. She struck me as an honest witness. I do not consider, as suggested on behalf of Mr Yurov, that she had a rather pedantic turn of mind, though it is fair to say that she was certainly quite precise, and on occasions literalistic, in her answers to questions put to her. I address her evidence (which relates in particular to limitation) in due course below.

64. Whilst there was some suggestion in the Shareholders' witness statements and the Defence pleadings that her appointment was unorthodox or inappropriate given her previous role at Otkritie, her then appointment by the DIA as the temporary administrator of the Bank and her subsequent return to Otkritie, this was not pursued in cross-examination and I do not consider that to be the case. In this regard she was not cross-examined in relation to paragraphs 3 to 5 of her second witness statement which I accept:-

> "3. A proposal by the DIA to an employee of an investor to come to work for the DIA for the purposes of managing a bank under rehabilitation is standard practice.
>
> 4. Moreover, pursuant to Federal Law No. 127-FZ dated 26 October 2002 (as amended on 29 December 2014) "On Insolvency (bankruptcy)", employees of a temporary administration of a bank have to be employees of the DIA.
>
> 5.There is certainly nothing "unorthodox" about this since there are a number of recent examples when employees of various investors were engaged by the DIA to manage banks under rehabilitation (to my knowledge these include, "Investtorgbank", "Timer bank", "Rost Bank" and other banks). The main purpose of this is so that the investor can get up to speed with work within the shortest possible time and proceed directly with managing the bank under rehabilitation (especially at an early stage when the situation is particularly strenuous)."

65. Equally the evidence she gave as to her own appointment was open and candid, and I accept it:-

> "Q. And you resigned from employment with Otkritie at the same time. Is that right?
>
> A. Yes.
>
> Q. And it was a requirement that you resigned, wasn't it, because it would not have been permissible for the head of the administration also to be associated with the investor, an employee of the investor's group?
>
> A. According to the legislation, heads of temporary administration must be employees of the DIA. That is why I resigned and came to the DIA to work.
>
> Q. You continued to use your Otkritie email address, though, didn't you, throughout the time you were employed by the DIA?
>
> A. I worked using the Bank Trust email address for some

time and using Otkritie email address because I had a notebook and that was convenient to me.

Q. Did you have an assurance from any Otkritie company that you would be re-employed by Otkritie once the temporary administration had finished?

A. When moving to that position, of course I was interested what would happen to me when the temporary administration will come to an end, would finish its work. I asked the question to Mr Dankevich once and I received a reply that all will be well, such an expert as yourself will always be required and called for. This is the maximum that we discussed.

Q. Did you receive any payment from any Otkritie group company in respect of the work you did whilst you were an employee of the DIA, whether it was paid at the time or paid later?

A. No, I did not receive any such payment."

C.2.7 MR ROMAKOV

66. Mr Romakov joined the Bank as CFO in February 2013, becoming a member of the Management Board in May 2013 and of the Credit Committee in January 2014. At the time of his witness statement he was in prison in Russia serving a sentence having been convicted for his alleged role in frauds on the Bank. Amongst other matters he gave evidence in relation to his role at the Bank, the Bank's operations and his relationship with the Shareholders. I was not impressed by his evidence. He was clearly involved in "balance sheet management" but he denied it. I do not consider him to be a witness of truth and I am satisfied that no value can be attached to his evidence, such as it was.

C.3. THE DEFENDANTS
C.3.1 MR YUROV

67. Mr Yurov was cross-examined across four days. By the conclusion of his evidence I was in no doubt whatsoever that Mr Yurov was a dishonest and untruthful witness, and that his dishonesty in the witness box (often when seeking to distance himself from conduct which was itself self-evidently either dishonest, dishonourable or not in the best interest of the Bank) was equally reflective of his approach to business dealings and his relationship with the Bank, including a willingness to deceive, as illustrated by his willingness (amongst other matters) to back-date documents so as to create a false representation as to what actually happened and when. In consequence, and in circumstances where Mr Yurov was not a witness of truth, his written and oral evidence cannot be taken at face value or given any weight save where it is corroborated by credible evidence or is contrary to his interest.

68. Perhaps in recognition of the unfavourable impression that Mr Yurov gave when giving evidence, as reinforced by the wealth of contemporary damning documentation to which

Mr Yurov was a party and which showed that Mr Yurov acted very much in what he considered to be his best interests rather than those of the Bank (and its investors), Mr Paul Stanley QC, in Mr Yurov's Closing Submissions, urged upon me that Mr Yurov should not be seen as a "*venally unscrupulous"* person, that a fairer assessment would be that "*Mr Yurov may rather have been a person who took a somewhat cavalier view of the finer points of corporate governance"* and that: *"Whilst the Bank will say, no doubt, that some of this is discreditable. But it is some far distance removed from the ghosts of Messrs Madoff, Ablyazov, or Maxwell", who have periodically been invoked. The Court may think that Mr Yurov emerges as a representative product of his milieu, conducting himself very much in accordance with the mores that apply to Bank Peresvet, Baltika Bank, or (for that matter) Otkritie itself, and probably hundreds of other Russian banks".*

69. To suggest that what Mr Yurov did was simply to take a *"somewhat cavalier view of the finer points of corporate governance"* is something of an understatement – indeed in the best traditions of English understatement. It is also a euphemism to distance Mr Yurov's actions from the reality of what he was involved in. In any event, honesty is not a geographical concept, and what stands to be applied here is Russian law no more, no less. Unsurprisingly, and as was common ground between the experts, under Article 53(3) of the Russian Civil Code and Article 71(1) of the JSC Law, members of a board of directors are obliged to act in the interests of the company when performing their rights and obligations as members of the board of directors and to perform their rights and obligations in relation to the company in good faith and reasonably. In that regard it is necessary to examine the specific allegations pleaded and whether they have been made out.

70. However, in terms of the credibility, and worth, of Mr Yurov's evidence, which are relevant when considering the allegations made against him, the tone was set by Mr Yurov's answers, at the very start of his evidence, to questions asked about his June 2015 memo to Mr Belyaev and Mr Fetisov, to which reference has already been made. This example well illustrates both that Mr Yurov was not a witness of truth, and that he was willing to countenance the Bank acting contemporaneously in a manner which he recognised amounted (at the very least) to an administrative violation of Russian law.

71. It will be recalled that on 28 June 2015 Mr Yurov sent a memo in Russian to Mr Belyaev and Mr Fetisov (though only disclosed in these proceedings by Mr Fetisov) to their private email addresses under a heading, "for the attorney examination". The backdrop to the document was Russian criminal proceedings concerning two of the companies involved in the scheme (Erinskay and Baymore) and which the Bank says was Mr Yurov's attempt to defend the Shareholders against allegations of criminality.

72. The memo is written in the first person. It starts with the words*, "I first heard about Erinskay and Baymore"*. It records that Erinskay and Baymore were, along with a *"few dozens"* of other foreign companies used *"in order not to record previous years' losses from banking operations in its reporting to the CB".* Various types of loss are then listed, including losses sustained when borrowers failed to repay their loans in 2008 as well as the failure of individuals to pay back retail loans in 2012 and 2013 (said to have caused RUB 19 billion of losses). It was then stated:

> "If such losses had been recorded in the bank's books back in 2008, the CB would have had to revoke NBT's banking licence

> as the reduction in capital would have been over 20%. As a rule, as soon as a bank's licence is revoked, it becomes bankrupt because the depositors have the right to withdraw their deposits. Since no share capital could be attracted after NBT's shares were unlawfully attached in 2008 on the grounds that they allegedly belonged to Khodorkovsky (the attachment is still in force regardless of 12 complaints and petitions), **a decision was made to start submitting false accounts to the CB (which, in my understanding, was only an administrative offence punishable at most by a fine and licence revocation (in any case, the risk of licence revocation already existed)) and focus on providing loans to individuals instead (as the most profitable transactions) in order to offset the previous years' losses by the received profits, recover the bank's capital over time, and stop submitting false accounts to the CB.** This business logic had failed as NBT incurred new losses, this time on loans to individuals, and had to file for rehabilitation proceedings to avoid bankruptcy." (emphasis added)

73. There is a later reference to *"the forced decision of 2008 to submit false accounts to the CB in order to avoid the revocation of licence and bankruptcy".* Those acting for Mr Yurov submit that "false accounts" is too strong a translation and that the reference is to submitting inaccurate returns which is an "administrative violation". The Bank submits the translation is accurate. Either way it is an admission that what had been done was (at the very least) something that could result in a fine and the revocation of the Bank's licence. The drafter was clearly seeking to minimise and justify what had been done, but on any view it was a damaging admission of wrongdoing. It is clear that Mr Yurov wished to distance himself from the memo, however it was to be interpreted.

74. The memo is, in fact, entirely consistent with what Mr Yurov told Mr Popkov in a meeting in Cyprus in May 2015, *"here it is a kind of the total amount of losses. I can't say for sure now, but, in any case, it was such that if the bank reflected it ... on ... created provisions, well, proceeding as it were, well, from its scale, directly, yes, there it would be revoked the license in 2008*" (informal translation from the Russian). It is also consistent with his Second Affidavit (albeit in a sanitised form) in which he swore:

> "28. Then the global financial crisis hit in late 2008. This caused the Bank (now merged into one) considerable difficulties (as it did for all other banks in Russia and elsewhere). In particular (i) there were large numbers of defaults from 2008 onwards on corporate and personal loans that had previously been made; and (ii) the Bank suffered heavy losses from the fall in the value of Russian securities in 2008, and again in 2014. The Bank also suffered as result of the fall in the Russian Rouble, in particular in 2014. In addition, in 2009 the Russian courts found the Bank liable to Rosneft for US$75 million (the claim arose out of a previous transaction entered into by the Bank on behalf of Yukos), which further reduced the Bank's capital. I estimate that between 2008 and 2012, the Bank lost around US$70 million in total, which was around a quarter of the share capital.

29. All of these problems placed the Bank in a very precarious financial position. The impact of the diminution in capital was magnified, because the Bank was restricted in its ability to lend funds by reference to a multiple of its capitalisation. Accordingly, the Bank's ability to lend was greatly reduced by any fall in capital. This was compounded by the fact that the Bank was unable to raise additional capital by issuing further shares, because its shares were frozen.

30. As a result, there was considerable concern that if those losses had all been recorded on the Bank's balance sheet, it would have had its licence revoked by the Central Bank of Russia and consequently been declared bankrupt. For obvious reasons, the Bank's management wished to do everything possible to prevent this from happening, and took steps to manage its balance sheet using its pre-existing offshore structure (as I will describe in more detail below)".

75. His statements for trial do not repeat such evidence. By this stage there has been a clear distancing of himself from such evidence. When questioned about the memo Mr Yurov denied it was a document that he wrote to justify and defend his behaviour once the criminal investigations had started getting underway in 2015 saying, *"No, it is not. That's not my memory*", and when asked to admit that he wrote the document he said *"no".*

76. It was pointed out to him that the metadata showed that he was the author, it was created on Sunday 28 June 2015 at 09.24hrs and last saved by him after a total editing time of 118 minutes. Mr Yurov's response was to say that it was a document generally prepared by his Russian lawyers EPAM. In his Closing Submissions it was submitted that this is probably right (though there is no reference in it to correspondence from EPAM, nor has any such correspondence been disclosed). It was also submitted (rightly) that a document can be re-saved as another document, thereby generating its own metadata.

77. Yet Mr Yurov also said that he combined this letter, *"from different emails or letters"* which he got from EPAM by himself *"for the purpose to send this to my colleagues and partners to show the way how [EPAM] is think that [it] will be proper to present our position in the proceedings against Mr Dikusar"*. This shows, on any view, that he had a hand in the document either as its drafter or its editor – as such it is inconceivable he would send it containing an admission with which he did not agree. When it was put to him that it contained an admission of criminal conduct, his response was that *"that was a wild idea of [EPAM]".*

78. It is quite plain (1) that Mr Yurov either drafted the memo or adopted it as his own (having worked on it for 2 hours) when he sent it to Mr Fetisov (twice) and Mr Belyaev (once); (2) on any view he agreed with its contents or otherwise he would have qualified the memo either in the memo itself or in his covering email (he did neither), and (3) that it did contain an admission (at the very least) of a decision to submit inaccurate returns which is an "administrative violation" leading to a fine in circumstances where the Bank's licence would otherwise be revoked – that is an admission of wrongdoing. What is also notable is that neither Mr Fetisov or Mr Belyaev responded saying they disagreed with the contents of the memo or that the admission was not true (nor, it will be noted, did Mr Belyaev suggest that this was the first he knew of such conduct).

79. The suggestion that the contents were a "*wild idea*" of EPAM's is absurd and is a clear attempt by Mr Yurov to distance himself from the contents – it is absurd to suggest that

his own Russian lawyers would have invented a damaging admission such as the submission of false accounts/inaccurate returns as they would have had neither a basis nor a reason for doing so. Mr Yurov's explanation for the inclusion of the admission is simply incredible, and not capable of belief – in short it is not an honest answer. If it was a "*wild idea*" (which it clearly was not), Mr Yurov would not have included it or would have disowned it – he did neither. I am satisfied that Mr Yurov falsely disowned the document, and that he did so in an attempt to distance himself from events or documents which were damaging to his case. That does him no credit.

80. Another example of Mr Yurov giving answers which are incredible and obviously untrue is in the context of Mr Yurov (and Mr Fetisov and Mr Belyaev) obtaining substantial personal benefits from the Bank. There are pleaded allegations of personal benefits (including those pleaded at paragraph 14 of the Yurov Reply). However, Mr Yurov was also asked about two yacht holidays that he and others enjoyed at the expense of the Bank (as matters going to credit). Even though this was not a pleaded benefit (and not pursued as such), it portrayed him (and Mr Belyaev and Mr Fetisov) in a bad light – and no doubt as a consequence he was prepared to give obviously untrue evidence, in the form of inventing a patently false explanation in an effort to justify the receipt of personal benefits at the Bank's expense.

81. The two yacht charters were set up so that the yachts were ostensibly chartered by Mr Worsley, who was either put in funds or reimbursed using the Bank's money. In relation to the 2010 charter of MV TRIDENT, it was agreed between Mr Worsley, Mr Fetisov and Mr Drozdov that Mr Worsley would pay the (very substantial) cost of the charter via one of his companies and then be reimbursed by TIB Equities (a subsidiary of the Bank). The following year, the yacht chartered that year (the MV KOGO) was chartered for €680,000 for 8 days. Mr Worsley sought and obtained approval from the Shareholders to go ahead with the charter, which was paid for by his company Polden Coombe with Mr Worsley being reimbursed by the Bank. The Shareholders, their wives and Mr Worsley completed the trip with a private jet from Bodrum to Istanbul.

82. It appears that the two yacht charters were enjoyed exclusively by the Shareholders, their wives and Mr Worsley at the Bank's expense of (more than) €1.1 million for two weeks. When it was put to Mr Yurov that, as all the evidence suggested, these were in fact personal holidays of the Shareholders at the expense of the Bank Mr Yurov stated that they were in fact planned corporate events; but that <u>on both occasions</u> the supposed corporate invitees had cancelled at the last minute, leaving the Shareholders with no choice but to go ahead with their cruise around the Mediterranean without them. This is a simply incredible suggestion which was obviously untrue. For this to happen once would appear unfortunate (if true), but for it to happen twice (and with the Shareholders not having learned lessons from the first trip to ensure that clients were invited and were attending) defies belief.

83. Mr Yurov went so far as to claim to be able to name those invited on the first trip, but there is no contemporaneous evidence to support his suggestion that they had in fact ever been considered for, let alone accepted, an invitation. There is nothing in any of the emails about inviting or preparing for corporate clients of the Bank. It is inherently implausible that the documentation that <u>does</u> exist would not refer to such matters, or indeed that no such documentation would exist, had Mr Yurov's account of events been true. As for the second, 2011, charter Mr Yurov could not even identify any of the "clients" who were

supposed to be attending. Mr Yurov's evidence was absurd, and obviously untrue. The truth is equally obvious – but Mr Yurov was not prepared to admit it – namely that these were high-end luxury holidays for the Shareholders and their wives paid for by the Bank.

84. Mr Yurov chose to lie rather than make an honest admission of the true position, which is even evidenced in the contemporary correspondence. Thus as Mr Worsley said in relation to the first charter in an email at the time to a Marta Pawlowska dated 8 July 2010*, "Its for the shareholders. I am renting it only in name:)"* (emphasis added) - there was not even a pretence, at the time, that it was for the Bank.

85. Whilst Mr Belyaev would not concede that what was done was improper he ultimately (rightly) agreed that it was "*unethical*" (another euphemism):

> "Q. And, Mr Belyaev, you know that this was improper use of the Bank for your personal benefit and that's why you can't give a straight answer to a straight question about any of this, can you?
> A. If by improper, it means unlawful, then the answer is absolutely not. If by improper it means that it's somehow unethical or it would be better, you know, if it would be paid personally, then I agree with you."
> (emphasis added)

86. The importance of Mr Yurov's lies are not that he, Mr Belyaev and Mr Fetisov improperly used the Bank for their own personal benefit in relation to the yacht charters (which they clearly did – and in doing so were not performing their rights and obligations in relation to the Bank in good faith and reasonably) – given that these are not pleaded improper benefits, but rather Mr Yurov's willingness to invent a story, and lie on oath, demonstrating that he is not a witness of truth, and that his evidence cannot be relied on. Of course it also says something about his (and Mr Belyaev and Mr Fetisov's) attitude to their duties as directors of the Bank which is of resonance when considering those allegations which are pleaded, and do arise for determination.

87. There were other instances in relation to personal benefits where I am equally satisfied that Mr Yurov not only obtained personal benefits in breach of his duties to the Bank, but was prepared to lie in relation to such matters (often in the form of expressing ignorance of matters that he was obviously aware of). A good example is in relation to his personal loans from the Bank and the role of TIBI in that regard – and Mr Yurov's professed ignorance or lack of recollection, of the role played by TIBI in this regard.

88. The Excel "*receivables and business financing*" spreadsheet (in translation) contains details of the various personal loans taken by Mr Yurov and the other Shareholders from the Bank via TIBI and other companies which were not transparent by reason of the use of the EWUB/Donau schemes which effectively hid such loans from view (I consider the EWUB/Donau schemes in greater detail below). It also refers to the large personal loans that the Shareholders had taken from MC Trust, when it had borrowed US$140 million from Crédit Suisse and Merrill Lynch for the purpose of buying out Mr Kolyada and making shareholders' loans to the Bank. As is apparent from the document Mr Yurov personally borrowed substantial sums from TIBI and others during 2007/8 (with many of the loans being expressly described as "*personal*").

89. As the Bank points out, there is nothing wrong in principle with (genuine) loans being taken out by the Shareholders with the Bank provided they are properly documented, authorised, and disclosed as related party transactions. Such loans, one might anticipate, would be direct from the Bank. But that is not what was done. Instead the loans were from TIBI, being routed through the EWUB/Donau scheme rendering the routing of monies opaque.

90. For present purposes what matters is Mr Yurov's reaction when such loans were explored with him in cross-examination. Despite TIBI being central to the EWUB/Donau schemes (borrowing large sums from EWUB/Donau and then lending them to other companies in the offshore network including Yaposha and Business Group (as is apparent from an email of Mr Fetisov and attached spreadsheet dated October 2008)), Mr Yurov, when cross-examined, feigned a total lack of any recollection whatsoever agreeing that his evidence was that he had *"a memory blank about that company"*. He clearly wanted to distance himself from the role played by TIBI (and for that matter EWUB/Donau) in the context of personal loans made to him.

91. His evidence in this regard was, I am satisfied, a lie. He knew perfectly well about TIBI and indeed had referred to it in evidence when it suited him. There are two references to TIBI in his first witness statement (at paragraphs 125 and 134(b)) and another in his reply statement at paragraph 41 where he refers to TIBI as being *"obviously related to the Bank"*. He also made express reference to TIBI in his witness statement in the Kolyada proceedings in 2014 when he stated, *"Nor have I received any dividend or income from my shares in TIB Investments Limited, or my shares in NBT"*.

92. So any "*memory blank*" would have to be recent – despite Mr Yurov no doubt having prepared to give evidence for the present trial and refreshed his memory in relation to his witness statements and contemporary documents. His alleged "memory blank" is just not credible and I am satisfied it was an untruth.

93. There are two further reasons why it is inherently improbable that Mr Yurov did not know about TIBI. The first is that there are numerous references to it in contemporary documentation to which he was a party. For example, when Mr Drozdov sent structure charts showing the Bank's holding structure to the Shareholders he told them in an email dated 18 December 2008 that, *"I'm sending the structure of the TRUST Group and NBT stockholders for your information. I didn't say that TIB investments owns 60% of the shares of the 3Sistercos, since you are the ultimate owners of TIB investments in a ratio of 1:1:1.5".* Then in late 2009/early 2010 when Mr Worsley became involved he created and distributed structure diagrams that showed TIBI interposed between Tactio (owned by the Shareholders) and various intermediate companies in the holding structure of the Bank. Whilst Mr Yurov claimed during his cross-examination that TIBI was a subsidiary of the Bank, it is common ground that it was beneficially owned by the Shareholders.

94. The second is the sheer size and number of the loans made to Mr Yurov which involved TIBI. The use of TIBI to make personal loans is considered in Mr Allen's Schedule 7. He addresses how particular liabilities of Mr Yurov to TIBI were cleared on 1 December 2008 by what he describes as a "*cycle scheme*". The involvement of TIBI is illustrated with an example where monies originating from the Bank ended up with Mr Yurov (via TIBI) to be withdrawn "*in cash*" and used for Mr Yurov's own personal benefit. On 1 December

2006, the Bank made a loan of RUB 300 million (about US$10 million) to Nikilin. RUB 270 million of this went, via TIBI, into Mr Yurov's personal bank account and then on 4 December 2006, Mr Yurov withdrew US$7 million in cash which was taken from the Bank in an "*armoured vehicle*", with the remainder being withdrawn a few days later to pay 40-50% of the purchase price of a property outside Moscow. The transfer of the RUB 270 million to Mr Yurov was characterised as a "payment for shares" that were "sold" to him by MC Trust. The result, says the Bank, is that he never had to pay back this loan. It is said that he further benefitted when the property was sold in July 2013 for RUB 381 million. A similar cash withdrawal was made in October/November 2007 when Mr Yurov withdrew around US$3 million in cash from his account with the Bank which was used to purchase property.

95. In short, I am satisfied that Mr Yurov had no genuine "*memory blank*" about TIBI and that he pretended he had as he did not want to be asked questions about it or associated with its use as a conduit through which "loans" were received by him.

96. Another aspect of this is whether these were in truth loans at all. When asked about how the loans were repaid Mr Yurov's evidence was that:

> "… I don't remember but I have, like, the only answer
> To that, that the only source of money which I had, again in Russian Federation, from 1999 until 2014 were my bonuses and salary in the Bank and the proceeds of the sale of my shareholding in one way or form to Merrill Lynch. So I can tell you I presume that they will repay it from these sources."

97. However, Mr Fetisov's evidence in relation to the Merrill Lynch share purchase was that: *"Mr Yurov, Mr Belyaev and I used our share of the proceeds of selling part of our shares to Merrill Lynch to purchase Mr Terzyan's shares, as he had decided to retire"* (Fetisov 1 at para 55). Indeed this was Mr Yurov's own evidence in the Kolyada proceedings: *"The money Merrill Lynch paid was used to buy out another shareholder, Mr Terzyan"*. When asked why the Bank would lend him money via TIBI his evidence was as follows:

> " Q. … it's right,
> isn't it, that the reason you borrowed it from TIBI was so no one realised you were actually borrowing money from the Bank?
> A. I don't think that's the case. I think that was the most efficient or comfort way for the Bank to provide this loan to me."

98. This answer makes no sense whatsoever – there is no reason why this would be the *"most efficient or comfort way"* for the Bank to provide a loan to him. Like his professed ignorance of the use of the EWUB/Donau scheme, I am satisfied that Mr Yurov was not telling the truth not only about his knowledge about TIBI, but also as to why it was being used – which was indeed, I am satisfied, so that no one realised he was actually "borrowing" money from the Bank – money that there is no evidence he ever repaid.

99. He also claimed it was "*efficient*" for the Bank to lend him money via TIBI but this made no sense at all. In short, Mr Yurov's evidence in relation to TIBI was untrue because he

knew exactly what TIBI was, how it had been used and he chose to hide behind a false pretence of ignorance.

100. Another example of Mr Yurov giving untrue answers, again in order to distance himself from conduct which he no doubt recognised was inappropriate, related to his answers concerning documents that he was involved with which had clearly been back-dated and/or which misrepresented what had occurred (or when). The issue of the back-dating and falsification of Credit Committee minutes is addressed in due course below in relation to Issue 2, but his answers when questioned about back-dating were, I am satisfied, untrue.

101. For example, on 13 August 2012, Mr Postnov wrote to Mr Yurov, "*Please approve and instruct the BCC secretary to include in the minutes of the previous meeting the item on **providing Yaposhka City with a bank guarantee for $160,000…**"* (my underlining) attaching a draft (undated) resolution of the CC. Mr Yurov approved the insertion of this resolution into the minutes, which were then reproduced and back-dated to 25 July 2012 as if the additional resolution had been: (1) on the agenda (see point 8 of the "agenda"); (2) raised and discussed at the meeting (see page 9 of the English version, which specifically notes: "*Speaker: D S Postnov*"); and (3) voted on and approved by the Committee. At p. 13, the minutes are then signed by Mr Yurov personally as if they were true. It is therefore readily apparent that the minutes are deceptive and contain false representations.

102. When this was put to him, he was quite unwilling to acknowledge that he had signed a document containing a false representation:-

> "Q. You signed this document as a minute of a meeting that took place on 25 July 2012, didn't you?
> A. Yes.
> Q. And you knew that part of it was recording something that did not take place on 25 July 2012, didn't you?
> A. I accepted to include to this meeting the decision which was took -- the decision of the Credit Committee which was taken later, yes.
> Q. It was dishonest of you to sign that minute and pretend that the matters recorded in it were discussed on the date it bore, on 25 July, wasn't it?
> A. Sir, I just explained to you my position on that. No, I cannot accept that."

103. This is but one example – other examples are addressed in due course when dealing with particular meetings. The relevance of the point, for present purposes, is that Mr Yurov was not willing to give a straight answer and acknowledge his involvement in any matter which he knew was wrong or inappropriate (such as back-dating documents), and he was prepared to brazen his way out rather than recognise the reality of his conduct. It also shows, of course, that Mr Yurov was prepared not to be honest in his business dealings – the back-dating of documents is not an acceptable practice whatever country's laws are in play. Russian law is no different in this regard having regard to the agreement

of the experts on, and the wording of, Article 53(3) of the RCC and Article 71(1) of the JSC Law.

104. Perhaps the most egregious example of this related to events on the day that the temporary administrators arrived to take over management of the Bank on 22 December 2014 and the "cleaning" of Mr Yurov's computer. That morning, and as is apparent from the timings of the texts and the content of the texts, before the temporary administrators arrived at the Bank's premises, Mr Worsley sent Mr Yurov a text which read, *"Do u want to ask Tatyana to clean your computer or to remove it…??"*. Tatyana Sidorova was Mr Yurov's personal assistant.

105. The meaning of the question is obvious and in reality the text can only bear one meaning – Mr Yurov was being asked if he wanted Mr Worsley to ask Ms Sidorova to wipe his computer clean to remove all documentation and emails that would or might be on his computer, or indeed to remove it (so that it was not available to the administrators). He responded *"**OK**"* – the only possible meaning of this word is that he was agreeing to such (inappropriate) conduct. It is not the response of someone who had nothing to hide. On the contrary, and as the Bank submits, rightly in my view, it is the action of a guilty man. In the very same exchange of texts on 22 December Mr Worsley is proposing names for an "indemnity", to include himself – the obvious context in which indemnities would be needed would be in the context of contemplated proceedings (civil and/or criminal).

106. Admittedly Mr Yurov was between a rock and a hard place when cross-examined about this, but the only honest answer would have been that he had indeed agreed that his computer should be wiped. However, no doubt alive to how damning such conduct would be regarded as, he denied instructing his secretary to wipe his computer:

> "Q. And pausing there, you did indeed ask your secretary to clean your computer so that no incriminating material could be found on it, didn't you?
> A. No, I didn't do it.
> …
> Q. Do you have any explanation for why the hard drive of your computer was formatted at the time the new administration was going into the Bank?
> A. Again, I seriously doubt about that because I never gave such instructions to nobody and, no, and I cannot -- I do not have any explanation to that, if it really happened."

107. There was also this series of answers:

> *"* MR JUSTICE BRYAN: …. Tatyana was your PA?
> A. She was my PA, yes.
> MR JUSTICE BRYAN: Did Tatyana normally follow your instructions?
> A. Well, yes, sir, I mean, (inaudible) of course.
> MR JUSTICE BRYAN: So when you were asked by Mr Worsley: "Do you want to ask Tatyana to clean your computer or to remove it?"

And she normally follows your instructions --

A. If I would say so, yes.

MR JUSTICE BRYAN: So what makes you think that she didn't follow your instructions and do what you are being asked to confirm she should do.

A. Yes, maybe I was not specifically clear. I do not accept that there was anything happened to my computer because it was my personal property and I cannot imagine that somebody told Tatyana, let's just like reformat that. But again, if Mr Pillow says that it really happened and I cannot, you know, check this, I say that that means that she was acting not on my instructions or somebody else did this but I really cannot imagine how it is possible because she was working for me for -- again, we still are in a quite friendly relations we're not, you know -- she's quite friendly relations with my wife and I definitely ask her about that but I do not have any written, you know, evidence of that but that's what I can tell you. So ..."

108. I am satisfied that Mr Yurov was not telling the truth when he denied that he agreed to Ms Sidorova cleaning is computer or wiping it. It is perfectly plain that Mr Yurov was agreeing that Ms Sidorova should clean his computer. It is also clear that this was actioned. In this regard as Mr Popkov explained at paragraph 14 of his statement (about which he was not challenged in cross-examination):-

> "On 27 December 2018, I prepared a draft outline of the key ongoing issues that I sent to Ms Dolenko. Action points included, amongst other things, the rehabilitation plan, balance sheet risks, loans, financial market conditions, potential staff changes in the Bank as well as next steps on assessing "problem assets". The situation at that time was a complete mess. I advised Ms Dolenko that steps needed to be taken to preserve the Bank's IT systems but we later established through the Bank's internal security team and from speaking to senior management of the Bank that shortly before the collapse of the Bank the email accounts of most of the Bank's senior management had been deleted and some personal computers and servers had been completely wiped using special software, making our job much more difficult." (emphasis added)

109. The Bank's Second Disclosure Statement of 27 October 2017 provides further information as to what was found:-

> "5. As explained in Steptoe's letter of 30 January 2017 and at paragraphs 44-49 of the Ninth Witness Statement of Neil Dooley ("Dooley 9"), after the rehabilitation of the Bank and the temporary administration in December 2014, the Bank's IT specialists (led by Andrey Babiy, an independent IT contractor) established that data from the Bank's email servers had been deliberately deleted shortly prior to the Bank's rehabilitation. In

particular, emails held on the accounts of the First to Third Defendants (the "Primary Defendants") and other senior executives (including Mr Iskandyrov, Ms Balkan, Ms Sidorova, Mr Pospelov, Mr Postnov, Mr Popov, Mr Vartsibasov, Ms Karalkina, Mr Kazakov, Mr Kuznetsov) had been systematically deleted.[25]

6. In addition to the deletion of emails from the Bank's servers, the Bank established that immediately prior to the temporary administration, the desktop office computers of the Primary Defendants had also been wiped clean and held no recoverable data. The Bank sent the relevant machines to an external IT forensic laboratory for further analysis, but the Bank was informed that the desktops *had been professionally cleaned and that deleted data could not be restored."* (emphasis added)

110. Accordingly, this is a further instance of Mr Yurov not telling the truth when questioned. It also relates to a matter that had serious potential implications for what evidence was available to the court when judging the allegations against the Defendants. In the event the Bank settled with Mr Worsley, and so secured his email archives. It is notable that the text exchange with Mr Worsley is not addressed in either Mr Yurov's Closing Submissions or the oral closing submissions made on his behalf.

111. Other examples where I am satisfied that Mr Yurov was not giving a truthful account to the court about particular matters include who the "CBR consultants" were that are referred to in the documents, and what they were doing. Mr Yurov initially denied that he knew who these consultants were, but later suggested they were small time Russian law firms advising the Bank on CBR regulations. Given the amounts paid (US$2.7 million in 2013), this seems implausible. One of Mr Worsley's memos under the heading "*potential partners*" referred to the involvement of "X", and included the comment, *"We need to provision for what happens if/when X is caught doing all of this. Currently, we pay X on a deal by deal basis. In other words we have some room to escape from trouble by saying that it was a one off. In the proposed new deal, we would be embedded with X in a concrete fashion and we risk being dragged into any charges that X may one day face. This sounds dramatic, but as it could involve NBT directly, we should not ignore such a risk".*

112. I am not in a position to reach any firm conclusions, and it is not in any event a pleaded issue – but whatever they were doing it does not appear consistent with it being the giving of proper advice to the Bank. Mr Yurov, when asked for an explanation, gave no coherent explanation. I am satisfied that Mr Yurov's account was not a frank and truthful account.

113. This is not the only area where it is not possible to reach any firm conclusions about what was actually going on but in relation to which it is clear enough that Mr Yurov's evidence was not a truthful account. One example is Mr Yurov's evidence as the source of cash deposits totalling around US$14 million in cash into his account with the Bank between 2010 and 2014 (receipt of which he did not dispute), and which he said represented profits from a boxing academy and promotion company (Mr Fetisov received

[25] Note that, whilst described as senior executives, this list in fact includes the Shareholders' secretaries' emails (Ms Balkan, Ms Sidorova and Ms Karalkina).

a similar amount, Mr Yurov's evidence being that he was a co-investor). Mr Yurov's evidence was that the business was sold for around US$1 million in 2015 despite (allegedly) having generated profits of over US$25 million over a 5 year period. This evidence (absent further explanation which was not forthcoming) appears incredible – there is a clear mismatch between the two. Whilst the true source of the cash is not clear, and it is not possible to know whether there was in fact any alleged sale of a business, I am satisfied that Mr Yurov's account was not a frank and truthful account.

114. Another area illustrating Mr Yurov's propensity to give untruthful evidence relates to the purchase of the Kolyada shares, the Kolyada case itself, and legal costs recovered in that case. As to the first Mr Yurov denied that the Bank ended up paying for his, and the other Shareholders' acquisition of Mr Kolyada's share in the Bank in 2006/7 stating that the money to pay back Credit Suisse/Merrill Lynch originated from the sale of shares to Merrill Lynch. However, the difficulty with this is what is stated in an email on 15 October 2014 from Mr Worsley to him summarising discussions between him and Mr Worsley in which it is stated, *"NBT paid back ML and CS facilities".* He could not offer any explanation for this other than to say that Mr Worsley was in *"unstable shape".*

115. In fact it is clear that the email itself was all about a dishonest plan to pretend that the Shareholders had bought Mr Kolyada's shares as nominee for the Banks so that if the case was lost Mr Yurov would look to the Bank to pay the costs. Again it involved putting in place (false) documentation to support the plan:-

> "After further long discussions today: You (plural) stepped up to save the business
> This involved buying out the Kolyada TIB shares
> Monies were raised for this. TIB had board meetings in regard to it
> NBT paid back the ML and CS facilities
> Thus, it is seen that you acted as Nominees for NBT, and that you are
> holding the shares in bare trust on behalf of the bank
> The 2006/2007 transaction will be seen as a share buy back by NBT
> If the price of the buyback deal is altered by the High Court (EG from 40 to
> (40+x)) then it is NBT who will pay the 'x' in the equation.
> This is because you are simply nominees.
> The other side of this is that:
> i) You (plural) cannot benefit from the 16%. You have not to date, so it's
> OK.
> We need to put in place the corporate governance so that the deeds of
> trust are in place, and all paperwork is formalised.
>
> In other words, the price of the indemnity is that you will not have the 16% -
> You simply hold it on behalf of NBT.
> I do not think that there is another way around this issue.

Work continues, and I will keep you posted, but I think that you and B&F
need to be ready to do this if you want the protection.
Points:
I need to sit with the team and work through the steps, and what it means
for things like the MICEX deals etc. That can be managed. It's a question of
mathematics and paperwork.
I spoke to James - this does NOT change our pleadings in the case. The fact
that you are a nominee for part of the holding does not change what we have
pleaded or what we need to say in court. It's ok.
I will revert ASAP. We are working on the draft indemnity now."
(emphasis added)

116. It is also clear that what was being contemplated was an irrevocable indemnity to be given by TIB Holdings so that Mr Yurov would not bear responsibility for wrongdoing. Once again it was contemplated to involve the fabrication and back-dating of documents. In this regard in an email of 10 July 2014 from Mr Worsley to Ms Evangelides headed "Indemnity", Mr Worsley described what was planned:

"Thoughts on actions which need to be indemnified:
Decision to buy out Kolyada's equity in the bank
Power to agree price for that deal
Instructing Drozdov to make the paperwork
Mistakes in Drozdov's paperwork, and any mistakes made by any member of the team
Mistakes made by YBF in any negotiations with Kolyada
Pricing errors (too high or too low)
Signing a Deed of Trust rather than an SPA (it saved time)
Signature to buy the shares under the DOT
Using NBT funds to pay the 40M via Yurov
Yurov selling on to BF
BF using NBT funds to buy the shares from Yurov
Receiving salary based on the higher shareholding that YBF all had
Receiving any other benefits in cash or ownership terms based on the higher shareholding that YBF all had

Using NBT money to pay legal costs in this case
This must stand up under Cypriot law
There needs to be a meeting of the Directors to approve and sign it.
They need to discuss that at the time, if Kolyada had been a shareholder when he was arrested, the bank would have fallen
Thus, it was in the best interests of TIBH to have agreed this trade.
Question: How is it in the best interests of TIBH to sign this now I think the answer is around reputation, and protecting NBT's reputation and future.
We should also see this like Director's Insurance from TIBH to YBF.,

> EG: Drozdov drafted the DOT badly - that is the basis of this whole case So TIBH need to indemnify the employees and shareholders for the actions of the employees of TIBH's main asset (NBT).... Also, this was in the interest f TIBH at the time, so indemnity is fair and honest.
> It must be irrevocable. If someone buys NBT in 2 years' time, this must stand up.
> Thoughts?"
>
> (emphasis added)

117. When cross-examined about this proposal, he stated as follows:-

> "as I said before -- and I think it's quite obvious that NBT money were used to purchase Kolyada to some extent, some small amount of money, but everything was repaid to NBT after the 40 million was raised from Credit Suisse -- sorry to say that but I think, you know, there was a special clause in -- in the loan documents -- I don't remember -- with Credit Suisse or whether this facility -- loan facility were extended for 140 million that 40 million -- certain amount of money had to go to buy out Kolyada. So I think -- well, it's -- it's just like some kind of hysterical mistake by Mr Worsley or something else." (emphasis added)

118. The proposal speaks for itself – what was envisaged was for the benefit of Mr Yurov, and what was being envisaged may have been dishonest but it was not *"some kind of hysterical mistake"* by Mr Worsley. Mr Yurov was, once again, simply seeking to distance himself from such matters.

119. Mr Yurov accepted that the Bank's funds had been used to pay for his costs in the Kolyada litigation (as was readily demonstrable) – the funds came via the entity Kuri Hills (which is addressed in detail in due course below) and so there was no documentation in the Bank records evidencing the funding by the Bank. It is plain that had the CBR known of such payments they would not have been regarded as acceptable. This was also demonstrable – in an email on 13 October 2014 from Mr Worsley to Mr Yurov, Mr Worsley had stated, *"Mishcon want a million quid During cbrf audit the guys say it's hard to move monies around...."* Mr Yurov was not willing to accept the obvious implication from this email that such payments were not proper and would not be regarded as proper by the CBR. Mr Yurov chose to obfuscate when cross-examined about this: "*I really cannot -- I don't want to speculate on that".*

120. When the Kolyada case settled Mishcon received £1.9 million in respect of Mr Yurov's costs from Kolyada. That was, on any view, the Bank's money (as Mr Yurov acknowledged). That money in fact ended up in the Shareholders' personal Swiss bank accounts with Mr Yurov receiving US$1.276 million. When cross-examined about this he was not prepared to accept the obvious – that the money should have been paid to the Bank not enjoyed by the Shareholders. His explanation for what he intended – that the money would somehow be accounted for to Otkritie when they bought the Shareholders' shares on the Bank makes no sense as the money was owed to the Bank not Otkritie – and it was no explanation for why the money had gone to, and been split between, the Shareholders. His answers (which also involve obfuscation as to how he came to learn of

receipt of the monies) are another example of Mr Yurov not being willing to give a truthful account where it would involve recognition of wrongful conduct:-

"Q. At the end of the Kolyada litigation, Mr Kolyada was ordered to repay or to pay some of your costs, wasn't he, about 1.9 million?
A. That was a part of the settlement, yes.
Q. And I think you accept, don't you, now that that was in fact the Bank's money.
A. It was the Bank's money for sure, yes.
Q. So when it came back from Mishcon via Kuri Hills, why did it end up in your Swiss bank account, Mr Yurov?
A. Well, unfortunately I got knowledge about that, that this money ended up on my personal bank account to my share, right, only after the fact. Mr Worsley did not colluded -- sorry, contact me for that reason and stuff like that. And I was, like, in Australia with the whole family and this trip was, as you understand, was pre-booked many, many months, like, you know, ago to that. And when I asked him why it happened, he could not reply to me perfectly what was the reason of that.
Q. Even if that is true, which I suggest it's not, you could simply have said, "I'll instruct it to be paid to the Bank straight away," and you could have done so, couldn't you?
A. It was -- when I understood that, as I explained before, it was after the fact. We shook the hands regarding the transaction -- regarding the deal on selling of my beneficial rights to the Bank, so I thought again that firstly it was absolutely hectic times, the end of December, it was -- everything was going on in one time and I had to deal with this by the phone from Australia, which means I was not really have any free second, you know, to deal with this specific $1 million but I had in mind all the time that, because I will be -- I will get certain amounts of money according to the deal from shareholders of Otkritie, I will settle somehow this $1 million with them. That was my -- not understanding, that's what I thought at this period of time.
Q. That's a nonsense, Mr Yurov, because even if you had that thought, which you didn't, the money was not payable to Otkritie, it was payable to the Bank, wasn't it?
A. Well, it was Otkritie, like, which agreed to purchase the Bank for pretty much -- not a considerable amount of money, according to the value of the Bank, but for the goodwill. So again, I didn't specifically, like, in December 2014, had in mind: okay, I will settle this 1 million in such a specific way, now give instructions

here and there, but I just like, you know, had understanding that I will be able to find a way how to settle this.

Q. …

and you knew it, Mr Yurov, because that was your modus operandi, wasn't it?

A. No, I cannot accept this, sir."

121. Many of these matters are collateral to the central pleaded issues, but go to demonstrate that Mr Yurov was not a witness of truth. However, there are other matters which are of central relevance to the pleaded issues in relation to which I am equally satisfied that Mr Yurov did not give a truthful account, which I address when dealing with the particular issues that arise for determination.

122. One of the most important of these relates to ownership of companies used in the offshore network and supposed distinction between "Bank Companies" and "Personal Companies". I address the offshore network and its administration in due course in detail in Section F below. Suffice it to say at this point, that I am satisfied that there was no such distinction contemporaneously, that it is simply incredible that Mr Worsley could have so fundamentally misunderstood the true position in terms of ownership or that the Shareholders would not have recognised such misunderstanding. Mr Yurov's evidence to the contrary is, I am satisfied, simply a lie. The reality, as demonstrated by the transfer of Mr Yurov's interests in both sets of companies into a personal discretionary trust in the Isle of Man (of which I am satisfied Mr Yurov was aware) is that although the ownership structure changed over time, the companies were always beneficially owned by the Shareholders personally, and were managed in accordance with their instructions and for their benefit. Mr Yurov's denials to the contrary, and his suggestion that he would "*sign pretty much whatever Mr Worsley will ask me to sign… I never paid a lot of attention"* are obvious untruths that lack any credibility. It ignores the true, and close, relationship, between Mr Worsley and Mr Yurov, and one of the reasons for Mr Worsley's recruitment – namely the consolidation of the Shareholders' ownership of the companies.

123. It is equally clear that the purported distinction between Bank Companies and Personal Companies was only manufactured late in the story when, in the early summer of 2014, the Shareholders decided what companies they wished to keep (those which were either profitable or could be sold as such) and those which they would abandon so as to avoid the need to finance the lending that had been used to keep them going. As Mr Worsley put it in his text to Mr Yurov of 27 May 2014 (which reflected the truth of the decision to be taken), "*Main problem is that we have loans of 1.2 billion USD, 90% of which are under water… And we have to finance them… And service all [these] companies that get loans… I will also make a corporate event budget. Basically, if you guys* ***keep*** *only the two cash flow positive companies for Billa, plus the trusts, the costs are super minimal… Like almost zero. The weight is in the bad debt stuff…*"

124. The supposed distinction between Bank Companies and Personal Companies is belied not only by the lack of any contemporaneous reference to such distinction but also by reference to actual events which are simply inconsistent with the existence of such distinction. The best example is that given by the Bank in relation to the negotiations to sell the "Personal Companies" Willow River and RCP in 2015 - i.e. after the Bank's

collapse. As the Bank points out, the Shareholders were in negotiations to sell Willow River and RCP, and the commercial properties owned by Willow River and RCP were managed by another company in the offshore network called Alians Development which was owned by Wave. Yet Wave was used for balance sheet management and so on the Shareholders' version of events they had to argue that it was a "Bank Company", owned by and run for the benefit of the Bank with the result (it would follow) that Alians Development was a Bank Company. Despite Wave being allegedly a "Bank Company" in 2015 the Shareholders were arranging a transaction with the Guriev family whereby the Gurievs would buy Willow River, RCP and Alians Development (which required Wave agreeing to sell Alians Development – this could not have been procured if Wave was a Bank Company). I am satisfied that the reality was that there was no such distinction and the companies were all beneficially owned by the Shareholders.

125. Mr Yurov could offer no credible (or coherent) explanation:

> "Q. If you believed, Mr Yurov, that Wave was a company owned by or run for the benefit of the Bank, then you were effectively misappropriating the Bank's assets when you sold Alians to the Gurievs, weren't you?
> A. Well, again, I knew that Alians and Wave was acting in all material times prior to this contract for the Bank but as well I knew that Wave and Alians were just management companies for the best of my understanding, without any assets or anything else; it was just -- if I may say so -- infrastructural companies, that was the best of my understanding, which do not have any economical value if the main, like, benefit for the Bank was that to some extent -- sorry, in all material times this company was employed by the Bank employees and was monitoring the cashflows of the Retail Chain Properties and Willow River, so that was my understanding."

126. That there was no contemporary distinction between "Bank Companies" and "Personal Companies" is also illustrated by an email from Mr Drozdov to Mr Yurov dated 13 January 2015 after the collapse of the Bank, which draws no distinction between "Bank Companies" and "Personal Companies" in an accompanying "*list of assets for transfer*" as it logically would if any such distinction had existed. In the email (sent by Mr Drozdov from a private email address that did not include his name – 2332537@gmail.com) Mr Drozdov stated:

> "The meeting was yesterday. They invited me to cooperate <u>on returning all the assets financed out of bank funds to the bank's books</u>.
>
> I have several options for my next steps:
> …
>
> I don't want to argue with anyone and am ready to structure all asset transfer deals to repay the debt by transferring assets to the Bank's or Otkrytie's books.

> Attached is a list of assets for transfer. It's not complete, since I put it together quickly for lack of time. It will be expanded.
>
> If my suggestion is accepted, I'd put together a letter acceptable to me, that I'm carrying out the will of the shareholders with respect to the asset transfer and I'd sign the appropriate addenda to my employment contract with Otkrytie on work with the assets.
>
> And I'll get to work. This needs to be done quickly, since financing was suspended, and the assets might simply be lost for reasons beyond our control.
>
> Please review and take a decision. They are awaiting my decisions." (emphasis added)

127. When cross-examined Mr Yurov asserted that Mr Drozdov knew of the alleged distinction – but he gave no explanation as to why (as would be expected) that distinction was not referred to in a private email addressing the transfer of assets to the Bank:-

> "Q. Mr Drozdov plainly had no idea there was any distinction between companies you say now were the Bank's companies and companies you are prepared now to admit were shareholder companies, did he?
> A. No, my understanding that he definitely had such knowledge.
> Q. This document, Mr Yurov, proves that he did not and that's the truth, isn't it?
> A. Well, if I may look at it again because I have one thing in mind.
> Q. By all means have a look at it again.
> A. Can you please return me to ... a page back. (Pause)
> Yes, I don't see here any distinctions -- any at least point here distinctions between the Retail Chain Properties, Willow River, Priangarskiy and all other companies.
> Q. Because he knew, Mr Yurov, that they were all yours, didn't he, all of these in this list?
> A. No, I can only repeat myself: he definitely knew that some of these companies were beneficially owned partly by me, partly by my partners and some of them -- some of these companies, the majority of these companies, were beneficially owned by the Bank."

128. I am satisfied that the distinction between "Bank Companies" and "Personal Companies" was an invention, and that Mr Yurov's evidence in that regard was untrue.

C.3.2 MR BELYAEV

129. I found Mr Belyaev to be an unsatisfactory witness from the very outset of his evidence. First, it was abundantly clear to me from the start of his cross-examination not only that he had received witness training but that he had taken from that witness training just about every available technique to avoid answering questions asked of him if he did not wish to do so or wished to gain time before doing so. These techniques included asking for questions to be repeated, re-phrased or broken down when not required and questioning the meaning of phrases when the meaning was obvious. I formed this impression within minutes of him starting to give evidence but his approach pervaded the entirety of his evidence and the answers he gave. In this regard I consider the points made by the Bank in its Closing Submissions at paragraph 134 (and the examples given) to be entirely apposite and representative of his approach to questions asked of him.

130. An examination of any line of questioning would yield representative examples, but one will suffice. I choose it because it was very close to the start of his cross-examination and related to a central matter on which he must have given prior thought and cannot possibly have lacked an understanding of the issues arising – namely balance sheet management (I address the issues relating to this in due course below as his actual answers were no more satisfactory):-

> "Q. …
> Do you know that Mr Yurov and Mr Fetisov, in their witness evidence, refer to there being a network of companies that were used to keep assets and liabilities off the balance sheet of the Bank that they referred to as an offshore network?
> A. Could you, please, break down that question?
> Q. Mr Yurov, in his witness evidence, has told the judge that there was a network of companies used to keep assets and liabilities off the Bank's balance sheet, referred to as the offshore network. Do you know that?
> A. I believe I read it in his statements, yes.
> Q. Right. Mr Yurov refers to that network of companies being used for what he calls balance sheet management purposes. Do you remember him saying that?
> A. I believe I remember him referring to it as a balance sheet management or some similar terms, yes.
> Q. Right. Considering the period between 2008 and 2014, Mr Belyaev, were you aware of such a network of companies as those?
> A. Can you, please, define a network of companies because I believe your question has some very broad, undefined definition. What do you consider exactly to be the network of companies?
> Q. Mr Belyaev, have you received training in witness questioning before today?
> A. Yes, I did."

131. I have borne well in mind that when a witness adopts such techniques when answering questions it may not always be their fault, or entirely their fault, and that it does not

necessarily impact upon the veracity of the evidence being given by the witness. What it undoubtedly does do, however, which is both unsatisfactory and unacceptable, is to increase the length of the cross-examination and it makes the task of eliciting the truth more difficult for the cross-examiner, one of the very reasons why such techniques are (wrongly) deployed. However, ultimately such techniques do a witness no favours, and I am in no doubt whatsoever that Mr Belyaev was using such techniques to his own advantage to avoid, so far as possible, answering questions where he considered that a straight answer would be adverse to his interests.

132. I agree with the submission of Mr Yurov's counsel (at paragraph 16(i) of Mr Yurov's Closing Submissions) that Mr Belyaev's oral evidence was slow and *"rather"* unsatisfactory (though this is an understatement), and that he *"sometimes"* seemed evasive (again an understatement). However, I do not agree with the suggestion that the evasiveness sprang from a rather pedantic turn of mind, rather than from the deployment of the techniques I have identified, and because he did not wish to acknowledge the truth where it was adverse to his interests. To the extent that Mr Belyaev was pedantic, and he was at times, he used that to his advantage when answering questions.

133. In any event, and quite apart from his manner of answering questions, I am satisfied that Mr Belyaev was not an honest witness and did not give honest answers to the Court. In consequence I do not consider that any real weight can be given to his evidence save to the extent that it is corroborated by documentation or other evidence. In fact, and as appears below, I consider that the contemporary documentation, including documentation received by Mr Belyaev, and signed by Mr Belyaev, sheds by far the greater light on the truth, including as to Mr Belyaev's knowledge which is no doubt why he was forced to deny (variously) reading emails, recalling receiving emails, reading documents, and denying that he read that which he signed. This evidence was neither credible nor, I am satisfied, true.

134. The evidence of Mr Belyaev, that he did not read all emails sent to him or could not recall receiving a number of emails in this case or did not read documents he signed, or did not read documentation relating to matters in respect of which he was voting in favour of in the context of CC meetings, is not credible and I am satisfied that Mr Belyaev did not give a truthful account as to his reading of emails and documentation and signing of documents. As already identified, and contrary to paragraph 21.2 of Mr Belyaev's Closing Submissions, there is every reason to doubt Mr Belyaev's version of events as to not reading emails and not reading documents he was signing, not least because I am satisfied that he is not a witness of truth, and his evidence is simply not credible, and is contrary to common sense. It is inherently improbable that he did not read emails sent to him or documents he was asked to sign. If he was in late 2008 and following working 20 hours a day trying to save the Bank (as was his evidence) that is all the more reason why he would perform his duties diligently and read what was sent to him, and read what he was asked to sign. A pressure of work defence might be an answer to missing something in a particular document but not failing to read anything, and failing to put his mind to anything he signed – those are not the actions of someone performing their duties and acting in the best interest of the Bank.

135. Indeed, to suggest otherwise is also in conflict with his duties under his contracts of employment and as a director – it is difficult to see why he would commit such a dereliction of duty. This is not to *"apply conventional Western European business*

standards to judge the conduct of Mr Belyaev and the other Defendants" (Belyaev Closing Submissions paragraph 20), it is to recognise (1) that people normally read that which is sent to them, (2) *a fortiori* if the documentation is sent either (a) in a business context in relation to which they have responsibilities or (b) in relation to matters where they have a personal interest (and so an interest in what is said), and (3) there is no feature of Russian law as identified by the experts to suggest that this is not the case in Russia in relation to responsibilities under Russian law (very much the reverse in the context of the experts' agreement concerning Article 53(3) of the RCC and Article 71(1) of the JSC Law).

136. One aspect of his denial of reading emails that was itself self-evidently untrue – and in relation to which he was caught out in cross-examination – was an alleged inability to read emails outside of the office, in particular an email sent by Mr Worsley to the Shareholders on 14 January 2010. That email contained a detailed update of the progress made by Mr Worsley in relation to restructuring the offshore network. Mr Belyaev's response when the document was put to him was to say that*, "if we are talking about 2010 and this is the Bank's email, "trust.ru", I'm suggesting that I was only able to read this email being present at the Bank"*. I am satisfied that this was not true. He had a Blackberry at this time from which he could send and receive emails if out of the office. He was able to, and did, email Mr Worsley from his "trust.ru" (work) account when he was travelling to Las Vegas. See, for example, his email to Mr Worsley at 9.11pm on 18 January 2010 from his "trust.ru" email address in response to an email from Mr Worsley to that email address:

> "Hi Ben!
> Coming back to Moscow next monday. Let us talk about it.
> Regards!
> Sergey"

The language of this email "coming back" to Moscow next Monday, makes it very unlikely that he might have been in Moscow (and in the office) when he sent this email.

137. Another technique when cross-examined was to suggest that he deleted emails without reading them. Whilst, in the abstract, that might be a tenable line, it is not when the sender of an email is someone in the position of Mr Drozdov. Mr Belyaev himself described Mr Drozdov in his second witness statement as a *"senior member of the Bank's management"* and (as he said in evidence) that he, *"was in charge of the shareholding structure of the bank and … the shareholding structure and a director of TIB Investments"*. Indeed, he was the Bank's Head of Legal, a member of the Bank's Supervisory Board and a director of the Bank's holding company.

138. When an email from Mr Drozdov that was sent to him and the other Shareholders in December 2008 which attached a presentation called "*Non-affiliate companies chart*", and a document called "*TIB Investments stake*", was put to him and it was put that he knew that he owned TIB Investments as to "2/7ths", he replied that he *"didn't see this chart of this structure"*. This was the particular occasion on which he gave his evidence about working 20 hour days:-

> "So that was probably about the worst of the 2008 crisis, the financial markets and the Bank and all the banks in Russia went

> through and that was exactly the time where it was pretty much 20 hours a day occupied with holding endless meetings with the customers of the bank, corporate customers, that pulled out in the fall of 2008, $800 million of deposits within two weeks and I had to spend days and nights in the office trying to solve the liquidity problem, keep the money in the Bank and deal with all related issues, literally saving the Bank. So I do not think that there would be any emails which would not be related to what I was involved pretty much 24 hours a day that I would be at leisure to read."

139. Mr Belyaev's answers in relation to this email led the Court to ask him, "*when you receive emails to your email address, such as the one we have just seen, in particular for example from Mr Drozdov, I would be assisted to know…what your normal practice is, as to whether you read emails or not."* His response was that:

> "at the time I would receive, like, maybe hundreds of emails every day from all different places, different departments and what not. And sometimes, especially in this, you know, fall/winter 2008, when there was a crisis, I probably wouldn't read pretty much anything unless it was something like urgent from Mr Eggleton with, like, three exclamation points or something, and if I would – if I would read emails for two or three days, there would be normally like hundreds of emails and I just scroll. If something important catches my attention, I would read it, most of the other stuff I just leave and normally delete later without even opening"

140. It was then put to him by Mr Pillow, on behalf of the Bank, that leaving aside what might be called regular reporting emails from departments or branches or whatever, he would not have deleted any individual email that came in before he had looked at it to decide whether it was important or not. To which he replied:

> "I just delete a lot of them in one go and email from Mr Drozdov is, you know, is not an important email because he is not in operational kind of chain, what you say, so nothing urgent can come from him."

There was then this exchange:

> Q. How could you possibly know whether an email from Mr Drozdov was important or not until you looked at it?
> A. Well, because normally there were no important emails from Drozdov."

141. Mr Belyaev's evidence in this regard is simply not credible and I reject it. I do not consider that he would have deleted an email from Mr Drozdov without first reading it, given Mr Drozdov's position, and in suggesting this was not the case I consider that he is endeavouring to avoid being fixed with the knowledge that is contained in Mr Drozdov's email.

142. It was not only emails that Mr Belyaev denied reading – he also denied reading documents. He even went so far as to say that he did not have knowledge of the Bank's Articles of Association or Charter saying it was a *"very dry, long document, I do not believe I really paid a lot of attention to it, if I did read it"*. If true, this would be a surprising state of affairs given that it set out the functions and responsibilities of members of the Supervisory Board, including Mr Belyaev, and would be a rather cavalier attitude to be adopted by him.

143. However, I am satisfied it was not true – and that this was an aspect of his quite astonishing (and wholly incredible) attempts to downplay what his responsibilities actually were at the Bank which reached its zenith in relation to his evidence concerning his employment contacts. In this regard:-

(1) Despite his 2010 employment agreement containing a bespoke Appendix prepared for him and listing under the heading "Functional Responsibilities of the Executive Manager" (emphasis added) a set of roles and responsibilities that he had and was to perform (and in return for which he was being paid US$2.5 million per annum), his evidence (which I reject) was that these were not *"responsibilities"* but merely *"competences"* which gave him *"the right to participate in discussing those issues".* His reason for doing so was clear enough – to distance himself so far as possible from the Bank's business and his responsibilities in relation to the same.

(2) He repeatedly obfuscated and refused to accept that his responsibilities were as per his 2010 employment contract stating variously (when particular responsibilities were put to him), *"the description of my duties is not exactly as they were even at the time"*, *"my evidence is that I was performing a function which this description would not be a very precise description of what I did at the bank"* and *"I didn't know exactly when I was signing that document what my responsibility would be in that regard but what this document says, that this is one of the competencies of my position. It doesn't say that this is my responsibility"*.

(3) He denied that he was performing functions that were set out in the main body of his employment contract. Clause 1(a) of the 2010 agreement provided, *"The Bank is hiring the […] Manager (a) for the purposes of performing the functions of the President of the Bank's investment unit until the moment of the transfer of the rights of title to more than 50 percent of the shares of the Bank in favour of OAO NK Rosneft (or its affiliated entity)"*. Yet Mr Belyaev's evidence was that the description in Clause 1(a) was inaccurate, did not record his true role, and that the "*investment unit*" (of which he was stated to be President) did not exist at the time. As he put it, the 2010 agreement was *"somewhat misleading"* because *"there was no as such an investment block at the bank, as a defined unit at the time"* and he had *"stopped trading or taking positions"* after 2010. Either the employment agreement was a sham to justify paying Mr Belyaev US$2.5 million a year, or he did have the responsibilities (and with it the knowledge that would come from the exercise of those responsibilities). The balance of the evidence favours the latter. If one looks to the contemporary documentation, for example in May 2012, Mr Worsley was describing Mr Belyaev's role in an email to a Mr Heiner of VP Bank as "*…Sergey runs investment block" w*hich is entirely consistent with Mr Belyaev's contract, but not his evidence.

144. As for evidence in relation to signing of documents his evidence was even less credible. Mr Belyaev signed various documents declaring him to be one of the beneficial owners of companies in the offshore network. His signature upon such documents is, self-evidently, unhelpful to his denial of knowledge of the offshore network, his denial as to the use of that network in "balance sheet management" and his denial of a personal interest in the offshore companies, as such signatures (at least at first blush) fix him with knowledge of the contents of those documents. When asked about this he claimed not to have read what he was signing in particular cases. Indeed, in the context of "*regulatory*" documents and "*anything to do with indemnifying*" he went as far as to suggest that it was his practice not to read documents of such types. This evidence was not credible and if true (which I am satisfied it was not) would be a serious dereliction of duty of a director of a Russian company under Russian law – based on the expert evidence before me (there being no evidence of the alleged Russian banking practices alleged):-

> MR JUSTICE BRYAN: Sorry, can I just ask you one question, just before Mr Pillow goes on. I think you said you didn't read the previous document before you signed it. Was it your normal practice not to read documents that you signed? Or was it just this sort of document that you didn't read before you signed?
>
> A. That would depend on what kind of document, my Lord, that would be because I was used, you know, throughout my years with the Bank -- that would be usually pretty much like big piles of documents which were brought to me for signing on a daily basis, so if they were prepared by people I trusted, you know, or there were some regulatory kinds of documents, those I would normally sign without even considering them. Anything like that, I wouldn't even look at because this is out of my kind of area of expertise or any specific knowledge and if it's signed by, you know, my partners, I would sign that without even, you know, thinking. Some other documents that would be somehow more, you know, elaborative or would be some specific kind of dealer knowledge, I would look at and properly read it but I would say most of the time -- and I believe this is a practice of any high mid-level manager in the Russian banking system is pretty much to sign stuff that was prepared for you without even looking at it because Russian reporting requirements, they require the managers of the Bank to sign, like, piles of documents on a daily basis pretty much.
>
> If you try to read them, you will have no time to work at all.
>
> MR JUSTICE BRYAN: And your evidence is, as I understand it, that that applies to documents which were signed by you and the two other shareholders, including documents where, on their face, you appear to agree to indemnify someone personally?
>
> A. Well, I probably wouldn't even go too deep -- I mean, so

deep as to read that, if it was anything -- you know, had anything to do with indemnifying."

145. Mr Belyaev's approach to signed documents that he considered were adverse to his interests did not stop with a denial that he had read that which he had signed. Another technique he (repeatedly) adopted was to claim that documents bearing his signature were in fact forgeries, going so far as to suggest that such documents were created after the Bank's collapse so as to implicate the Shareholders. This is despite the fact that there has been no challenge to authenticity of such documents, nor indeed any previous challenge by Mr Belyaev himself.

146. As to the former, and by way of example:-

"I would like to go back to the time of 2011 and pick up the story with you and Mr Worsley and so on by going, please, to {D2/8/1}, because this is an application form in the name of Mourija Trading, one of our borrowers, to open a bank account, as you can see, at Piraeus Bank with a turnover of $50 million for investment and lending in the areas of securities and in Russia and the CIS and if you turn over, {D2/8/2} you will see the source of funds was going to be loans and revenues from clients, from Cyprus, BVI, Russia and Nevis and that's where the money was expected to be sent to and you signed this on or around 23 November 2011, didn't you?

A. Well, it really doesn't look like my -- that, you know, that I signed it and especially Nikolay Fetisov's signature doesn't look right. It looks like it's something that been made at some point but it doesn't look like my signature, but I do not recall.

Q. Right, {D2/10/1}. This is another form for Oldehove and over the page you will see that you've signed this one as well. {D2/10/2}

A. Is it the same date?

Q. Yes.

A. So obviously, it should be a forgery because here the order has changed. It now Nikolay Fetisov first, in completely different handwriting, and me second. If the documents were signed at that date, they would be signed as, whatever, a single pile of documents and the person who would be signing it would just sign in the same place –"

147. As to the latter he stated:-

"in my opinion there are lots of documents which were probably forged by Mr Worsley, or I don't know by whom, in 2015, when he was trying to somehow, you know, put those companies on us and get out of the cloud of criminal investigation that started in Russia."

148. There is no evidence before me that would justify the conclusion that such documentation is not authentic or that they are anything other than documents signed by Mr Belyaev evidencing his involvement in, and knowledge of, the matters contained in those documents – which relate to the operation of the offshore network, and companies of which the Shareholders were beneficial owners. I am satisfied that Mr Belyaev's evidence in respect of such matters was neither frank, nor honest. The evidence points to him having signed such documents and being aware of their contents.

149. Turning to particular areas of Mr Belyaev's evidence which demonstrated that he was not a witness of truth, and that he was prepared to lie, a clear example of an untruth (and one that went to the heart of the Bank's case) is what was pleaded at paragraph 3 of Mr Belyaev's Defence supported by a statement of truth signed by him:

> "3. Save as expressly set out below, Mr. Belyaev was entirely unaware that he had any interest, whether direct or indirect, in any of the Borrowers until after the commencement of these proceedings. Even now, he does not admit that he has an interest and the Bank is required to prove the accuracy of the structure charts in the Schedules to the Particulars of Claim. Mr. Belyaev does not recognise the names of and details relating to the Borrowers and Connected Companies (as defined) identified in Schedules A to Q, being the transactions which are the subject of the claim. This is not surprising, given the very limited role Mr. Belyaev played in the management and governance of the Bank post 2008." (emphasis added)

150. Mr Belyaev is there stating (supported by a statement of truth) (1) that he was "*entirely unaware*" (so stating in unequivocal and positive terms (if not with a degree of hyperbole)) that he was unaware that he had an interest direct or indirect in any of the Borrowers until after the commencement of the proceedings; (2) he did not admit that he had an interest; (3) he did not (when pleading his Defence) recognise the names of, and details relating to, the Borrowers and connected Companies (as defined) identified in Schedules A to Q; and (4) (1)-(3) were *"not surprising, given the very limited role Mr Belyaev played in the management and governance of the Bank"* (so seeking to explain such lack of knowledge or recognition by seeking to distance himself from the management and governance of the Bank).

151. In response to paragraph 80.1 of the Particulars of Claim, which pleaded that the Shareholders each "*held an ultimate beneficial interest in and controlled each of the Borrowers*", Mr Belyaev pleaded at paragraph 94.1 of his Defence (supported by a Statement of Truth) as follows:-

> "94.1 In relation to paragraph 80.1 and as set out above, Mr. Belyaev was entirely unaware that he had any interest, whether ultimate or otherwise, in any of the Borrowers until after the commencement of these proceedings. Even now, he does not admit that he has an interest and the Bank is required to prove the accuracy of the structure charts in the Schedules to the Particulars of Claim. Further, it is denied that Mr. Belyaev controlled any of the Borrowers."

152. There are numerous contemporary documents either sent to, or copied to, Mr Belyaev which referred to the Borrowers. As addressed above, I do not accept his evidence that he did not read emails sent to him – that evidence was not credible and was itself a lie. However, the statement that he did not recognise the names of, and details relating to, the Borrowers and connected Companies (as defined) identified in Schedules A to Q would be incredible (if true), but in fact was, I am satisfied, untrue. Amongst the Schedules to the Particulars of Claim was Schedule F (Stivilon) and Schedules H, I and J (Priangarskiy, Business Group and SiberianKD).

153. As to Stivilon, and notwithstanding what was stated in his Defence (that "*Mr.Belyaev does not recognise the names of and details relating to the Borrowers and Connected Companies (as defined) identified in Schedules A to Q*") when cross examined Mr Belyaev accepted that when he saw the Particulars of Claim (to which his Defence was responding) he recognised the name Stivilon, knew that Stivilon was one of the Bank's biggest customers and that it was a company where the Bank had a direct investment:-

> "Q. …when you saw the Bank's particulars of claim,
> did you recognise the name Stivilon, I think in Russian
> it's OOO Stivilon, often translated as LLC Stivilon?
> A. As far as that relates to Gelengic project, yes, I did
> recognise the name Stivilon.
> Q. Right. And you knew the Bank had lent a lot of money to
> Stivilon in relation to -- well, over the period 2008 to
> 2014, didn't you?
> A. I knew that Stivilon was one of the big customers of the
> bank and I knew that Stivilon was also a company where
> Bank had a direct investment, direct stake.

154. Accordingly, in relation to Stivilon, it was simply untrue to say that Mr Belyaev did not recognise the names of the Borrowers when he pleaded his Defence, as he recognised the name of Stivilon when he saw the Particular of Claim (to which the Defence was responding). The reality, I have no doubt, is that Mr Belyaev was well aware of the name Stivilon at all material times.

155. However, whatever the position in relation to Stivilon, what was said in the Defence (supported by a statement of truth) about being *"entirely unaware"* that he had *"any interest whether ultimate or otherwise*" in Priangarskiy, Business Group and SiberianKD is, demonstrably untrue.

156. There is contemporary documentation referring to these entities provided to Mr Belyaev from which he clearly knew the names of these entities and was aware of an interest in them. By way of example (taking matters chronologically):-

(1) In September 2009, Mr Drozdov sent Mr Belyaev a presentation stating, amongst other things: "*OOO Business Group – real estate in the city of Kodinsk, a timber processing plant*" - which thereby expressly linked Business Group and the Kodinsk project (which Mr Belyaev accepted, when cross-examined, that he knew he had an interest in).

(2) On 21 March 2011, Mr Belyaev, together with the other Shareholders signed a document as "*beneficial shareholder(s)*" of SiberianKD, from which he knew that he had an interest in SiberianKD.

(3) On 5 October 2012, Mr Belyaev approved the inclusion of a currency forward transaction with SiberianKD in CC minutes.

(4) On 29 August 2013, Mr Belyaev voted in favour (as CC chairman) of a resolution relating to the "*classification*" of the outstanding debt of Priangarskiy. The full name of the company given in the CC minutes was "*OOO Priangarskiy Wood-Processing Complex*" – thereby identifying the nature of its business – and on the basis of his own evidence knowledge of his personal interest in the company.

(5) On 20 June 2014, Mr Belyaev voted in favour (as a member of the CC, chaired by Mr Yurov) of a resolution amending the terms of the loans advanced to "*OOO Priangarskiy Wood-Processing Complex*".

157. In any event, and in relation to the point currently under consideration, quite apart from the contemporary documentation, there is evidence of Mr Belyaev's knowledge, from what he now admits, and what emerged through cross-examination. Thus, in his second witness statement (his main statement for trial), Mr Belyaev did not make any mention of SiberianKD or Business Group, and the only reference to Priangarskiy, was in relation to one CC meeting he "attended" in relation to Priangarskiy. He did not acknowledge that he was one of its owners or had any economic or other interest in it. In his third (reply) witness statement he again did not mention Priangarskiy, Business Group or SiberianKD by name but he agreed with paragraph 35(b) of Mr Yurov's witness statement which admitted that the three Shareholders did own these, amongst other, companies – Mr Belyaev thereby admitting that he was, indeed, one of the beneficial owners of Priangarskiy, Business Group and SiberianKD.

158. It is also apparent, from Mr Belyaev's cross-examination, that knowledge of ownership of particular Borrowers pre-dated these proceedings. Thus he admitted that he *"knew we had an economical interest with the other defendants"* in the *"Kodinsk mill factory in Siberia"* and (contrary to the suggestion that he did not know how it was held) the connection between the plant in Siberia and SiberianKD was patent. He also admitted that at the time of the CC meetings he *"could probably presume that [Priangarskiy] is related to the Kodinsk mill factory somehow"* and that when he wrote his witness statement, he "*knew that Priangarskiy is the company that is somehow related to the Kodinsk mill factory".*

159. The impression I formed was that Mr Belyaev was not willing to admit anything unless he had no choice but to do so – and that he resorted to denying he had read documents or read what he was signing, if the admission he had done so would have been adverse to his interests. Still further, if he did not like the content of a document he would attempt to belittle the content or its relevance. The most egregious example of this related to the document sent by Mr Yurov to Mr Belyaev and Mr Fetisov on 28 June 2015 in which a decision being made in 2008 to start submitting false (or as Mr Belyaev would have the translation "unreliable") accounts to the CBR is acknowledged – as addressed above in the context of Mr Yurov's evidence. This is, on any view, an admission of obvious

impropriety. If such a decision was not made, or Mr Belyaev was not party to it, the obvious response would be for him to reply either saying it was not true, or (if he had not been aware of it) expressing shock and surprise at such impropriety. He did neither.

160. When cross-examined about this he had no answer, resorting to describing a communication from his fellow Shareholder, in the form of Mr Yurov, as "garbage":

> "MR PILLOW: Mr Belyaev, there is no record in the emails that we have of you responding to this document or email. Can you explain that?
> A. How do you respond to that garbage?
> Q. Right. Is that your answer to the judge?
> A. My answer is I couldn't respond to that nonsense because it is a nonsense and I don't know what was the meaning of that exercise and who wrote this but that looks to me as, you know, as most of it is written without any understanding of how the banks work, of how the procedures operate. Like any banker would know that depositors would not be able to withdraw deposits if the licence is revoked. Like any decent banker would absolutely know that."

161. I did not find this answer to be credible – the obvious inference (which I draw) is that Mr Belyaev did not respond to Mr Yurov's memo because he knew perfectly well that the memo contained the truth, and that he was (contrary to his denial) party to that decision. Yet further, if he genuinely regarded it as "garbage" one would have expected him to engage with his fellow shareholder upon it. His evidence in this regard, when asked questions by the Court, was no more credible and involved resort to the familiar technique of not recalling the email and not remembering seeing it, before speculating that he and Mr Yurov could have talked over the phone and speculating further as to what might have been said (in terms which themselves were not a credible response to Mr Yurov's email):-

> MR JUSTICE BRYAN: Mr Belyaev, just help me, just in terms of your relationship with your fellow shareholders.
>
> A. Yes.
>
> MR JUSTICE BRYAN: Mr Yurov. If you got a long email like this, which you describe as "garbage" from one of your fellow shareholders, I understand your evidence to be that you didn't respond to this. Why was that?
>
> A. My Lord, there was a lot of derogatory articles at that time. In all of the -- well, pretty much thousands of articles written by Otkritie in everything, where they blamed us for stealing some billions of dollars from the Bank and stripping assets and I don't know what. So there was a pile of all this disinformation and if, you know, I would receive any of that, I do not even know what to make out of that. Is it a calculation of what

somebody said? It's a nonsense.

MR JUSTICE BRYAN: But as I understand it, if it be true, this is an email from Mr Yurov, one of your fellow shareholders, to you.

A. Yes, it is.

MR JUSTICE BRYAN: When you receive an email from a fellow shareholder, is that your normal reaction, simply not to respond to it and regard it as garbage?

A. We could have talked over the phone and I could have told him -- I don't know what was my reaction because I do not recall it and I don't remember seeing this email but if he would have sent it to me and I would have read it, I would tell him, what is the source of it and did you drink too many beers or what's going on here."

162. Mr Belyaev's evidence was particularly unsatisfactory when it came to areas that involved his (alleged) knowledge of matters at the heart of the Bank's case specifically knowledge of the offshore network, knowledge of "balance sheet management" including knowledge of the Bank lending to companies set up or controlled by Mr Worsley.

163. I have already given the example of Mr Belyaev rather than answering questions as to his knowledge of the offshore network asking for a definition of the "offshore network" when he knew perfectly well what that meant. He himself had said in his witness statement that Mr Worsley had been hired to *"manage various companies for the Bank, a number of which were incorporated outside Russia".* He was particularly coy about even referring to companies in the "offshore network" choosing instead to use the term "SPV" for such a company which was neither apposite (given that SPVs are neither necessarily offshore nor necessarily off-balance sheet) nor a term that features heavily in the contemporary correspondence. Even when asked to give an example of an "*SPV*" being used to take over a defaulted asset/project during the relevant period (a practice he accepted he had some awareness of in a general sense), Mr Belyaev asked for a "*specific company*" to be named.

164. When asked about balance sheet management, he chose instead to say that "*yes, there were companies that were SPV companies to conduct transactions and hold assets and liabilities*". He then chose to deny knowledge of "balance sheet management". There was this series of exchanges:

"Q. Were you aware at any time between 2008 and 2014 that such companies, SPVs as you would call them, were being lent money by the Bank to service loans that the Bank had given to other companies?

A. I cannot -- can we, please, define what companies we are talking about, because the question is too broad to give an answer and if I give a positive answer, that would be an answer to unlimited -- undefined amount of companies.

If I give a negative answer, it will be the answer to unlimited number of, you know, negative answer to an unlimited number of companies and I will be probably giving incorrect evidence and answer in every case. So if you could specifically ask me about any company that you have in mind, I will be able to answer what I think I know or knew at the time about that company.

Q. No, Mr Belyaev, I've asked you the question I want you to answer and I will repeat it. Were you aware at any time between 2008 and 2014 that SPVs, as you would call them, were being lent money by the Bank to service loans that the Bank had given to other companies, any other companies?

A. I could say that I would be -- I am aware that some of the companies which will be receiving loans from the banks as a part of their operational business would be passing money to the other companies.

Q. Right. Can you name any examples, please?

A. Well, that was just a very general conclusion. I can't think of any example."

165. Mr Belyaev was equally evasive in relation to his knowledge of the Bank lending to companies set up or controlled by Mr Worsley as can be seen from these exchanges:-

"Q. Were you aware between 2008 and 2014 that the Bank was lending money to companies set up or controlled by Mr Worsley?

A. I was aware that the bank was lending money to some of the SPVs which were -- some of them probably were set up and controlled by Mr Worsley (^ck sentence).

Q. Can you name any of those companies that the bank was lending to that were set up by Mr Worsley?

A. Do you want my -- do you want my answer to be my recollection from 2014 or as a part of what I have been, you know, shown and become familiar with in the process of first criminal investigation in roubles and then this process in the UK?

A. Let's start with the names of any companies you were aware of between 2008 and 2014 that fall into that description, please.

A. What description, please?

Q. Companies controlled or set up by Mr Worsley to which the Bank was lending money, Mr Belyaev.

A. And you said starting from 2008?

Q. Yes.

A. It is my understanding that Mr Worsley didn't appear ^(inaudible) to the Bank until 2010 or 2011.

Q. Is that your answer to my question, Mr Belyaev?

A. Let me think about any examples. The answer is, no, not really."

166. Whilst, as can be seen from such answers, Mr Belyaev was keen not to admit any knowledge of "balance sheet management", or Bank lending to companies set up or controlled by Mr Worsley, his very evasiveness begs the question why he was being so evasive in his answers. He was similarly evasive about the various documents he signed declaring him to be one of the beneficial owners of companies in the offshore network (as has already been noted). I am satisfied that the reason he was lying as to not reading documents he signed and not reading emails he was being sent which revealed the use of the offshore network and "balance sheet management" was precisely because he knew about "balance sheet management" and the use of the offshore network but was prepared to lie rather than admit he had such knowledge, given that it was adverse to his interest to do so.

167. It would, in fact, have been incredible if Mr Belyaev did not know about the use of balance sheet management given that he was (on his own evidence) still participating in the Bank's business following the events of 2008. The genesis for balance sheet management, at this very time, was explained by Mr Yurov on Affidavit in these terms:-

"29. All of these problems placed the Bank in a very precarious financial position. The impact of the diminution in capital was magnified, because the Bank was restricted in its ability to lend funds by reference to a multiple of its capitalisation. Accordingly, the Bank's ability to lend was greatly reduced by any fall in capital. This was compounded by the fact that the Bank was unable to raise additional capital by issuing further shares, because its shares were frozen.

30. As a result, there was considerable concern that if those losses had all been recorded on the Bank's balance sheet, it would have had its licence revoked by the Central Bank of Russia and consequently been declared bankrupt. For obvious reasons, the Bank's management wished to do everything possible to prevent this from happening, and took steps to manage its balance sheet using its pre-existing offshore structure (as I will describe in more detail below)."

(emphasis added)

168. "Balance sheet management" was conceived and implemented at a time when Mr Belyaev was, on any view, still participating in the Bank's business and I am satisfied that he must have been aware of it. There is, in this regard, a very telling email from Mr Worsley to Mr Belyaev alone (to his private email address) dated 19 December 2012 – i.e. when balance sheet management was in full swing with a network of offshore companies set up or controlled by Mr Worsley, which shows that Mr Belyaev knew very

well what was being done by Mr Worsley in relation to an offshore network for balance sheet management with fake nominee UBOs and the like. It was in these terms:-

> "Sergey,
>
> Hi. FYI - the 5 copies of the paperwork in storage for the new people are of course already in place.
>
> We did not discuss this, but it is of course in hand, and was indeed handled several days ago - IE well before the transfer of assets as per the papers to sign today."

169. The reference to the "new" people (in my judgment manifestly a reference to the new nominee i.e. fake UBOs) would only make sense to Mr Belyaev if he had discussed such matters with Mr Worsley, and knew what he was talking about (otherwise it would be gibberish) – and equally Mr Worsley would only write to him in such Delphic terms in circumstances where Mr Belyaev would know what he was talking about. Mr Belyaev did not respond asking what Mr Worsley was talking about. I am satisfied that Mr Belyaev (contrary to his evidence) knew perfectly well about the offshore network, and its use for balance sheet management (as well as the ultimate beneficial ownership in the Shareholders – as reflected in the numerous documents signed by Mr Belyaev declaring him to be one of the beneficial owners of companies in the offshore network). Mr Belyaev was simply unwilling to tell the truth given that it would implicate him in balance sheet management.

170. That Mr Belyaev knew about balance sheet management and about all the companies being owned by the Shareholders is also illustrated by the fact that Mr Belyaev (like the other Shareholders) received, and did not react with surprise, to Mr Worsley's 17 June 2014 *"how to carry the assets"* email (sent to the Shareholders' private email addresses), an email revealing that all the companies were being treated as the Shareholders' and suggestions were being made as to factoring out the "dead assets" (to be characterised as the Bank's) leaving the "good assets" with the Shareholders. When Mr Pillow put this document to him, his response was evasive, as usual, in an attempt to avoid being fixed with knowledge of the contents:-

> "…Pausing there, you knew by this stage, didn't you, that the funding of the offshore companies involved circular payments through multiple companies to pay interest on loans?
> A. I can see Mr Worsley's description of, you know, some kind of situation but if you were to generalise it somehow, I do not agree with your statement.
> MR JUSTICE BRYAN: Mr Belyaev, did you read this email at the time and did you acquire the knowledge that is set out in this email at the time or not?
> A. I can't really say, my Lord, because I might as well be travelling, which is most likely, because I spent in 2014 more time, you know, abroad than in Russia and I would have to check with the date, which is -- this

is June, middle of June. I don't know, I really don't know. I would have to look at it. But if -- even if I read this email, just, you know, I cannot -- would not go into any deep conclusions that the counsel is trying to infer here.

…

MR PILLOW: If I may, Mr Belyaev, I think the judge was asking you whether you read it and the fact that you weren't in Russia isn't an answer to that question, is it, because this is to your private address and even you accept that you could read those emails from your mobile devices.

A. Yes, I agree but it is less likely that I would read it if I'm travelling than if I'm at the Bank, so it's just as simple as that, if I'm travelling and if I'm busy with some stuff, I would check my emails regularly. If something would catch my attention, I would go over it. As you know, I was not really involved with the Bank at that point. But if I'm at the Bank, I would, you know, most likely read it or definitely read it because, you know, that would be convenient.

Q. Why do you think Mr Worsley didn't send it to your bank address but sent it to your three private addresses instead?

A. I do not have an answer to that question but I would probably suggest that he was not even using my bank address at the time at all. That would be probably the only address in his phone that he would be using if he wants to address me because he knew that I travelled most of the time."

171. Mr Belyaev also sought to down-play evidence that connected him to relevant events even where he had initially addressed such matters. The most egregious example of this related to his relationship with Mr Plyakin the Director of the Banking Regulation and Supervision Department at the CBR who had attended a meeting with the Bank's representatives on 7 December 2009. Mr Belyaev went so far (in his evidence in chief) to delete evidence from his own witness statement that he and Mr Plyakin knew each other socially from attending martial arts classes together (which he must have consciously included in his witness statement, before subsequently regretting saying that). He then also denied attending that meeting despite Mr Belyaev being recorded as attending in the contemporaneous minutes signed by Mr Plyakin himself and sent to the Bank under cover of a letter also signed by Mr Plyakin. It is difficult to see why the minutes would be other than accurate or if not accurate why they would not have been corrected. An attempt was made to get Mr Fetisov to confirm that Mr Belyaev was not there – but that attempt failed rather dramatically, Mr Fetisov saying, *"I think he was there, you know, that's what I think".* Once again, I am satisfied that Mr Belyaev gave evasive and untruthful evidence in this area.

172. There are also numerous matters going to credit on which Mr Belyaev was cross-examined where I am satisfied Mr Belyaev did not give truthful evidence, and which reflect adversely on his character. One example will suffice at this point, namely the yacht charters already addressed above in relation to Mr Yurov. Mr Belyaev too was unwilling to accept the obvious that the use of the Bank's money for personal holidays was improper and dishonest, albeit he accepted it was "*unethical*":

> "Q. And you knew all of this at the time, Mr Belyaev, not the details of precisely which accounts were being debited and credited but you knew that the Bank was funding your lavish holiday, didn't you?
> A. No, I didn't -- no, I didn't know that and I should say that actually to the best of my understanding of, you know, how Russian banks work, it would be under Russian legislation a permittable expense for the Bank. It just would have to be funded probably from the profit of the Bank but it would be quite possible to do that. I would not think that it would be right way to do that personally but legally and from a financial standpoint, that would be perfectly fine. As you probably know, banks in Russia own, you know, planes, can pay for the travels of the executives, they charter yachts. This is a permissible way of doing things. I would not agree that this is probably the, you know, the most ethical way to do things.
> Q. And, Mr Belyaev, you know that this was improper use of the Bank for your personal benefit and that's why you can't give a straight answer to a straight question about any of this, can you?
> A. If by improper, it means unlawful, then the answer is absolutely not. If by improper it means that it's somehow unethical or it would be better, you know, if it would be paid personally, then I agree with you."

C.3.3 MR FETISOV

173. Mr Fetisov, like Mr Belyaev before him, was also a user of techniques such as denying he had been at meetings or had read mails when he considered that presence at those meetings or the contents of those emails, to be contrary to his interest. Tellingly such matters tended to be at the heart of the Bank's case in relation to particular loans that are in issue and his approval of them at CC meetings, and his ownership of companies in the offshore network. He was also defensive and argumentative at times as candidly recognised in Mr Fetisov's Closing Submissions. I do not consider, however, that he was an "*essentially*" honest witness (as I was invited to find at paragraph 8(1) of Mr Fetisov's Closing Submissions). On the contrary, and in the circumstances I identify, I am satisfied that Mr Fetisov did not give honest answers of questions asked of him, and was prepared to lie with a view to evading evidence that he perceived as contrary to his own interests. He made wild and, I am satisfied, unjustified allegations against Mr Worsley (largely in

an attempt to distance himself from contemporary emails received by the Shareholders from Mr Worsley, and the fact of companies ending up in his, and the other Shareholders' personal trusts), and was also prepared to be economical with the truth (omitting reference to his role as President of the Bank), and to change his evidence when he considered it would suit his defence to do so (most graphically in the context of "balance sheet management"). I address examples of such matters below. Overall I consider that little, if any, weight can be placed on his evidence in areas of controversy, save where it is supported by contemporary documents or amounts to an admission contrary to his interest.

174. Mr Fetisov's attempts to distance himself from events, and from involvement in the Bank's activities is well illustrated by his omission of his role of President of the Bank in his written evidence and the denial of various responsibilities set out in his contract of employment. As to the former, Mr Fetisov does not mention, anywhere in his Defence or in two witness statements that he was President of the Bank, as well as being the chairman of the Management Committee for significant periods of time.

175. It is difficult to see how this could be anything other than a deliberate omission given the importance of addressing what his roles and responsibilities were set against the backdrop of the pleaded allegations made by the Bank, and his pleaded Defence that he was "*not involved … in the day-to-day management of the Bank*". His answer (which is hardly credible given his (rightful) recognition that he should have mentioned it), is that *"it must have slipped through*":-

> . "Right. What is your explanation to the judge for why that information is not in any of your pleadings or witness statements?
> A. I guess -- it's hard to say. It must have slipped through.
> Q. This was the position at least nominally at the head of the Bank, wasn't it? The president is the person in charge. So it's hardly something that would have slipped your mind?
> A. No, that's a wrong assessment. President of the Bank was not the person in charge at all. But I agree that I should have probably reflected the fact that I was the president of the Bank in -- well, in defence or in my witness statement."

176. I am satisfied that it was an untruth to suggest that "*it must have slipped through*" – given the issues in play as to his role and responsibilities, a matter going to what his role and responsibilities were would logically be addressed, unless there was a conscious decision not to do so, so as to downplay his involvement in relation to management. So far as Mr Fetisov's positive plea in his Defence that he was *"not … involved in the day-to-day management of the Bank"* this is difficult to square with his contractual responsibilities as set out in his 2010 employment agreement (and his 2013 employment agreement which is materially identical). As to the former it provided, amongst other matters under the heading "Subject of the Agreement" that (Clause 2.1), "*The Bank shall hire the Manager (a) for performance of the functions of the President of the Bank*…".

177. The accompanying Annex, entitled "Functions of the Manager's Position" provided, amongst other matters that:-

"President of the Bank
The competence of the President of the Bank includes the following matters:

1.1 Organization of execution of the decisions of the General Meeting of Shareholders and the Board of Directors of the Bank;

1.2 Organization of work of the Management Committee of the Bank created as the permanent collective working body of the Board of Directors, including, without limitation:
• exercise of the powers of the Chairman of the Management Committee of the Bank;
• convocation of meetings of the Management Committee, performance of the functions of the chairman at the meetings of the Management Committee and organization of recordkeeping;
• determination and approval of the agenda of the meetings of the Management Committee;
• decision-making on the inclusion of additional issues into the agenda of the Management Committee;
• signing of all documents approved (adopted) by the Management Committee;
• approval of minutes of the meeting of the Management Committee;
• appointment of the Executive Secretary of the Management Committee.

1.3 General management and coordination of activities of the following supervised units and areas of activities of the Bank:
…
• Unit of Development of Business with Legal Entities and Small Enterprises;
• Unit of Risk Management;
…
• Legal Directorate;
• Accounting Unit and Unit of Management Accounting and Directorate of Financial Control;
• Unit of Retail Business;
…
• work with distressed assets;
• debt financing and securitization.

By decision of the Chairman of the Board of Directors of the Bank, the list of supervised units and areas of activities of the Bank in this clause may be amended without any additional consent of the Manager."

(emphasis added)

178. Yet Mr Fetisov had denied responsibility for risk management in his Defence (at paragraph 8(4), supported by a Statement of Truth, "*Mr Fetisov was never responsible for risk management or the Bank's finance department."*). The Bank's audited IFRS accounts (bearing Mr Fetisov's signature) provide (under the heading "Risk management policies and procedures") that

"The Management Committee has overall responsibility for the oversight of the risk management framework, overseeing the management of key risks and reviewing policies and procedures as well as approving significantly large exposure.

The Management Committee is responsible for monitoring and implementation of risk mitigation measures and making sure that the Group operates within the established risk parameters. The Chief Risk Officer is responsible for the overall risk management and compliance functions, ensuring the implementation of common principles and methods for identifying, measuring, managing and reporting both financial and non-financial risks. **He reports directly to the President of the Bank and to the Management Committee."**

(emphasis added)

179. When questioned about the contradiction between what he had stated at paragraph 8(4) of his Defence and what was stated in the IFRS accounts that he had signed, he suggested that it was the accounts that were inaccurate. That is not credible. He stated:-

"Q. … Mr Fetisov was never responsible for risk management ...
And that's simply untrue, isn't it?
A. No, it's not untrue. The chief risk officer of the Bank did not report to me directly. Well, you want to have my honest answer, there it is. There must be some sort of mistake or misstatement in the accounts because chief risk officer of the Bank, which was always one of the -- there was always one, he would in essence report to a number of people. He would report to the CEO. He would report to the chairman of the executive board, Mr Yurov. He would also report to me on a variety of issues, right, because chief risk officer of the Bank oversaw the risks of fairly large and diversified bank, different portfolios, different asset classes, board position, retail portfolios, corporate loans. So that's in essence what I was trying to describe in my defence."

180. I am satisfied that there was no mistake or misstatement in the accounts in this regard, and that it is paragraph 8(4) of his Defence which is not true, an untruth which he perpetuated when he was cross-examined. There is no reason why the IFRS accounts should mis-state the position in this regard and every reason for them to be accurate on a matter of factual detail. The reason for Mr Fetisov's answers is clear enough – to attempt to distance himself from responsibility for risk management.

181. Mr Fetisov was keen to distance himself from the audited accounts that he himself signed in 2008, 2009 and 2011. Despite the importance of the signing-off of accounts as a result of which one would expect anyone in Mr Fetisov's position to read carefully what he was signing Mr Fetisov suggested that he had not read the part setting out the Bank's policies in relation to subsidiaries, and he would not accept that companies owned or controlled by the Bank (per Mr Fetisov's evidence on the offshore network of companies) would fall within such definition. The former is not credible – any competent director in

Mr Fetisov's position would have read the accounts he was signing (and there is no suggestion Mr Fetisov was not competent), whilst the latter was obvious from the definition – and Mr Fetisov's reluctance to acknowledge the obvious did him no favours. Again the reason is plain – he wanted to distance himself from the offshore companies and their associated loans.

182. Whilst it might just be conceptually possible that Mr Fetisov had not read the detail of the accounts he signed, the suggestion that he simply ignored, or paid little or no regard to emails from Mr Worsley is incredible, as are the reasons he gave such as that Mr Worsley was full of "*wild business ideas*". I am in no doubt that Mr Fetisov's evidence was untruthful in this regard. His professed reasons for not reading emails from Mr Worsley is typified by reference to questions concerning an email from Mr Worsley to the Shareholders (to their private email addresses) of 30 May 2012, which provided:-

> "All,
> Re the meeting tomorrow at 1030am
> VP Bank: A rated Swiss bank
> Meeting: CEO Roger Hartmann
> Reason for the meeting: VP need to get to know you all, so that they are comfortable to trade with NBT. Be relaxed, be cool, etc
> Transactions under review:
> 1) We build a trading history with them (EG in Russia 30)
> 2) Part of those securities are lent to companies, under Fiduciary agreement (as per Winter Bank). Then Repo, and monies used to cover positions.
> 3) Key Issue: VP asked me why such a structure is needed. I said that some of NBT borrowers do not wish that the market knows that they borrow from NBT, as the Moscow market is very competitive, and for example if Company A wants to sell an asset to Alfa Bank or RosBank etc, it is best that Alfa/Ros do not know that NBT is lending to Company A VP accept this view.
> 4) Presentation: I have presented myself as a borrower from NBT, and also a consultant to NBT who runs its non banking assets. Hence, as a borrower, I am interested in setting up this structure. I have signed NDA with VP re NBT. In the NDA, I agreed that I would be the channel between NBT and VP (except trading decisions), so that as with Winter, we keep this private."

183. When questioned about this document and the meeting. Mr Fetisov stated, amongst other matters:

> "A …I think I didn't go, if the meeting took place.
> Q. Well, you knew that a meeting was planned and you knew that Mr Worsley had already lied to VP Bank about himself and the business that was going to be discussed, didn't you?
> A. No, I didn't know. I probably paid very little attention to this email, skipping through first three or four lines, if that, understanding that's not my cup of tea and I would not be going regardless, and that's really it. That's really -- what he lied about, I probably didn't read, if he lied about anything.
> Q. You can see in number 3 that he was telling you, about

a meeting you were meant to be having "tomorrow", apparently, that he had told VP Bank that some of the Bank's borrowers don't wish the market to know that they borrow from the Bank, and it gives the example of AlfaBank and RosBank. You knew that wasn't true, didn't you?

A. If I read that email, that wouldn't be true, but --

Q. Right. That's all I was asking.
Then number 4, the same thing: he says he's presented himself as borrower from the Bank and, "as borrower", he says, "I'm interested in setting up a structure with VP Bank". And you knew that wasn't true, didn't you?

A. If I read that, that wasn't true. However, I say that those type of emails with those wild business ideas which Mr Worsley from time to time shoot to me -- I think Mr Yurov was receiving a lot more of them -- I didn't pay -- I paid very little attention to his contemplations on how some sort of business arrangement should be arranged.
I have plenty of examples of wild behaviour and unreasonable behaviour of Mr Worsley with regards to -- to some sort of business arrangements where he was involved in 2012. So handling him on some wild ideas wasn't my responsibility, and I repeat: I paid probably very little attention to this email"

(emphasis added)

184. This was not a wild business idea, but one carried through to draft fiduciary arrangements being negotiated between the Bank and VP Bank, albeit Mr Worsley was stating matters that were untrue in the email. Mr Fetisov would have known of the untruths but did not respond to Mr Worsley asking why he was stating such matters. Mr Fetisov's denials of reading such documents are an attempt to disassociate from what Mr Worsley was saying, where what Mr Worsley was saying to a third party was not true. Mr Worsley's emails could not, as a whole, be characterised as containing "*wild ideas*" and the suggestion that Mr Fetisov would not read what was sent to him by Mr Worsley who was not only managing the offshore network, but also managing personal assets of the Shareholders including Mr Fetisov is simply incredible, and I reject it – Mr Fetisov was not telling the truth in terms of his knowledge of the contents of emails from Mr Worsley.

185. Mr Fetisov accepted the following matters in cross-examination:-

"MR PILLOW: Mr Fetisov, if you knew that an asset was owned by the Bank or for the benefit of the Bank, it would have been improper for you to cause it to be transferred to yourself personally unless you'd paid a proper price for it, wouldn't it?

A. Generally, yes, I agree.

Q. Indeed that would be dishonest, wouldn't it?

A. I guess so, yes.

Q. And it would be improper for you to take the income or profit from a Bank asset personally instead of the Bank getting that money, wouldn't it?
A. Generally, yes.
Q. And it would be dishonest, wouldn't it?
A. Yes, I agree.
Q. If you knowingly transferred an asset that was the Bank's into a discretionary trust of which you were the sole beneficiary, that would also be improper and dishonest, wouldn't it?
A. Generally, yes".

186. This is precisely what Mr Worsley planned to do, and in due course did, even though how it was contemplated it would be done, and it was done, changed over time. When such proposed structures were put to Mr Fetisov (by reference to a proposed structure chart sent by Mr Iskandyrov to Mr Worsley dated 15 January 2010 that Mr Fetisov was cc'd into) Mr Fetisov resorted to the blatantly untrue suggestion (effectively itself a wild "conspiracy theory" against Mr Fetisov himself):-

> "Q. … what I'm suggesting to you is that in substance this is what ended up happening because although the names of the companies changed and the places of incorporation because Mr Worsley was advising on those matters, ultimately what happened was that he restructured the network so that you did come to own these companies personally through offshore companies and nominees, didn't you?
> A. I did not. I disagree with your presumption. In essence, what Mr Worsley has created eventually is the big deception, conspiracy, **in a way against me** in particular, and the structure which he created secretly, without proper authority, without instructions, had nothing to do with that." (emphasis added)

187. If Mr Fetisov disagreed with what Mr Worsley was doing he would have responded disassociating himself from what was being proposed but he never did so. On the contrary he signed numerous documents showing he was the beneficiary in relation to various companies with no distinction between whether they were "Bank Companies" or "Personal Companies". For example, on 29 July 2010, he (and the other Shareholders) signed letters to Chrysanthou & Chrysanthou as beneficiary, in respect of Willow River, Moscow River (admitted Shareholder Companies) and Black Coast (allegedly a "Bank Company"). When this document was put to him (somewhat incredibly) he said: *"I've seen a number of documents during this trial, where my signature clearly is not mine or initials not mine. Here it looks strange. It looks like it's superimposed, basically, and there are plenty of other documents in this. I think -- you know, I might have signed but there is a certain degree of doubt here."*. When asked to account for the lack of any apparent distinction between the Shareholder companies and Black Coast he suggested that *"if you have a bunch of companies with different holding structures, run by the same service provider, you give instructions to the service provider with one list"*. This makes no sense. As was pointed out to him there would be no way for Chrysanthou &

Chrysanthou to understand that there were different beneficial ownerships. In any event Mr Fetisov cannot have been signing as beneficial owner of the Bank as the schedule shows the beneficiaries with shares 2/7th, 3/7th, 2/7th beneficially owned which, as Mr Fetisov admitted, was not the same percentage as their ownership of the Bank. Mr Fetisov would not accept the obvious which was that he was signing personally because he knew they were his companies. This whole series of answers shows Mr Fetisov obfuscating when shown documents demonstrating his beneficial ownership of companies and the lack of any Bank/Shareholder distinction.

188. If Mr Fetisov has not understood what he was being asked to sign, and why, he could and would have asked Mr Worsley – in this regard he accepted that, as an intelligent businessman he understood the importance of legal documents he signed – there is no rational reason why Mr Worsley would not have told him what he was doing and why. However, the reality, I am satisfied, is that Mr Fetisov did not ask such a question because he knew perfectly well that the reason why Mr Worsley structured or transferred the companies in the offshore network into Mr Fetisov's beneficial ownership and then into his personal discretionary trust was precisely because Mr Fetisov (and the other Shareholders) regarded such assets as their own personal assets.

189. However rather than acknowledge this, I am satisfied that Mr Fetisov gave untruthful answers to explain the companies ending up in his personal discretionary trust involving wild accusations of "*dishonesty and deception and maybe possibly fraud*" on the part of Mr Worsley (seemingly allegedly against him and the other Shareholders), that ultimately made no sense and had not been advanced before Mr Fetisov gave evidence:-

> "So what I've seen in the documents which -- in the emails, which Worsley passed on to me. Worsley undertook a massive fabrication exercise, which lasted from about February 2016 to about May of 2016, whereabouts dozens and dozens if not hundreds of deeds of trust from various companies, I think a lot of them on this list, it's really hard to -- I didn't do exact -- you know, table -- but dozens of documents, if not hundreds are created. Companies are moved around. Shareholder relationships are changed in order to stash it all under Valesior. I think Valesior Holding, where, surprisingly enough, a deed of trust to Arlingham exists. That's what -- the knowledge I gained later on through this failed settlement, which didn't come to the -- to the successful completion with Worsley.
>
> So that's why I think this table at the end of, I believe -- that was the end of 2016 -- was incorrect because all these newly created documents which Worsley, you know, done on his own accord, I believe also he -- you know, he might have been instructed by the claimant to do that and definitely paid by the claimant at that time, as recognised by himself, so it was all stashed under the Valesior once again. I also seen that – the whole arrays of the documents missing, he showed me emails, for instance -- I've seen emails where Worsley communicates with employees of Teos and this particular lady called Melanie -- -- I forgot her last name but she comes up saying: I have nothing, no documents whatsoever on these, these, these, companies, can I create them as usual. And miraculously, like later in the day or

next day or two days, documents appear to be suddenly available, found somewhere. So this is why I'm saying that this is all -- like not clear to me how it was all organised, I definitely never gave instructions to include all that into my personal trust and, at best, I think that all constitutes big sort of dishonesty and deception, maybe possibly fraud."

190. A difficulty with this wild conspiracy theory, quite apart from the contemporary documentation signed by Mr Fetisov and reflecting his knowledge, is that there has never been any challenge to the authenticity of any of the contemporary documents disclosed by the Bank, the Defence makes no such allegations, nor did Mr Fetisov do so in his discontinued Part 20 proceedings against Mr Worsley – it appears to be a recent creation on the part of Mr Fetisov.

191. In this regard Mr Fetisov went so far as to suggest that Mr Worsley tried to "*trick*" him by transferring what were alleged to be "Bank Companies" to Arlingham and Brora – *"What basically Worsley had done here is, I guess, trick to maybe do what you just described without explanation, without proper – proper disclosure of what has been done".* The fundamental difficulty with this suggestion is that there is no apparent reason why Mr Worsley would want to defraud Mr Fetisov or trick Mr Fetisov by deliberately transferring what Mr Worsley supposedly knew to be "Bank companies" into the personal ownership of Mr Fetisov or his personal discretionary trust – if anything it would be the Bank being defrauded. Also the motivation of Mr Worsley for doing so (i.e. acting other than in accordance with the Shareholders' instruction, or for that matter the Bank's) is entirely opaque. When asked for his explanation, Mr Fetisov responded with a yet further (new) and ultimately incoherent theory that finds no foundation in the evidence before me:-

"Why would Mr Worsley possibly want to trick you, as you've suggested to the judge might be the case?
A. That was just a suggestion. I think by that time already, 2012, Mr Worsley has established a system of improper benefit from these -- from various companies and from the structures he ran for the Bank and for the -- well, for us personally, for RCP/Willow River and other companies, PLPK, whatever, I've seen the documents in this dataset which Worsley passed on to me and my solicitors at the failed settlement which I was trying to achieve with him. There are indications there that he was taking a cut with nominees. He was getting a feed -- how it's called, paybacks from certain service providers, from accounting firms, from some possibly auditors. So there are bits and pieces there which show that there was a system in place to benefit him personally at that time already."

192. Another unsatisfactory aspect of Mr Fetisov's evidence is that, somewhat surprisingly given his acknowledgment of knowledge of "balance sheet management", and his defence of such practice in his Defence and witness statements, during the course of his cross-examination he went so far as to distance himself from such practice, and indeed answered

in a manner that was inconsistent with the thrust of his defence that loans taken out by the likes of Erinskay and Baymore (the two largest "balance sheet management" borrowers) were used (honestly) to service and/or repay loans taken by other companies. Thus there was the following exchange of questions and answers:-

> "Q. You know that the Bank's money, when it was given to Erinskay and Baymore and companies like that, after being used to buy bonds and repo them was passed around other companies in the offshore network, wasn't it?
> A. I do not have, I think, recollection of that, or a knowledge at the time. I've seen -- clearly I've seen those type of claims in disclosure. So that's ...
> Q. You knew at the time, Mr Fetisov, that's exactly the essential purpose of giving money to these companies, didn't you?
> A. No, I did not. And I disagree. These companies, I have seen again documents in the disclosure and it was generally known within the Bank that back in 2012, 2013, those companies made a lot of money for the Bank." (emphasis added)

193. This professed lack of knowledge is inconsistent with his Defence, the Schedule thereto dealing with Erinskay, his witness statement and his Skeleton Argument for trial:-

(1) Mr Fetisov's Defence at paragraph 18(2) pleaded that Mr Fetisov understood that the Bank:

> "loaned monies and other assets to companies within the off-balance structures so as to provide the funds required to conduct the activities carried on within those structures. Such monies would also be moved between the companies forming part of the off-balance sheet structures as necessary, e.g. monies lent to one offshore company could be transferred to another company to repay a loan previously taken by the latter from the Bank."

(2) The Schedule to Mr Fetisov's Defence dealing with Erinskay provides (in terms identical to that in respect of Baymore):

> "Erinskay was part of the Bank's off-balance sheet structure. It was used as a treasury company (a) to conduct financial investments, including trading securities and entering into REPOs, for the ultimate benefit of the Bank and (b) to provide funds for use elsewhere in the Bank's off-balance sheet structure including, in particular, for the purposes of refinancing loans."

(3) Mr Fetisov stated at paragraph 121(a) of his witness statement that:-

> "'Treasury Companies', which existed to service the Bank's operational cash-flow requirements. These companies typically received loans from the Bank which they invested in securities.

> They would then raise money against those securities through REPO financing, which would be loaned to other companies in order to meet the Bank's operational needs. In some instances the money would be used to repay existing loans due to the Bank from such companies, or to meet margin calls on existing REPOs. The Treasury Companies accounted for the vast majority of the 300 or so companies which were managed out of Columba. They included Erinskay, Baymore, Mourija, Belenfield and Edenbury."

(4) Paragraph 26 of Mr Fetisov's Skeleton Argument for Trial had asserted:-

> "26. The provision of funds to the structures in this way did lead to 'recycling' of loans: that is, when one loan from the Bank to the off-balance sheet structure was due to expire, it would often be repaid using funds which the Bank lent to a different company (often in a higher amount, due to the need to pay interest). Equally, where a borrower needed to pay interest this would often be funded by way of a loan to another company. This feature is critically important in evaluating whether the Loans/Transactions in issue were harmful to the Bank: 'recycling' effectively prolongs the status quo (and avoids recognising a loss) rather than itself causing any harm to the Bank's existing financial position."

194. Mr Fetisov's last minute denial in cross-examination that he knew at the time that the funds lent by Erinskay and Baymore, the two largest "balance sheet management" borrowers, has been used to service and/or repay loans taken out by other companies was simply untrue. It was, I am satisfied, a last ditch "change of tack" in an attempt to distance himself from balance sheet management. I am satisfied that Mr Fetisov knew perfectly well what these companies were used for, and that it was not honest.

195. Equally Mr Fetisov's attempts to suggest that the purpose of the Bank lending to offshore companies was so that they could buy bonds and then repo them so as to generate liquidity for the Bank made no sense, and he could offer no coherent explanation when cross-examined:-

> "How is it advantageous for the Bank to use cash that it already has to give to other companies for what you call liquidity purposes?
>
> A. I don't know how it was exactly advantageous. I was not involved in the bond trading, as you know, and then other people made those decisions and made those allocations between the companies and the Bank balance sheet, which should trade which bonds and how it should be financed.
>
> Q. And how do you say it generated liquidity for the Bank?
>
> A. Well, bonds were repo'd, as I understand, from time to time.
>
> Q. Yes, but if the Bank had the cash to lend these companies, it had liquid cash. So how did these

companies generate liquidity for the Bank?
A. The position of the bonds, I understand -- we have been through one of the examples, I think, on Friday, that the bonds -- the amount of the bonds purchased with the cash received far exceeded the amount of the cash because there is an outside financing of the repo counterparty involved. That's my understanding of how it worked.
Q. The Bank could have done that itself and at better rates on repos, couldn't it?
A. Done what itself, I'm sorry?
Q. Used the cash to buy bonds and repo them?
A. Indeed. I'm sure it did but there were, I think, restrictions on the limits, counterparty limits, as far as how much bonds the Bank could repo. I think that was the reason."

196. Perhaps in recognition that his description of such companies as "*liquidity*" or "*treasury companies*" did not really make any sense, he described them during cross-examination as "*bond trading companies*", but bond trading could have been done by the Bank, and there is no evidence to support Mr Fetisov's suggestion (which seems entirely misplaced) that the "*bond trading*" activities of Erinskay and Baymore had generated "*millions of dollars of profit*" from the Bank.

197. In fact, as the Bank points out, and as I accept Mr Fetisov knew, in the first half of 2014 a scheme was being put in place to use Bank funds notionally borrowed by Erinskay and Baymore to allow the Bank's own shares to be purchased in the name of Mr Piecha. This can be seen from:-

(1) A "Step Plan" sent by Mr Worsley to the Shareholders and others on 16 February 2014 which sets out a plan for funds loaned to Erinskay and Baymore to be routed, via a series of intermediate companies, to an "Investor" who will buy Bank shares on the Moscow Stock Exchange or MICEX.

(2) Mr Drozdov's email copied to the Shareholders of 4 March 2014, and Mr Worsley's email at the bottom of the page – it being envisaged that Mr Piecha would pay RUB 2.3 billion for 9.75% of the Bank.

(3) The email exchanges between Mr Fetisov and Mr Worsley on 11 June 2014 in which Mr Worsley said:-

> "Droz [Drozdov] sent me a letter for Piotr [Mr Piecha] to sign.
> I will get Piotr to sign it today. Piotr did not want to sign it, but I worked the
> Worsley magic, and he will sign it.
> Andrey said that the CBR 'will check'. He has not sent me any actual requests
> for information. I told him that as soon as he does, I will fill the requests.

> Overview: We funded the structure is a coherent fashion. Party A lost
> monies to Party B in securities trades etc etc etc. We have all of the SWIFTS
> and SPAs for the securities etc.
> We are as watertight as can possibly be in the situation."

It is self-evident that Mr Fetisov was well aware about what was going on in relation to this false paper-trail. The same day in an email to Mr Worsley he asked, *"Did u see email from Drozdov about CBR checking the source of the funds of Piecha? Ae we all good and under control there?"*

198. "Balance sheet management" was not the only area where Mr Fetisov's evidence shifted during the course of the trial, and in relation to which I am satisfied Mr Fetisov gave obstructive, and ultimately untruthful evidence. Indeed the most egregious example was in relation to his attempts to resile from his attendance at CC meetings and participation in all the CC decisions that the documents record him as participating in. It was common ground in the Agreed Facts and Issues that he participated in all of the CC decisions for which the documents record him as having attended. This was entirely consistent with Mr Popkov's evidence (which went unchallenged) that his team reviewed records of all of the CC meetings (both in person and *in absentia*), the relevant details (including the participants) were identified in Appendix 1 to his first statement, and that where there were physical meetings, there exist full minutes signed by the Chairman (usually Mr Yurov himself), which have been checked to confirm their conformity to the disclosed extracts (see paragraphs 10 to 11 of Mr Popkov's second statement).

199. Yet during the course of his evidence, in particular on Day 23, Mr Fetisov denied having participated in just about every (of the many) CC decision he was shown. He augmented such denial in particular cases with an account of being away at the time of meetings. Thus, he said he was in eastern Russia racing rally cars on 25 February 2010, when the documents show that, along with Mr Yurov, he voted in favour of a loan to Business Group (this was an absentee ballot). However, he had not previously suggested that he had not approved this loan or sought to modify his evidence by a corrective or supplemental witness statement.

200. The reality is, however, that Mr Fetisov could have approved this, and other decisions, which were made by absentee ballot, remotely. Indeed, ultimately, I understood Mr Fetisov to accept that in fact where there was an *in absentia* vote, and he was away, he did approve the decision on his return to the office:-

> A. It can be sent by email but I think generally you come back to the office and it waits for you and you look at that, and you sign it with your own hand. That's how it worked. So I don't remember I was basically that much using facsimile, the stamp of my signature, even though there was a stamp in control of my PA but, generally, I think you come back, you look at the paper and you sign it physically, right. So that's what I recall.
> MR JUSTICE BRYAN: Right. So your evidence is that, you

didn't, as it were, sign it in absentia wherever you were in the world, you signed it when you were physically in the office. Is that right?
A. That's what I recall, yes.

201. I am in no doubt whatsoever that the documentary record, and the evidence of Mr Popkov (which went unchallenged in this regard) was accurate as to presence and approvals, and that Mr Fetisov's evidence in cross-examination was a dishonest attempt to deny he had approved and voted for every decision which the documents showed he voted for (regardless of where he was when he did so, or indeed when he did so). This was another example of Mr Fetisov obfuscating and attempting to distance himself from the CC decisions that are in issue.

202. I am also satisfied that he also sought to distance himself from attendance at meetings with the CBR and his recorded attendance at two meetings with the CBR in August 2009 and April 2010. He was recorded as attending in the official minutes in his capacity as President of the Bank. Ms Podstrekha gave evidence as to the care taken over CBR minutes, and those minutes were sent to the Bank contemporaneously and did not prompt a call for correction. Notwithstanding his suggestion that he was not in Moscow at the time of the first meeting the weight of the evidence is that he attended those meetings, and I am satisfied that this is another illustration of Mr Fetisov seeking to distance himself from a matter by saying he was elsewhere at the time.

203. As with Mr Yurov and Mr Belyaev, Mr Fetisov was also cross-examined in relation to various matters going to credit, including in relation to the yacht charters. He too attempted to defend the indefensible and chose to support the implausible account of events recounted by Mr Yurov that I am satisfied was a false account of events. It was submitted in Mr Fetisov's Closing Submissions by Mr Willan on behalf of Mr Fetisov that in relation to the intended use of the yachts if any findings can safely be made in relation to the intended use of the yacht they will tell the Court little about the quality of Mr Fetisov's evidence on the matters in issue in the case. I disagree. His evidence shows that he was prepared to lie to the Court and to defend that which was not capable of being defended. That shows he is not a witness of truth and this inevitably impacts on the veracity of his evidence as a whole. It also shows that he was prepared, contemporaneously, to act in a dishonest manner, which is of relevance when considering the inherent probability of him acting dishonestly in the respects which are in issue.

204. In relation to the first trip Mr Fetisov recounted the same (implausible) account of events:

"A. The first trip? Yes, I do remember.
Q. It's the Kogo, I think, at this stage.
A. Yes.
Q. And that was never intended to be anything but a private excursion for you and your wives, was it?
A. No, it was not. Actually, I think Mr Yurov gave quite a full account of what has been -- what has been planned for this trip. Unfortunately, people who were supposed to be there, they very rich and very, you know -- they have really extravagant life styles, so they didn't show

up. And that so happened that -- yes, they were -- Mr Yurov with his wife, Belyaev with his wife, myself, and Mr Worsley joined in because he was helping to organise that trip.

205. The initial correspondence with the charter company on 3 June 2010 is for a vessel of an appropriate size for the Shareholders, their wives and Mr Worsley, and that initial correspondence between the charter company and Mr Worsley was forwarded to the Shareholders including Mr Fetisov (at two email addresses) who forwarded it to his wife. There is nothing in the initial email or subsequent correspondence about any involvement of corporate guests whether or not including the Guriev family.

206. Mr Fetisov recounted the same (implausible) account as Mr Yurov in relation to the second trip:-

"Q. Right. Do you say -- in relation to the next yacht trip -- I should have said that was the Trident, not Kogo. The next yacht trip in 2011, the same time approximately, do you say that was planned as a private trip or had it been intended for corporate clients originally?

A. No, it was also intended for corporate clients. There was a bit of, I think -- the way I remember that -- because I didn't deal with the corporate clients. There were a few ideas that I think Mr Yurov and Mr Belyaev pushed around again, Gurievs and some others and then also Mr Chukseyev was involved. He was saying that as an alternative he can bring in the chief editor of RBC, which is a business Russian sort of daily internet site. I think it's still the leading business internet site. So that was the talk at the time, when the plan was put together. Again, it didn't work out that way and I remember the trip on the second boat was a disaster in all the respects, you know, so that's --

Q. So --

A. It was planned as some sort of similar exercise. The answer to your question, yes.

Q. It was just a coincidence that you ended up on a 600,000 euro yacht alone with your wives and Mr Worsley for the second year running at the same time, was it?

A. Believe me, I didn't enjoy it…

… If you --

A. Well, I ended up -- yes, I ended up -- it happened that way.

MR PILLOW: It was a coincidence, right.

A. It was absolutely coincidence, it would be my last choice to take vacation together with Mr Belyaev and Mr Worsley wasn't that much fun as well on that particular trip.

Q. And yet you went with your wife?
A. Yes."

207. As already discussed in relation to Mr Yurov I am satisfied that this was no corporate event gone wrong not once but twice, but rather two high-end luxury holidays for the Shareholders and their wives paid for by the Bank. Like Mr Yurov, Mr Fetisov chose to lie rather than make an honest admission of the true position that the charters were for the Shareholders at the Bank's expense and unlike Mr Belyaev did not even proffer any recognition that what was done was unethical.

C.4 WITNESSES NOT CALLED

C.4.1 Applicable Principles

208. In *Wisniewski v Central Manchester HA* [1998] PIQR 324 the Court of Appeal addressed the circumstances in which adverse inferences may be drawn from the absence of a witness who might have been expected to have material evidence to give on an issue in the action. After a consideration of previous authorities Brooke LJ (with whom Aldous and Roch LJJ agreed) stated as follows:-

> "From this line of authority I derive the following principles in the context of the present case:
> (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."

209. It is apparent therefore that the particular issue must be identified, there must be an identified witness who might be expected to have material evidence to give on that issue, the other party might reasonably have been expected to call that other party, and there must be some other evidence (a case to answer) i.e. evidence going in the direction of the inference that is sought to be made. It is then necessary to ask, in each case, whether there is a satisfactory explanation for that person's absence. If there is then no adverse inference may be drawn. If there is not but 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. If, however, there is no such explanation the Court may draw an adverse inference, but it remains a matter for the Court to decide whether, in all the circumstances, an inference can properly be drawn in a person's favour.

210. It is therefore necessary for each of these points to be addressed by a party in the context of any invitation to the Court to draw an adverse inference in relation to a particular issue. In such circumstances I do not consider that the general approach advocated by Mr Belyaev at paragraph 12 of his Closing Submissions would be appropriate as it does not grapple with the matters to be addressed in relation to particular issues and particular witnesses:-

> "… the Court is invited to treat this as an overarching submission that should be applied to all of the facts and matters alleged against Mr Belyaev, and in respect of each piece of evidence relied upon by the Bank to ask itself whether these individuals, or others, might have been able to give contrary evidence had they been called by the Bank."

211. Such an approach would not grapple with the principles identified in *Wisniewski* and the matters to be addressed. It would also place an unjustified burden upon the Court. Accordingly, it is necessary for a party inviting the Court to draw adverse inferences to address matters by reference to particular witnesses and the issue or issues to which their evidence is said to relate. I address below the witnesses that have been identified and the application of the principles to those witnesses.

C.4.2 Mr Worsley

212. Mr Worsley was not called to give evidence by the Bank, but equally he was not called by Mr Yurov or Mr Fetisov (who had issued, and then settled, Part 20 proceedings against him) or Mr Belyaev (who did not issue Part 20 proceedings against him).

213. For its part, at an interlocutory stage, the Bank relied on two affidavits from Mr Worsley in the context of its application for the (continued) Worldwide Freezing Order (WFO). Such evidence was provided by Mr Worsley pursuant to his obligations of cooperation under a settlement agreement with the Bank dated 17 November 2015. The Bank approached his evidence on the basis that he was an "insider" to an alleged fraud who had decided to "come clean" about what was going on and, at that stage at least, it was in his interests to cooperate with the Bank.

214. However, as was (rightly) recognised by Males J on the application to continue/discharge the WFO, *"Mr Worsley's primary importance to the bank is likely to be as a source of documents."* In this regard the Bank obtained from Mr Worsley a very large amount of contemporaneous documentary material, including hundreds of thousands of emails. The Bank says (but the Defendants very much deny) that this material demonstrates what was really happening in relation to the offshore network. On the exchange of witness statements for trial, the Bank served a Hearsay Notice in relation to Mr Worsley's affidavit evidence, but then withdrew it, choosing not to rely on Mr Worsley's evidence at trial, although it says that Mr Worsley's evidence was (and remains) consistent with the vast number of contemporaneous documents he supplied. It

says that it did not need to rely on Mr Worsley's evidence on the basis that, post-disclosure and exchange of witness statements, the Bank's case can be proved by other evidence.

215. In the meantime, both Mr Yurov and Mr Fetisov commenced Part 20 proceedings against Mr Worsley. Most of the obligations under the Bank's settlement agreement with Mr Worsley lapsed on 31 December 2016; and the Bank submits that Mr Worsley's interests, or his perception of them, shifted when he was faced with the Part 20 claims in this action, criminal complaints in Cyprus, and various other civil claims brought against him by Mr Yurov and/or Mr Fetisov.

216. On 16 April 2018, Mr Worsley reached an agreement to settle the Part 20 claims that Mr Yurov and Mr Fetisov had brought against him in this action (along with claims made in another set of proceedings before this Court, as well as in civil and criminal claims in Cyprus) and such agreement required, amongst other matters, his cooperation in providing a witness statement and attending as a witness at this trial. Indeed, clause 4.4(a) of this agreement provided that the release of claims was not to take effect until Mr Worsley has *"signed and permitted to be served a witness statement in the Commercial Court Proceedings".*

217. Mr Fetisov has since stated that both he and Mr Yurov obtained proofs of evidence from Mr Worsley but that he is nonetheless not calling Mr Worsley because he does not believe he can be put forward as a witness of truth *"in circumstances where Mr Fetisov considers that Mr Worsley has given misleading and incomplete evidence to the Bank in his [interlocutory affidavits]"* (paragraphs 21 to 22 of Davies 5). To similar effect Mr Yurov says that since he considers that Mr Worsley gave misleading and incomplete evidence in his interlocutory affidavits, *"it would not be appropriate for him to call Mr Worsley"* (paragraph 4(b) of Kakkad 11).

218. It is not stated that what he said in the proofs of evidence provided to Mr Yurov and Mr Fetisov is itself believed to be true. The explanations for not calling him are specifically stated to be in terms of an alleged unreliability of his previous evidence, given to the Bank in 2016. In those circumstances the Bank submits that the Court should draw an inference that whatever Mr Worsley told Mr Yurov and Mr Fetisov following his settlement with them undermines their case and/or supports the Bank's, and that the reasons for not adducing his recent evidence are tactical rather than ethical. The Bank submits that this is hardly surprising since (it says) the documents tell the true story, and there is little or nothing that Mr Worsley could truthfully say that would support the Shareholders' cases.

219. For its part, the Bank states that it was not willing to go along with what it characterises as a farcical situation that it alleges Mr Yurov and Mr Fetisov had attempted to engineer whereby they, having settled with Mr Worsley and procured his cooperation, would conduct a friendly-fire, pre-scripted "cross-examination" of Mr Worsley at trial pursuant to CPR 33.4, in circumstances where the Bank would have no advance notice of what he was going to say, and no opportunity to cross-examine him itself.

220. For his part, Mr Belyaev submits that whatever the position may be as between the Bank and Messrs Yurov and Fetisov, as between the Bank and Mr Belyaev the Bank's "excuses" for not calling Mr Worsley are irrelevant. Mr Belyaev did not bring a Part 20

Claim against Mr Worsley and is not a party to the settlement agreement between Mr Worsley and Messrs Yurov and Fetisov.

221. On the Bank's case, Mr Worsley appears to have been a party to the "dishonest scheme/massive fraud" and he was certainly present at a large number of the meetings and discussions in respect of which the Bank has alleged that Mr Belyaev must have discussed material issues concerning the alleged dishonest scheme: for example, the meeting in London in April 2010 with SMP, the yacht charters and the various meetings referred to in his emails which Mr Belyaev either denies took place or stated in evidence that he had no recollection of the meeting. The Bank could have adduced evidence from Mr Worsley about the content of these meetings, it has chosen not to do so, and it has thereby deprived Mr Belyaev of the opportunity of cross-examining Mr Worsley. It is said that this is a particularly important factor when it comes to the Bank trying to piece together a chronological narrative that depends upon establishing that Mr Belyaev was a party to discussions. In the absence of that evidence from Mr Worsley, the Court should apply *Wisniewski* and find that the Bank has not established that Mr Belyaev discussed the matters that the Bank relies upon. Mr Belyaev also identifies other matters on which it is said he would have liked to cross-examine Mr Worsley including Mr Belyaev's evidence that he would sign bundles of papers without reading them, indeed that he would do so as a matter of course of his work at the Bank, and that it was standard for senior Russian bankers to sign stacks of documents brought to them each day which had been prepared by executives and managers at the Bank. It is said that in the absence of Mr Worsley's evidence, the Court should accept Mr Belyaev's explanations as to how he came to sign so many documents and how, despite his signature appearing on so many documents, he did not have any knowledge or understanding of what he was signing.

222. It is also said that Mr Worsley was described as a man who was obsessed with security and who liked to act like James Bond, and it would appear that he was something of a fantasist and prone to exaggerate, and that he was prepared to act dishonestly and to backdate documents. It is submitted that in the absence of an opportunity for the Defendants to cross-examine him (and in any event), Mr Worsley's emails and documents must be treated with great caution. Where his emails say that meetings or discussions took place, it cannot be assumed that they did take place. In short, unless there is clear evidence that Mr Belyaev read and responded to an email from Mr Worsley, the Court should not find that the Bank has established that he did in fact read and understand the contents of the email. Had Mr Worsley been in Court, he would have been able to assist the Court on these matters.

223. For his part Mr Yurov submitted at paragraphs 57 to 58 of his Opening Submissions:-

> "Either party might have called Mr Worsley to give evidence; but neither is doing so. The Bank originally served a Civil Evidence Act notice in relation to affidavits provided by Mr Worsley for the Bank's freezing order applications and the subsequent discharge application made by Mr and Mrs Yurov, but withdrew the notice when it became apparent that the price of relying on it might be that he was cross-examined. There is little point for either side trying to make much of the other's reluctance to call Mr Worsley. It must be apparent to all that, on anyone's view of the case, he is a venal and dishonest person, ready to say whatever

> suits him, accustomed to mixing truth and falsehood, and a habitual liar. Had he been called to give evidence by either side, he would probably have provided the Court with some mix of truth and falsehood; he is evidently a witness that anyone would sooner cross-examine than call; and both sides have taken essentially the same decision in that regard.
> … Still, as the Bank says, the Court has his documents. Sometimes those provide useful information about what was happening. But his documents, no less than the man himself, have to be handled with care. In particular, his ex-post facto explanations of his role should be treated with caution."

224. At paragraph 19 of Mr Yurov's Closing Submissions it is stated:

> "Despite Mr Worsley's physical absence from the trial, the Court will now have formed an impression of him, and will understand why nobody would be inclined to call him as a witness expecting his evidence to have any positive value or to be anything other than a self-serving mixture of truth and lies. It remains important to handle his documents with care. He evidently often had an agenda of his own, and his only consistent loyalty was to his own self-interest. One sometimes says that documents 'speak for themselves'. In Mr Worsley's case, however, they often speak through many layers of self-aggrandizement, paranoia, drama, and pretence. As a non-Russian speaker (or rather, as it was suspected, a Russian-language refusenik), whose relationship with his key staff such as Mr Iskandyrov seems to have been appalling, he probably did not understand much of what was really happening. While the fact that Mr Worsley wrote a particular email on a particular date remains a fact, the extent to which anything he wrote was true is highly doubtful. The Bank cannot legitimately place much reliance on anything he said as actually reflecting reality, and the Court should treat it all with as much or more circumspection as it would treat any evidence he might give."

225. Mr Worsley was certainly a witness who might be expected to have material evidence to give on many of the issues in this case (although there is something of a lack of definition as to the particular issues relied upon and associated evidence in support of an inference). However, I consider that Mr Belyaev's application, and indeed that of the Bank against Mr Yurov and Mr Fetisov, fails in circumstances where I do not consider either the Bank, Mr Yurov or Mr Fetisov might reasonably have been expected to call Mr Worsley, and in circumstances where I am in any event satisfied with the explanation given as to why they did not call him.

226. Mr Worsley is an independent third party not employed by the Bank and not beholden to the Bank who was (on the Bank's case) heavily involved in a fraud upon the Bank, and who had also given statements to Mr Yurov and Mr Fetisov who were alleged to be at the heart of that fraud. Equally, and though he was obliged to provide evidence on behalf of

Mr Yurov and Mr Fetisov (a standard feature of settlement agreements) it by no means follows that either of those parties accept the truth of what he says or that they might reasonably be expected to call him given the Bank's case, and the Bank's reliance, on documentation generated by Mr Worsley against them (and likely reliance on his evidence against them).

227. The reality is that it is simply unrealistic to suggest that the Bank (or for that matter Mr Yurov or Mr Fetisov) could reasonably be expected to call Mr Worsley in circumstances where whoever called him would not be in a position to cross-examine him, and the other party or parties might well attempt "friendly" cross-examination that the other party would not be in a position to rebut. In any event I am satisfied with the reasons given why Mr Worsley was not called and there is no basis for the drawing of adverse inferences against the Bank (or against Mr Yurov or Mr Fetisov).

228. I would only add that if, in truth, Mr Belyaev considered that there was evidence that Mr Worsley could give that was helpful to his case, there is no property in a witness, and Mr Belyaev could have sought to call him himself. He did not do so. Of course had he done so, the Bank could have cross-examined Mr Worsley on any of the issues arising in the case including matters that the Bank submitted told against Mr Belyaev.

229. So far as the documentation provided by Mr Worsley is concerned, I bear well in mind the submissions that have been made in that regard, and the need to be satisfied that what is said in such documentation is true, but I reject the submission that little legitimate reliance can be placed on anything said by Mr Worsley in that documentation. Each item of documentation must be considered on its own merits, what it says, how it ties in with other evidence (and the issues that arise, who it was provided to, and what response it did or did not generate and from whom). It is also to be borne in mind that much of the documentation either speaks for itself, or does not relate directly to Mr Worsley, but was simply disclosed by him. In circumstances where there is evidence (as already identified) of computers and servers at the Bank being professionally wiped immediately prior to the administrators coming in, the documentation provided by Mr Worsley is a valuable source of contemporary documentation, albeit that, ultimately, each document, and what it states stands, to be considered on its own merits.

C.4.3 Mr Postnov

230. He was head of the Bank's corporate risk management department, a member of the CC and, as Mr Belyaev recognised, based on the contemporaneous email traffic was actively involved in the arrangements between the Bank and Columba in respect of the Borrowers, the Loans and Columba. It is said he could have given evidence in relation to Mr Belyaev's (alleged lack of) knowledge of the Loans and Transactions, their intended purpose and the use of funds loaned thereunder and the (alleged lack of) involvement of Mr Belyaev in any matters relating to the CBR and the Bank's accounts. It is also said that he could also have given evidence in relation to the state of knowledge of the new administration during late December 2014 and January 2015 (for limitation purposes).

231. Mr Postnov might well be expected to have material evidence in these areas (though it does not necessarily follow that such evidence would be supportive of the Defendants' evidence). Indeed, in the context of his active involvement in the arrangements between the Bank and Columba in respect of the Borrowers, the Loans and Columba he would

(says the Bank) be fixed with the same (guilty) knowledge as the Bank says the Shareholders have. Whether that is true or not, and given the nature of the allegations, it seems inherently improbable that he would be prepared voluntarily to submit himself to cross-examination.

232. Mr Popkov's written evidence was that Mr Postnov had given extensive evidence in the Russian criminal proceedings but that he had explained to him that he was not prepared to give evidence in England because he fears that the Shareholders may use this as a basis to make a criminal complaint against him in Russia because of his role in balance sheet management and being responsible for risk reports that were misleading. When it was put to him in cross-examination that this did not make sense, Mr Popkov reiterated that Mr Postnov was scared of the risk of his evidence being used against him, and that Mr Postnov had refused to give even a written statement. As he put it, *"he would be compelled to testify against himself. That was his fear."* In such circumstances Mr Belyaev's suggestion that the possibility of him giving evidence by video-link should have been explored is not in point – the evidence before me is that Mr Postnov was not willing to give evidence (full stop). I see no reason not to accept Mr Popkov's evidence and I find the stance of Mr Postnov to be unsurprising given his involvement in balance sheet management and the allegations the Bank makes about that, which the witness would now be aware of, whether or not the witness was knowingly involved at the time. I cannot see why Mr Postnov would wish to expose himself to cross-examination in relation to such matters. In such circumstances I am satisfied with the reason given why Mr Postnov was not called by the Bank to give evidence and no question of an adverse inference arises.

233. However, there is a further fundamental point – which is why, if it was considered Mr Postnov could give evidence that would be of assistance to the Defendants or their knowledge (or lack of it) or account of events, he was not called by them given that he is closely connected to the Defendants in terms of being a co-director, supervisory director, and close colleague who was also present at CC meetings. There is no evidence before me as to whether and if so when they were last in contact with him, what he said if they asked him to give evidence, or indeed anything justifying what his evidence would have been, or that it would have been of assistance (given that he himself was, as Mr Belyaev recognises, actively involved in the arrangements between the Bank and Columba in respect of the Borrowers, the Loans and Columba). The very same point applies in relation to Mr Drozdov and Mr Vartsibasov – they too no longer have any connections with the Bank but were (so the Bank alleges) the Shareholders' "*closest lieutenants*", and there is no evidence of the Defendants making any enquiries as to their willingness to give evidence – and indeed the questions put to Mr Popkov were open questions about anyone calling them.

C.4.4 Mr Drozdov

234. Mr Drozdov dealt with problem assets and he sat on the Bad Asset working group with Mr Fetisov and Mr Iskandyrov in 2008-2010, and he featured in emails relied upon against Mr Belyaev on the basis that Mr Belyaev must have read and understood the content of those emails and their attachments (as already addressed above). Whilst Mr Drozdov might have been able to assist as to whether he discussed those emails with Mr Belyaev, the emails to an extent speak for themselves and the central issue is as to Mr Belyaev's knowledge rather than whether he discussed them with anyone, and I have already found above that his evidence was not credible in that regard. In any event Mr

Popkov's evidence was that though he did not know of any reasons why he was not testifying (an open question equally applicable to all parties), his evidence was that Mr Drozdov and he *"said [their] goodbyes in March 2015"*. In circumstances where the documents involving Mr Drozdov speak for themselves (and Mr Belyaev was a counter-party thereto), and in which Mr Drozdov was said to be one of the Defendants, "*closest lieutenants*" I do not consider the Bank might reasonably be expected to have called him. In any event, and given Mr Drozdov's involvement in events, I consider it inherently improbable that he would willingly have given evidence in any event. Once again the Defendants themselves could have sought to call Mr Drozdov if they considered it would have been in their interest to do so. I do not consider there is any scope for drawing adverse inferences in relation to the Bank not calling Mr Drozdov.

C.4.5 Mr Vartsibasov

235. Mr Vartsibasov was a Board member and CC member, attending CC meetings with Mr Belyaev. He also assisted the new administration. It is said he would have been in a position to give evidence of procedure at CC meetings. Mr Popkov's evidence was that he did not know for sure whether there was any reason why he could not have given evidence (an open question equally applicable to all parties) as he *"stopped any communication with Vartsibasov in March 2015"*. In circumstances in which Mr Vartsibasov is said to be one of the Defendants, "*closest lieutenants*" I do not consider the Bank might reasonably be expected to have called him. In any event I doubt whether Mr Vartsibasov would willingly have given evidence. Once again the Defendants themselves could have sought to call him if they considered it would have been in their interest to do so. I do not consider there is any scope for drawing adverse inferences in relation to the Bank not calling Mr Vartsibasov.

C.4.6 Ms Cherkasova

236. She was Chair of the Management Board and CEO of the Bank between 2008 and 2012. It is clear that she was aware of balance sheet management and the off-balance sheet structure being party to correspondence (for example from Mr Iskandyrov) in which a circular finance scheme was set out. She also signed the Bank Winter agreements and the IFRS account and was the signatory of the letters prepared for the CBR relating to EWUB. I accept she could have had material evidence to give in relation to such matters, and she is an employee of Otkritie (i.e. the Bank's owner) so, prima facie, the Bank could have been expected to call her.

237. However, the evidence before me from Mr Popkov was that he talked to her about giving evidence but that she told him that *"it's all past history, water under the bridge for her, and she doesn't want to talk about it*". His evidence was also that she said that, *"there could be no questions really because under no circumstances will she testify for either party."* Whilst Mr Popkov was questioned as to why he did not mention this in his witness statement (he stated he did not consider it "*pertinent*"), Mr Popkov was not challenged as to the truth of his evidence. In such circumstances the evidence before me is that Ms Cherkasova was not willing to give evidence and I am satisfied that this explains why she was not called by the Bank. It is unrealistic to expect the Bank to attempt to compel her to give evidence in such circumstances (even assuming, under the terms of her employment contract, it could do so – as to which there is no evidence before me). In the above circumstances I do not consider that there is any scope for drawing adverse

inferences in relation to the Bank not calling Ms Cherkasova. I would only add that I do not consider that it can be assumed what her evidence would be in relation to balance sheet management or that her views would assist any of the Defendants on the issues in this case.

C.4.7 Ms Vashenko

238. Ms Vashenko was the executive secretary of the Credit Committee and Head of the Bank's Operational Unit at the time. It is said, and I agree, that she could have given relevant evidence of the working of that committee and what documents it saw. However the evidence of Mr Popkov was that in relation to any possibility about her giving evidence, "*I spoke with her a long time ago about it. I think it was at the time of the start, when we got the freezing order. She categorically declined to testify in relation to these hearings".* It was asked if he tried again before witness statements were exchanged to persuade her otherwise, and his evidence was that, "*She was asked, that it was important to the Bank that she would testify in relation to a number of issues. She said, "I'm not ready to do it. I'm ready to meet with the lawyers and, if necessary, to discuss things with them but I'm not going to testify in court."*. Whilst it was pointed out that Mr Popkov did not mention this evidence in his witness statement, the veracity of the evidence was not challenged. Given that she refused to give evidence, the possibility of her giving evidence by video link does not rise. In such circumstances the evidence before me is that Ms Vashenko was not willing to give evidence and I am satisfied that this explains why she was not called by the Bank. In the circumstances there is no scope for the drawing of an adverse inference in her case.

C.4.8 Ms Krivosheeva

239. Ms Krivosheeva was the Bank's former finance director (prior to Mr Romakov), and she gave evidence in the Russian proceedings. Mr Belyaev submits that she could, amongst other matters have given evidence of Mr Belyaev's (alleged) lack of involvement in material aspects of the Bank's business and balance sheet management, alleged lack of knowledge of communications with the CBR, and whether (as I have found) Mr Belyaev attended the December 2009 CBR meeting. Whilst I agree that she could be expected to have material evidence to give, Mr Popkov's evidence (the truth of which was not challenged) was that he did not know where she was employed and when he spoke to her at the end of 2015 or start of 2016, she refused to communicate with him. Given that she refused even to communicate with him, and it was not known where she was employed, the evidence before me leads to the conclusion that she was not willing to give evidence and I am satisfied that this explains why she was not called by the Bank. In the circumstances there is no scope for the drawing of an adverse inference in her case.

C.4.9 Mr Popov

240. Mr Belyaev refers to the fact that the chief accountant was not called by the Bank. He submits that he could have given evidence in relation to Mr Belyaev's case that he was not involved in the Bank's accounting function. Mr Popkov's evidence is that the chief accountant had left the Bank by about May 2015. Whilst it is true that there do not appear to have been any attempts by the Bank to contact him, by the same token there is no reason why, if Mr Belyaev or others thought that Mr Popov could give evidence that assisted them, they could not have contacted him and there is no evidence before me of any such contact, or if there was contact what he said. I do not consider there is any scope for an

adverse inference in the context of the Bank not calling an ex-employee who could equally have been called by Mr Belyaev if Mr Popov was willing to give evidence.

241. In the above circumstances and for the reasons that I have given, I do not consider it is appropriate to draw any adverse inferences against the Bank. I nevertheless bear well in mind when considering what findings can properly be made, that not all evidence that could potentially have been available has been adduced before the Court .

D. THE PLEADED ISSUES (ISSUE 27)

D.1 Introduction

242. The List of Agreed Facts and Issues at Issue 27 records the disagreement between the parties about the extent to which particular matters are legitimately matters which the Bank is entitled to rely upon, in the sense of proving part of its case (as opposed to matters which could legitimately be put as going to credit). The Bank's case is that all the matters identified in Issue 27 are relevant (and can be relied upon) not only as to credit, but as part of the substantive issues for determination. The Defendants submit that some or all of the matters are not properly or sufficiently pleaded and may not be relied upon as part of the Bank's case against the Defendants.

243. There was a danger that lengthy debate about, followed by a ruling upon, the scope of the pleaded issues could have derailed the tight, and actively managed trial timetable. There was also a recognition that matters were in any event potentially relevant to credit, and as such could be put to witnesses. In the event the trial finished on schedule in no small part due to active trial management, the co-operation of the parties and the transcribers, and the willingness of the Court to accommodate longer Court days where necessary and to compress judicial reading time of the written closings before the oral closings.

244. As part of active trial management and the efficient use of Court time, and following discussion with the Court, it was agreed as between the Bank and Mr Yurov and Mr Belyaev (as recorded in the List of Agreed Facts and Issues) that the question of whether the Bank is entitled to rely on the matters identified in Issue 27 was a matter to be dealt with in the parties' Closing Submissions (and dealt with in the judgment) and that relevant questions could be put to witnesses in cross-examination and their evidence heard *de bene esse*. This was a sensible agreement which was endorsed by the Court. Mr Fetisov reserved the right to seek a ruling prior to closing submissions, and in due course raised before the Court whether it would be appropriate to do so. However even a preliminary identification of the issues arising by Mr Willan on behalf of Mr Fetisov consumed a significant amount of Court time, and I ruled that matters would proceed as agreed by the other parties with the pleading issues being dealt with in Closing Submissions, as occurred. This ensured the efficient use of Court time and facilitated the conclusion of the trial on schedule. It is unlikely that this would have been achieved if the pleading points had been argued out and ruled upon as the trial timetable could not have accommodated such an approach.

D.2 The Issues

245. Issue 27 ("*entitlement to rely on specific matters*") asks, as to the following alleged facts, "*is the Bank entitled to rely on each or any of them in support of its case that each of the Shareholders acted in breach of duty and/or dishonestly, as well as going to the credit of the relevant Shareholder(s); and, if so, are they proven*" (which is addressed, where appropriate, in due course below):

27.1 the purchase of bonds and use of REPO transactions was intended by the Shareholders to conceal the "balance sheet management" exercise;

27.2 the fiduciary lending arrangements involving EWUB and Donau were inherently dishonest;

27.3 the CBR was misled, to the knowledge or at the direction of the Shareholders;

27.4 improper influence was exercised over the CBR in return for money, to the knowledge or at the direction of the Shareholders;

27.5 banks and corporate service providers of companies within the network were misled, to the knowledge or at the direction of the Shareholders;

27.6 monies were moved between companies within the network in large sums and/or using sham, fraudulently generated and/or backdated transactions, to the knowledge or at the direction of the Shareholders;

27.7steps were taken (including through the provision of false information in interviews) to deceive the Bank's auditors, to the knowledge or at the direction of the Shareholders;

27.8 companies in the network used dishonest auditors and/or accountants, to the knowledge or at the direction of the Shareholders;

27.9 Employees of the Bank concealed their communications with Mr Worsley and Columba, to the knowledge or at the direction of the Shareholders;

27.10 the Bank's IFRS accounts were deceptive and/or fictitious, to the knowledge or at the direction of the Shareholders.

D.3 Applicable Legal Principles

246. The applicable legal principles are well-established and, unsurprisingly, were largely common ground, although equally unsurprisingly there was a difference between the Bank and the Defendants in terms of the authorities they chose to emphasise in support of their respective stances.

247. The Bank's over-arching submission on its pleadings can be seen from paragraph 163 in Section I. of its Closing Submissions:-

> "… As is common in cases such as this, the Defendants have raised a series of "pleading points", which are summarised in Issue 27 and the ten sub-issues thereunder. The Bank's position, in outline, is that its case has been adequately particularised over the hundreds of pages of pleadings already served, which already vastly exceed the guideline length for cases in this Court. In adopting that position, the Bank does not seek to belittle the importance of pleadings in defining the issues and giving the parties fair notice of the case that they will have to meet (or make) at trial. But the Bank does say that, in this case, the Shareholders' suggestions that the Bank is not entitled to rely on the matters listed in Issue 27 are not well-founded because the relevant issues are adequately pleaded, insofar as they needed to be; and there is no question of the Shareholders having been taken by surprise or

not having had a fair opportunity to deal with them on their merits."

248. If what is being said in the first sentence is that not all "pleading points" that are taken prove, on analysis, to be good so that it is necessary to consider what is or is not pleaded with care, I would agree. As for the second sentence, and the length of the pleading and the number of allegations, the mere length of a pleading does not tell one anything about the adequacy (or indeed appropriateness) of the way a matter is pleaded, and equally you cannot judge whether an allegation is properly pleaded or particularised by looking at other allegations. Ultimately what is needed is to consider what is or is not pleaded and what should be pleaded in order to pursue a particular allegation applying the applicable principles as to pleading. The final sentence sets out the Bank's case and needs to be considered in the context of the issues that arise to see whether the Bank makes that case good.

249. The Bank is on sure ground when it relies upon what was said by David Richards J in *HMRC v Begum et al.* [2010] EWHC 1799 (Ch) at [89]-[91] which makes the important point that pleading is not a game and it is about fairness and fairly understanding the case that has to be met, and points about whether a case has been adequately pleaded are to be looked at in that context:-

> "89 In approaching criticism of the very detailed nature put forward by the defendants in this case, it is as well to bear in mind the following passage in the judgment of Saville LJ in *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR 1 at 4-5:
>
> The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the Court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing. Each case must of course be looked at in the light of its own subject matter and circumstances. Thus general statements to the effect that global or composite claims are embarrassing and justify striking out, to be found for example in Hudson 11th Ed. paragraph 8–204 are not automatically applicable to every case. With regard to the particular pleadings in question, I remain unpersuaded that either McAlpines or PDP were put to any sort of material unfair disadvantage by the way the matter had been set out by the Plaintiffs."
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> 90 To like effect, after the introduction of the CPR, was Lord Woolf MR in *McPhilemy v Times Newspapers* Ltd [1999] 3 All ER 775 at 792–3:

> The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to CPR, paragraph 9.3 requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.
>
> As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements pleadings frequently become of only historic interest. Although in this case it would be wrong to interfere with the decision of Eady J, the case is overburdened with particulars and simpler and shorter statements of case would have been sufficient. Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged.
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> 91 As against those principles, Miss Newman relied on the requirement for proper particulars of allegations of dishonesty. I am satisfied that the case of dishonesty is sufficiently pleaded. It is to a significant extent based on what are alleged to have been Mr Uddin's statements in the taped conversations and on inference from facts which are pleaded in paragraph 3.2.2, the alleged transactions and the consistent failure by the importers to account for VAT. There are not general and vague allegations of fraud such as were addressed in *Re Rica Gold Washing Co* (1879) 11 Ch D 36 and *Wallingford v Mutual Society (1880) 5 App Cas 685."*

250. As already noted the Bank also submits that it is entitled to and does rely upon all ten matters as going to the Shareholders' credit, as well as to their propensity or willingness to participate or acquiesce in improper or dishonest banking business (which the Bank submits supports the Bank's case that they did so in relation to the Loans and Transactions in this case).

251. For its part the Defendants identify the following principles (which I do not understand to be controversial):-

(1) A party pleading its claim must set out the facts on which it seeks to rely, but not (in general) the evidence which it intends to adduce to prove those facts – see CPR 16.4 (1) (a).

(2) "*The claimant must specifically set out the following matters in his particulars of claim if he wishes to rely on them in support of his claim: (1) any allegation of fraud; (2) the fact of any illegality; (3) details of any misrepresentation; … (5) notice or knowledge of a fact; … (7) details of any wilful default*" – see Part 16 PD para 8.2.

(3) In relation to whether matters are "*specifically set out*", the Defendants identify two rules:

(a) An ambiguous pleading which can be construed as making *either* a serious allegation of deliberate wrongdoing or a less serious allegation of carelessness is to be construed as making only the less serious allegation. Thus a plea that a person "*knew or ought to have known*" is construed not as an allegation of actual knowledge, but only as an allegation of constructive knowledge – see *Armitage v Nurse* [1998] Ch 241 (CA), at 257 (Millett LJ). Nor is it sufficient to "*sprinkle a pleading with words like "wilfully" and "recklessly"*" (*ibid*).

(b) Secondly, it is important not merely that the bare allegation is made, however forthrightly, but that proper particulars of it are given – "*general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice*": see *Wallingford v Mutual Society* (1880) 5 App Cas 685, 697 (Lord Selborne LC); see also at p. 709 (Lord Watson).

(4) In *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 at [185]-[186] Lord Millett identified that there are two distinct principles in play:

> "[185] The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. ...
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> [186] The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

(5) Paragraph 5.3 of the Commercial Court Guide reflects that second principle:

> "Full and specific details must be given of any allegation of fraud, dishonesty, malice or illegality. Where an inference of fraud or dishonesty

is alleged, the facts on the basis of which the inference is alleged must be fully set out."

(6) In relation to "similar fact evidence", although evidence should not normally be pleaded, matters which are relied on by way of "similar fact" evidence should be. The Defendants draw attention to what was said in *Signia Wealth Ltd v Vector Trustees Ltd* [2018] EWHC 1040 (Ch) at [502]:

> "... Similar fact evidence is dangerous to orderly trial management because it brings into play collateral disputes. It follows that its admission needs to be quite strictly controlled. As here, the similar fact evidence must be pleaded. But I consider that a proper pleading of similar fact evidence must go beyond simply pleading the facts relied upon. What ought specifically to be pleaded is why it is said (by the party seeking to rely on this material) that collateral evidence is so relevant that the ordinary rule regarding collateral facts ought to be set aside for the purposes of the trial."

252. The formal statements of case are still of fundamental importance in civil litigation in the CPR era. As was said by Lewison J in the Court of Appeal in *Lowe v Machell* [2012] 1 All ER (Comm) 153 at [74]:

> "The formal statements of case or pleadings presented to the court are still of fundamental importance in civil litigation. As Lord Phillips of Worth Maltravers MR said in *Loveridge v Healey* [2004] EWCA Civ 173 [2004] C.P. Rep. 30 (§23):
>
> > 'It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."

253. A further point emphasised by the Defendants is that it is not simply a question of what causes of action are pleaded – if a fact is necessary to establish a cause of action it must be pleaded. In this regard reference was made to the case of *JN Dairies v Johal Dairies Ltd* [2010] EWCA Civ 348 at [41]-[43]. That case involved a claim for misuse of confidential information, but in the course of the trial there were respective allegations of perjury on the one side and bribery and conspiracy on the other, and questions arose as to

whether those should have been pleaded. Stanley Burnton LJ (with whom Sullivan and Mummery LJJ agreed) considered they should have been stating at [41]-[42]:

> "41. For the Respondent Mr Flynn QC submitted that it had been unnecessary for the Respondent to plead the bribery or the conspiracy. If established, the bribery and conspiracy were no more than evidence on which the judge could find that what was the Respondent's case throughout was established, i.e. that the Appellant had misused the Respondent's confidential information. Mr Flynn submitted that it would have been unfair to require him to plead the bribery and conspiracy allegations while leaving the Appellant free to make an unpleaded allegation of conspiracy to pervert the course of justice. Thirdly, he submitted that the factual findings made by the judge had been fairly addressed during the trial. The Appellant had not sought an adjournment or sought to adduce any of the evidence that it now suggested, at this very late stage, would have been adduced if the Respondent's allegations had been pleaded.
>
> 42. I have no doubt that the Respondent's allegations of bribery and conspiracy should have been pleaded. The Respondent should not, as Mr Lord submits, have been able to have its cake and to eat it. CPR Part 16.4 (1)(a) requires a claimant to include in its particulars of claim "a concise statement of the facts on which the claimant relies". The Respondent did rely on the fact of bribery, by adducing evidence that Jitty had been seen paying a large bribe to Gurbir Singh, and the fact that there had been a conspiracy between the Defendants for Gurbir Singh to steal the Respondent's invoices. Moreover, paragraph 8.2 of the Practice Direction to CPR Part 16 requires the claimant specifically to set out any allegation of fraud and illegality where he wishes to rely on it in support of his claim. The Respondent should not have adduced evidence of the alleged conspiracy and bribery without amending its Particulars of Claim, and Mr Flynn should not have examined or cross-examined witnesses with a view to establishing those facts. It is no answer that the Respondent could have succeeded in establishing liability without establishing those facts: those facts were part of its case at trial. A party's pleadings set out for the other party and for the Court the facts to be investigated during the trial. The Particulars of Claim in this case did not do so. Nor is it any answer, if it be the case (which I address below), that the Appellant's allegation of conspiracy was also unpleaded. By alleging the unpleaded matters the Respondent assumed the burden of pleading them. Moreover, once the Respondent's allegations of bribery and conspiracy had emerged, the preliminary issue as formulated became wholly inappropriate."

D.4 The Issues under Issue 27

254. Mr Yurov addresses the pleaded issues in detail in paragraphs 33 to 71 of his Closing Submissions. Helpfully Mr Belyaev in his Closing Submissions (paragraph 342) and Mr Fetisov in his Closing Submissions (paragraph 163) adopt the arguments set out in Mr Yurov's Closing Submissions. I also heard further argument in relation to such issues during the course of the oral closings which I bear well in mind.

255. In the event, and as often occurs once the issues are aired and evidence heard (albeit some of it heard *de bene esse* and so of itself not relevant when considering whether a matter should have been pleaded), there has been both clarification of how the Bank puts its case in closing, and what matters go only to credit, and also a narrowing of the points taken in relation to the Bank's pleaded case, although issues remain for determination in relation to certain aspects of the Bank's case.

256. It is convenient first to address those Issues where there is no remaining substantial dispute, before turning to those issues where there remains an issue to be determined. Accordingly, the Issues are not addressed below in the same order as in the Agreed Facts and Issues, and the issues that remain are also grouped together where appropriate.

D.4.1 The purchase of bonds and use of REPO transactions was intended by the Shareholders to conceal the "balance sheet management" exercise (Issue 27.1)

257. I can deal with this point in short order as Mr Yurov (in his Closing Submissions at paragraph 70) does not object to the Bank making part of its case that the REPO transactions used in connection with the Loans were designed to conceal the reality of the transactions. The REPO transactions are pleaded and they are, on everyone's case, part of the balance sheet management exercise. I am satisfied that the Bank is entitled to make this allegation based on the pleaded facts (see, in particular PoC para 21.2.2 and Yurov Reply para 11). The points made in reply themselves respond amongst other matters, to (for example) Mr Fetisov's pleaded allegation that one of the purposes of the off-shore structure was *to "conduct treasury and balance sheet management activities…, including by investing in securities (especially Russian government bonds) and generating liquidity through REPOs"* (Fetisov Defence para 17(2)).

D.4.2 Improper influence was exercised over the CBR in return for money, to the knowledge or at the direction of the Shareholders (Issue 27.4)

258. In circumstances in which the Bank only relies upon this allegation as a matter going to credit, it is not suggested that is necessary for me to address whether the matter has been properly pleaded.

D.4.3 Banks and corporate service providers of companies within the network were misled, to the knowledge or at the direction of the Shareholders (Issue 27.5)
D.4.4 Monies were moved between companies within the network in large sums and/or using sham, fraudulently generated and/or backdated transactions, to the knowledge or at the direction of the Shareholders (Issue 27.6)

259. The Bank says that such matters occurred in the context of the operation of the offshore network and "balance sheet management". The Bank's case is that the matters go to establishing the inherent or objective impropriety of that operation and those schemes (otherwise it is said, there would be no need to engage in such practices) and to what is said to be the pervasive and systematic nature of the wrongdoing. In this regard in relation to Issue 27.5 the Bank says that prime examples are the Shareholders' involvement in pretending to Vassiliades that they (a) did not own amongst other entities RCP, and (b) they had sold their interest in Oldehove, Crylani, SiberianKD and the like (via Tactio) to new investors. Ultimately, I did not understand, in oral closings, that the Defendants objected to the subject matter of Issues 27.5 and 27.6 being advanced by the Bank, such matters largely going to credit and motive. It was expressly acknowledged on

behalf of Mr Yurov (without the other Defendants demurring) that it was unlikely to be necessary for me to consider whether such matters were properly pleaded, and I have not found it necessary to do so.

D.4.5 Companies in the network used dishonest auditors and/or accountants, to the knowledge or at the direction of the Shareholders (Issue 27.6)

260. This is again relied upon in the same context as Issues 27.4 and 27.5, and as going to credit, and Mr Stanley, on behalf of Mr Yurov, did not suggest that it was necessary to determine any pleading point in relation to Issue 27.6.

D.4.6 Employees of the Bank concealed their communications with Mr Worsley and Columba, to the knowledge or at the direction of the Shareholders (Issue 27.7)

261. Mr Yurov (and, as I understand it, the Defendants who adopt his submissions) do not object to the Bank relying on the fact that various Bank officers used iPads provided by Mr Worsley, and that different email addresses were sometimes used, as evidence that balance sheet management was known to be improper, on the basis that whether or not those facts should have been pleaded (the Defendants would say yes) there are no further investigations or disclosure which would have been required, the essential underlying facts are clear, and the matter has been explored with the witnesses in cross-examination. Mr Stanley on behalf of Mr Yurov realistically acknowledged that this was the sort of pleading point that might (rightly) be described as "*technical*" and as such was not pursued.

262. That leaves three matters where the Defendants do submit that the Bank's case is not properly pleaded and whether that is so or not requires determination namely:-

(1) The fiduciary lending arrangements including EWUB and Donau were inherently dishonest (Issue 27.2);
(2) The CBR was misled, to the knowledge and/or at the direction of the Shareholders (Issue 27.3), and
(3) The Bank's IFRS accounts were deceptive and/or fictitious, to the knowledge and/or at the direction of the Shareholders (Issue 27.10) including, to the extent that it is relevant, that steps were taken (including through the provision of false information in interviews) to deceive the Bank's auditors and/or accountants, to the knowledge or at the direction of the Shareholders (Issue 27.8).

D.4.7 The fiduciary lending arrangements involving EWUB and Donau were inherently dishonest (Issue 27.2);

263. This does not arise as a pleaded issue as such because no claims are made in respect of the (alleged) breaches of duty by the Shareholders in entering into the EWUB and Donau schemes. In relation to Issue 27.2, the only point that the Defendants object to is the allegation that the fiduciary lending arrangements involving EWUB and Donau "*were inherently dishonest*". As Mr Stanley confirmed in his oral closing submissions, no objection is taken to them being addressed, and findings made, as to the existence of the arrangements, the history of them, and their deployment as part of the matrix to various other points that are made, including as one of the ways the off balance sheet lending was done.

264. It is not in dispute that it is not pleaded that the fiduciary lending arrangements involving EWUB and Donau were inherently dishonest. On the principles I have identified I consider that if a finding was to be sought that the fiduciary arrangements involving EWUB and Donau were inherently dishonest then this case should have been positively pleaded (and particularised), and it was not. I do not consider, however, that the point is of any real significance in relation to the issues that arise for determination – if the Bank is right in its submissions about balance sheet management it would matter not that it is not entitled to submit that the fiduciary lending arrangements involving EWUB and Donau were "*inherently dishonest*", as that is not a necessary requirement to its case on the inappropriateness of balance sheet management (and the alleged breaches of duty that it submits arise in that regard). In any event, none of the Loans or Transactions under consideration appear to have been made via the EWUB or Donau schemes (although some were used in the context of "unwinding" such schemes). In the above circumstances, and whilst I find that it is not open to the Bank to allege that the EWUB and Donau schemes were "*inherently dishonest*", such a plea is not on the critical path in relation to the Bank's case on balance sheet management or my overall findings in that regard.

D.4.8 The CBR was misled, to the knowledge or at the direction of the Shareholders (Issue 27.3).
The Bank's IFRS accounts were deceptive and/or fictitious, to the knowledge or at the direction of the Shareholders (Issue 27.10).
Steps were taken (including through the provision of false information in interviews) to deceive the Bank's auditors, to the knowledge or at the direction of the Shareholders (Issue 27.7)

265. It is convenient to consider these issues together in the context of how they were addressed in the Closing Submissions and the oral closing submissions. The Bank says that these matters were squarely pleaded, and that they are also advanced as part of the Bank's direct answer to the Shareholders' own case.

266. In this regard paragraph 94A and 94B of the Re-Amended Particulars of Claim provide as follows:-

> "94A. Paragraphs 75A to 75L above are repeated. In the premises, and in the periods when they were employees of the Bank, if and insofar as they were in an employment relationship with the Bank at the relevant time, each of the Primary Defendants: 94A.1. breached the contractual obligations owed under their respective Employment Contract(s), specifically:
>
> 94A.1.1. Mr Yurov and Belyaev breached clause 2.1(a) of their 1999 Employment Agreements in failing to perform their duties conscientiously and/or in accordance with the Bank's own internal regulations and Charter and/or failing to act exclusively in the interests of the Bank;
> 94A.1.2. Mr Fetisov breached clause 3.1 of his 2005 Employment Agreement in failing to perform his duties conscientiously and/or in accordance with the Bank's own internal regulations and Charter and/or failing to provide disclosure in relation to transactions between the Bank and companies in which he had a beneficial interest and/or failing to act exclusively in the interests of the Bank;

94A.2. breached the obligations under Article 21 of the Labour Code to perform his work duties in good faith and to comply with the Bank's internal working regulations;

94A.3. breached their contractual obligation to comply with the JSC law (and the Bank relies on the particulars of breaches of the JSC Law pleaded at paragraphs 99 to 103 above);

94A.4. breached the Bank's internal regulations and Charter; and

94A.5. acted unlawfully under the general law in that:

94A.5.1. the making of loans to the Borrowers under the false pretence that the Borrowers intended to use the loans for genuine business purposes, whereas the actual purpose was to use the loan proceeds to service bad debts owed to the Bank by other companies, was a breach and/or caused the Bank to be in breach of the Russian Central Bank Regulation 254-P; in particular, the making of such loans was intended to have and had **the result that the Bank's publicly stated accounts were misleading** in that the bad debts that should have been recorded on the Bank's balance sheet were concealed;

94A.5.2. Russian Central Bank Instruction 2332-U required the Bank to submit to the Central Bank, on a special form, information on the quality of the Bank's loans. As the Primary Defendants were aware, **the Central Bank would have taken action to prevent any further recycling of funds through offshore loans and falsification of the Bank's balance sheet** had the true position been disclosed and/or would have caused the Bank to enter the DIA bail-out scheme. It is to be inferred that the Primary Defendants ensured and procured that **false information was submitted to the Central Bank** in order to avoid such preventative action;

94A.5.3. Russian Central Bank Instruction 139-I of 3 December 2012, "On Statutory Ratios for Banks", required a calculation of the Bank's capital adequacy ratio; as a result of the concealment of the Bank's bad debts by means of the recycling of funds through offshore loans, the Bank's capital adequacy ratio was calculated on a false basis; and this further constituted a violation of Article 15.26 of the Code of Administrative Violations;

94A.5.4. **the falsification of the Bank's accounts and the deception of the Russian Central Bank** constituted a criminal offence pursuant to Article 172.1 of the Russian Criminal Code (added to the Criminal Code by way of Federal Law No. 218-FZ of 21 July 2014); and 94A.5.5. further, **the falsification of the Bank's accounts** for personal gain of the Primary Defendants constituted an offence under Article 201 of the Criminal Code ("Abuse of Authority"); in this regard the Bank relies on the fact **that the falsification of the Bank's accounts** both artificially inflated the perceived value of the Primary Defendants' shares in the Bank and allowed them to continue to extract millions of dollars in salary and bonuses from the Bank over many years under the pretence that it was in good financial standing.

94B. Accordingly, the Primary Defendants are therefore liable to pay compensation to the Bank pursuant to Articles 232, 233 and 238 of the Labour Code." (emphasis added)

267. I consider that from these pleadings, and in particular those parts emphasised above, that the Shareholders had proper and fair notice that it would be in issue at trial whether the Bank's accounts were, and were known to them to be, deliberately misleading and that the CBR was misled – meeting the first of Lord Millett's principles in *Three Rivers* (which Mr Yurov's counsel appears to accept albeit that it was submitted that the principle was "*barely*" met). However, it is said that to the extent that these pleas are pleas in fraud, they are insufficiently particularised to meet the second of Lord Millett's principles.

268. A preliminary point is that the Bank's case, whilst extending to what can be described as fraud, does not depend on fraud – the Bank's case is equally that what was being done was not in the interests of the Bank and the Shareholders were not performing their rights and obligations in relation to the Bank reasonably (or in good faith) for the purpose of the relevant obligations of directors under Russian law.

269. However, to the extent that the Bank's case is one of fraud, in the respects under consideration, it is not an inferential type of fraud case to be inferred from primary facts that have not been pleaded. What is being said (for example) is that the making of the loans to the Borrowers was under the false pretence that the Borrowers intended to use the loans for genuine business purposes, whereas the actual purpose was to use the loan process to service bad debts owed to the Bank by other companies and this was intended to have and had the result that the accounts were misleading in that bad debts should have been recorded on the Bank's balance sheet but they were not (as they were concealed). Based on these facts the Bank invites the Court to infer or find bad faith on the part of the Shareholders.

270. The plea that the accounts were false or misleading is not a case which is based upon, or requires consideration of, (for example) what precise figure should have been on the balance sheet applying IFRS principles or the like, or requiring expert evidence on such matters. The plea is simply that the accounts were false because of the matters pleaded.

271. What it is said the Shareholders knew is equally clearly pleaded – for example in relation to the CBR that the Shareholders knew (were aware) that the CBR would take action to prevent "*further recycling of funds through offshore loans and falsification of the balance sheet had the true position been disclosed and/or would have caused the Bank to enter the DIA bail-out scheme*". Where an inference is then sought, it is clearly pleaded out – "*It is to be inferred that the [Shareholders] ensured and procured that false information was submitted to [CBR] in order to avoid such preventative action.*" The Shareholders knew what they needed to know to respond to this plea.

272. There is also a certain artificiality (if not coyness) in the Shareholders' stance on the pleadings in this area given the terms of the memorandum sent by Mr Yurov to Mr Belyaev and Mr Fetisov on 28 June 2015 which it will be recalled provided, amongst other matters in relation to Bank losses:

"If such losses had been recorded in the bank's books back in 2008, the CB would have had to revoke NBT's banking licence as the reduction in capital

would have been over 20%. As a rule, as soon as a bank's licence is revoked, it becomes bankrupt because the depositors have the right to withdraw their deposits. Since no share capital could be attracted after NBT's shares were unlawfully attached in 2008 on the grounds that they allegedly belonged to Khodorkovsky (the attachment is still in force regardless of 12 complaints and petitions), a decision was made to start submitting false accounts to the CB (which, in my understanding, was only an administrative offence punishable at most by a fine and licence revocation (in any case, the risk of licence revocation already existed)) and focus on providing loans to individuals instead (as the most profitable transactions) in order to offset the previous years' losses by the received profits, recover the bank's capital over time, and stop submitting false accounts to the CB. This business logic had failed as NBT incurred new losses, this time on loans to individuals, and had to file for rehabilitation proceedings to avoid bankruptcy." (emphasis added)

273. I do not consider that the fact that these points were pleaded in the context of the Labour Code and breach of contract impacts on the Bank's ability to advance such pleas. It is, as I understand it common ground, that the Shareholders were required to comply with the JSC law duties to act in good faith, reasonably and in the best interest of the Bank even if the claims are framed as Labour Code / breach of contract claims (and indeed the Shareholders' case is that the only claims that can be brought are the Labour Code claims).

274. The pleaded issues properly in play also have to be considered by reference to the matters pleaded in the Shareholders' Defences and the Bank's pleaded response thereto. Thus, at the heart of Mr Yurov's and Mr Fetisov's defences is that the Bank was engaged in a process of "balance sheet management", the entire purpose of which was to "manage" (which the Bank says is a euphemism for misstate) what would otherwise appear in the Bank's accounts and in its returns to the CBR. In particular, it is Mr Yurov's and Mr Fetisov's positive case that the Bank had a network of offshore subsidiaries, that were not declared as such in its accounts, and that it engaged in circular lending to those subsidiaries for the purposes of servicing/repaying other loans so that (according to the Yurov/Fetisov defences) the point where losses would have to be recognised in the accounts was "deferred", coupled with a positive case that the CBR was aware of what was being done. The Shareholders have themselves placed in issue what was being done, their knowledge of the same, and the CBR's (alleged) knowledge and reaction to the same.

275. Thus, by way of example, Mr Yurov and Mr Fetisov plead as follows in their Defences in relation to the CBR:-

(1) "The Russian Central Bank was well aware of the existence of this network of companies held for the Bank's benefit but not recorded on the Bank's balance sheet, and loans to them pursuant to the arrangements described above, from at least early 2009. The Russian Central Bank did not require the Bank to stop this practice." (Yurov Defence paragraph 6.3(d)).

(2) "From (at the latest) early 2009, the CBR was (and, in any event, Mr Fetisov believed that it was) aware from meetings and discussions which it held with the Bank's management, as well as its own review of the Bank's books and records, that the Bank had taken over certain assets following defaults on loans/investments, but that such

assets were being held through various structures and not on the Bank's own balance sheet. The CBR did not, at any time prior to December 2014, require the Bank to cease using such off-balance sheet structures."

276. The Shareholders have themselves put in issue the fact of "balance sheet management", its appropriateness (which includes its impact on the accounts) and whether the CBR knew about it or not (and what their reaction would be when informed about it, if they did not know about it).

277. The Bank, in turn, in its Replies, joins issue with the Defendants' pleas to the Bank's case, and positively pleads variously (examples given by reference to the Yurov Reply):-

(1) In response to the allegation that the loans in issue would have been approved by the CC even if the Shareholders' interest had been disclosed:

> "As a matter of Russian law, the Credit Committee and/or Supervisory Board would not have been able lawfully to approve transactions:
> 8.1. designed to hide facts, which would have led to the Russian Central Bank causing a takeover of the Bank by the Deposit Insurance Agency;
>
> 8.2. not reported to the Russian Central Bank, which would cause money to leave the Bank and into the control of 'controlling persons' thereby reducing Bank reserves below that required by law; and/or
>
> 8.3. which amounted to a fraud on the Bank's depositors by the falsification of the Bank's publicly available accounts."

(2) "9. it is denied that the Russian Central Bank knew of and/or implicitly approved the "balance sheet management" exercise".

(3) "11. Further, insofar as documentation was prepared indicating that the aforesaid Borrower Companies had a genuine or legitimate commercial business and were looking to borrow money from the Bank to make genuine investments for the purposes of any such business, such documentation was false and misleading because it was never intended that such companies would do so. It is to be inferred that the Primary Defendants were well aware of and/or directed the production of such false documentation in order to deceive the Bank's auditors."

(4) "13. Further and in any event, the Primary Defendants received considerable personal benefits from the "balance sheet management" exercise and the falsification of the Bank's accounts, in that they continued to extract substantial salaries and bonuses from the Bank in the period when its accounts were being falsified, they caused loans to be made to companies under their control (including companies admittedly under their control, such as Willow River and RCP), and they inflated the perceived value of their shareholdings in the Bank. Had the Bank's true financial position been disclosed to the Russian Central Bank and/or been publicly known, the Bank would have collapsed and/or entered the DIA rehabilitation scheme, and the Primary Defendants would have been unable to have caused the Bank to provide these benefits."

(5) In the context of limitation, "22.2"… their fraud took place over a long period of time and was deliberately concealed, included through the falsification of the Bank's published and internal accounts."

278. A consistent theme throughout the Bank's statements of case is accordingly the plea that the Bank was falsifying the accounts in the respects alleged, and the Court is invited to infer that the Defendants acted in bad faith in that regard (albeit that that is not a necessary element of the claim given the Shareholders' duties under Russian law).

279. It is also relevant to note the chronology of how the pleadings developed from which it is clear that from a very early stage (certainly by the time of the hearing of Mr Yurov's discharge application) the Defendants knew the nature of the Bank's case against them both affirmative, and in response to the Defendants' case. In this regard, the Bank originally pleaded the Particulars of Claim on the basis that the loans were themselves uncommercial, in bad faith, and in breach of duty (and that remains a free-standing aspect of the Bank's case). It was in riposte to that that Mr Yurov advanced a defence based on "balance sheet management", and in relation to which he made a number of admissions in his affidavit served in relation to his discharge application:-

(1) In 2008 there was "considerable concern that if those losses had all been recorded on the Bank's balance sheet, it would have had its licence revoked by the Central Bank of Russia and consequently been declared bankrupt. For obvious reasons, the Bank's management wished to do everything possible to prevent this from happening, and took steps to manage its balance sheet using its pre-existing offshore structure (as I will describe in more detail below)." (Mr Yurov's second affidavit para 30)

(2) "60. … The key in the short term was to ensure that, in the interim, the Bank did not have to enter all of this bad debt on its balance sheet and so risk bankruptcy.

61. Revocation of the Bank's licence would of course have been a disaster for the Bank and its customers, and so I believe that this action was justified as an attempt to avoid this disaster…"

(Mr Yurov's second affidavit paragraphs 60-61).

(3) "…This kind of solution, i.e. circular transactions intended to defer bad debt ruining the balance sheet, was very common in Russia at the time. It may be that this was not strictly in accordance with Russian banking regulations, but it was common practice in Russia and was seen as a valid way of dealing with an otherwise near-impossible situation that the whole Russian banking industry was encountering" (Mr Yurov's second affidavit paragraph 62)

280. The Bank's own riposte (as later pleaded out in the Re-Amended Particulars of Claim in 2017) was that these were artificial banking transactions mis-stating the true state of the Bank's financing which involved false accounts and the deception of both the CBR and depositors. That such matters were live issues even at the time of the discharge application can be seen from the terms of the Males J. judgment in which express reference is made to the deception of the CBR and allegations of false accounting:-

"8. …

The bank says that as a result the shareholders embarked upon a scheme to disguise the bank's toxic debts by recycling money, largely by way of sham

loans to further offshore companies under their control. Instead of using the loan funds for legitimate business purposes, these offshore companies would use them to service the bad debts owed to the bank by other companies in the offshore network, paying interest in order to avoid a default but not reducing (to any great extent or perhaps at all) the outstanding principal. This was a self-perpetuating process since the borrowers could only pay back these loans with money recycled through further sham loans and the overall result was to increase the amount owed to the bank. The bank says that the object and the result of this circular flow of funds was to deceive the outside world, including the Central Bank of Russia and the ordinary Russian savers who deposited their savings in the bank, over many years, by falsifying the bank's accounts and concealing its insolvency." (emphasis added)

281. In the above circumstances, I am satisfied that the Bank's case that the CBR was misled, to the knowledge or at the direction of the Shareholders (Issue 27.3) and that the accounts were false to the knowledge or at the direction of the Shareholders (the gravamen of Issue 27.10) are properly pleaded and particularised in the Particulars of Claim and Reply and that the Bank is entitled to advance its case in that regard. I note, again, that it is not the Bank's case that there was some particular breach of IFRS or accounting practice (such a case would probably have raised issues that would have involved expert accountancy evidence).

282. I also consider that the Bank is entitled to advance a case that steps were taken to deceive the Bank's auditors (including through the provision of false information in interviews) to the knowledge or at the direction of the Shareholders - the same being pleaded at paragraph 11 of the Yurov Reply (as quoted above). However, I do not understand this to be a free-standing point, but rather one deployed to support other aspects of the Bank's case and/or to undermine the Defendants' defences thereto. Thus, in order for the balance sheet management to work, it is said that the accounts had to be manipulated to reflect something other than the true state of the Bank's balance sheet, and in order for this to happen the auditors (who are not alleged to be complicit) would have to be deceived. The false information given in interview also goes to the alleged distinction between "Bank Companies" and "Shareholder Companies" given what the auditors and third parties were told about the relevant companies being owned by other individuals (Mr Worsley's UBOs), and goes to undermine the Shareholders' pleaded case that the relevant companies were owned by or for the benefit of the Bank itself.

283. I would only add that the Bank's case that the CBR was misled, to the knowledge or at the direction of the Shareholders and that the accounts were false to the knowledge or at the direction of the Shareholders are not necessary elements of the Bank's case that the Shareholders acted in breach of duty in relation to "balance sheet management" given the other features of that of which the Bank complains (including, but not limited to, loans of millions of dollars to companies said to be owned by the Shareholders on what are said to be patently uncommercial terms with no security, that purport to be arms-length loans to commercial borrowers owned by third parties when (it is said) the Shareholders know they are no such thing and that they are not in a position to service, still less repay loans themselves and indeed that the plan is that the Bank ultimately pays and services such loans).

E. THE SHAREHOLDERS AND THE STRUCTURE OF THE BANK (ISSUES 2-3)

What were the Defendants' respective roles and responsibilities at the Bank during the relevant period (2008 to 2014) (Issue 2)

What was the legal effect of a resolution of the CC approving the entry into a particular transaction and, in particular, did a resolution constitute a mandatory instruction to the Bank's management to enter into a transaction? Was there, as a matter of fact, any further independent consideration of whether or not to enter into a proposed transaction after it had been approved by the CC and what (if any) relevance does this have?

284. Issue 3 is addressed in the context of the consideration of Russian law in Section M below. This section addresses the Shareholders' roles and responsibilities in the context of their position as Supervisory Board Directors and members of the Credit Committee and how those roles fit into the Bank's structure. Paragraph 1 of the List of Agree Facts and Issues contains matters relating to the Shareholders and Structure of the Bank that are agreed. I have already quoted these above in Section B.1 above and will not repeat such matters here.

E.1 STRUCTURE OF THE BANK

285. The structure and organisation of the Bank is set out in its constitutional documents in particular its "Articles of Association" or "Charter" (both expressions are used synonymously).

286. It is common ground that the Shareholders were, at all material times, members of the Bank's Supervisory Board and Credit Committee. However, the Shareholders' precise roles and responsibilities remain in issue. The Bank had two boards: the Supervisory Board (also known as "the Board of Directors") and the Management Board.

E.1.1 THE SUPERVISORY BOARD

287. The Supervisory Board was elected on a yearly basis at the annual general meeting of shareholders (the "AGM"). There were always at least 7 members on the Supervisory Board. At all material times the Shareholders were members of the Supervisory Board and Mr Yurov was its Chairman. The other members varied over time. The Supervisory Board met once per quarter and had the power to make changes to the composition of the Management Board.

288. There was some debate between the parties as to the precise role of the Supervisory Board. In particular Mr Yurov, in his evidence, sought to characterise it as having some sort of strategic oversight role which seems to have been an attempt to distance himself (and the other Shareholders) from the transactions in issue which he suggested were promoted and implemented by the Bank's executive management.

289. I consider that the surest guide to what the Supervisory Board was and what its role and responsibilities were, is to look at the Bank's Articles of Association/Charter where such matters are addressed.

290. Article 17.1 provides: "*The Board of Directors shall carry on general management*[26] *of the Bank's activities, except settlement of issues that are within the competence of the General Meeting of Shareholders pursuant to the current laws and these Articles of Association.*"

291. Article 17.2 sets out a number of specific competencies of the Supervisory Board ("The competence of the Board of Directors shall cover the following issues"). Specific competences of the Supervisory Board include:-

(1) ***"****forming the Bank's executive bodies and termination of their powers ahead of schedule"* (17.2.9). It is clear from this that the Supervisory Board is high up in the corporate hierarchy. It involves the power to hire and fire the Bank's executive management - as illustrated by a Supervisory Board resolution of 27 May 2013 terminating the authority of the Deputy Chairman of the Executive Board.

(2) approving *"large transactions"* (Article 17.2.15) and *"transactions with interest in execution"* (Article 17.2.16)

(3) *"determining the list of positions of the Bank's officers to be appointed and replaced with approval of the Board of Directors only"* (Article 17.2.24)

(4) *"classification of loans (determining the borrower risk category)"* (Article 17.2.30). Examples of this appear in the documentation – for example on 30 June 2014 the Supervisory Board (including the three Shareholders) approved how the loan was to be provisioned in accordance with CBR Regulation 254-P.

(5) *"taking the decision on lending to related persons"* (Article 17.2.31).

(6) *"writing off bad debts and/or those recognized to be uncollectible."* (Article 17.2.32). Examples of this appear in the documentation – for example on 13 December 2013 the Supervisory Board (including the three Shareholders) wrote off a bad debt owed by an arm's length borrower.

(7) *"establishing, organization and functioning of effective internal control in the Bank; assessment of effectiveness of internal control and taking measures for its improvement; checking conformity of internal control to the nature, scope and conditions of the Bank's activities".* (Article 17.2.35)

(8) *"considering documents on organization of the internal control system in the Bank, taking measures that ensure prompt implementation of recommendations and notes of the internal control system, the Bank's auditor and regulatory authorities by the Bank's executive bodies…"* (Article 17.2.36)

292. Article 17.8 is an important provision when considering the respective roles and responsibilities of the Supervisory Board and the Management Board. It provides:

[26] The Defendants contend that the phrase "general management" is a mistranslation and should read "overall governance". I do not consider this is of significance. Either way it is clear that the Supervisory Board is high up in the hierarchy in terms of corporate governance.

> "Issues that are within the competence of the Board of Directors may not be submitted to the Chairman of the [Management] Board or the [Management] Board for settlement".

293. This makes clear that matters within the competence of the Supervisory Board are its responsibility and are non-delegable. In other words the Supervisory Board could not delegate issues within the competence of the Supervisory Board including (for example) matters such as the classification of loans and writing off bad debts to the Chairman of the Management Board or the Management.

294. Article 17.10 sets out the specific competencies of the chairman of the Supervisory Board including (amongst other matters):

> "17.10 The competence of the Chairman of the Board of Directors shall cover the following issues:
>
> 17.10.1 organising the work of the Board of Directors;
>
> …
>
> 17.10.4 holding joint meetings of the Board of Directors and the [Management] board.
>
> …
>
> 17.10.7 entering into an agreement with the Chairman of the [Management] Board on behalf of the bank.
>
> 17.10.8 exercising control over activities of the Chairman of the [Management] Board and the [Management] Board, as well as Committees of the Board of Directors;
>
> 17.10.9 issuing orders within his/her competence and the competence of the Board of Directors to be binding upon all of the Bank's officers"

295. Thus, amongst Mr Yurov's other competences (i.e. responsibilities) as Chairman of the Supervisory Board was the organising of the work of the Supervisory Board including *"exercising control over activities of the Chairman of the Management Board and the Management Board, as well as Committees of the Board of Directors"* and *"issuing orders within his/her competence and the competence of the Board of Directors to be binding upon all of the Bank's officers."* Given such responsibilities it is clear that the executive management answered to him (as well as other members of the Supervisory Board).

296. It is clear from the above Articles that the Supervisory Board had a superior position in the corporate hierarchy of the Bank, including "hiring and firing" powers in relation to the Bank's management, with the Supervisory Board having the specific and non-delegable responsibility for matters such as the classification of loans and writing off of bad debts, as well as establishing and enforcing effective internal controls within the Bank. Indeed under Article 17.8, the Supervisory Board was not permitted to delegate such functions to the Bank's management.

297. Although this was not part of the Bank's pleaded case, and it was not dealt with by the witnesses, or in the expert evidence, it is also clear that the Supervisory Board (per Article 14.4 of the Charter) *"shall approve the Bank's financial statements at least 30 days before the date of holding the Annual General Meeting."* Given that the specific competencies of the AGM included at Article 16.2.12, "*approving the annual financial statements, the annual reports"* the position (at least under the Charter) was that the Shareholders would be approving the Bank's accounts both as Supervisory Board Directors but also as shareholders at the AGM. It is also clear that the Supervisory Board did, in fact, approve accounts given that there are three examples of them doing so in the trial bundles, namely the approval of the 2010 Annual reports and accounts on 31 May 2011, the approval of the 2012 IFRS accounts on 27 May 2013 and the approval of the 2013 annual report and accounts on 29 April 2014. In each case the three Shareholders are stated to have voted by ballot in favour of approval. Item 4 in relation to each of the 2010-2013 AGMs record that Mr Yurov "took to the floor" in relation to the approval of the accounts (there is no full translation of the 2014 accounts but I consider that it is more likely than not that the accounts would have been approved in the same way). In addition, both the 2008 and 2009 IFRS accounts were signed by Mr Fetisov as President of the Bank. I have already addressed Mr Fetisov's attempts to distance himself from the contents of the IFRS accounts.

298. It was the Supervisory Board that was responsible for calling the AGM, at which the members of the Supervisory Board were themselves elected. It was the Supervisory Board that was responsible for making proposals to the AGM in relation to the approval of related-party transactions (although, tellingly, the Borrowers were not mentioned). Thus at the meeting of 10 May 2012, the Supervisory Board (including each of the Shareholders) agreed, at item 10, to recommend that the shareholders approve the entry into related-party transactions *"that the Bank may carry out in the ordinary course of business*" (with a list of companies which were mainly companies in the Bank's own holding structure) and with the individual Shareholders personally. This proposal was then adopted at the 2012 AGM. There was no mention of any of the Borrowers (for example Erinskay, which in fact borrowed substantial sums from the Bank in 2012). Equally at the 2010 AGM there was no reference made to WR or RCP which together borrowed around US$110 million from the Bank at the end of 2010 – and which the Shareholders now admit owning.

299. It is clear that the Shareholders were aware that one of the responsibilities of the Supervisory Board was to make proposals to the AGM in relation to the approval of related-party transactions, not least as Mr Yurov, on his application to discharge the WFO, went so far as to suggest that the Bank should have referred to the generalised personal approvals (as part of the duty of full and frank disclosure on the *ex parte* application). This is a singularly bad point (not pursued in the witness statements for trial) given the nature of those approvals which cannot possibly extend to specific loans to companies in the offshore network beneficially owned by the Shareholders. Males J (in my view rightly), gave this argument short-shrift at [59]:-

> "In my judgment there is nothing in this complaint. The resolutions passed at the annual general meetings do not begin to constitute approval of the grant of unsecured loans for "balance sheet management" purposes, let alone of the siphoning off of part of the loan funds for the shareholders' personal use. In any event it is hard to see how transactions of this nature could validly have

been approved by the shareholders as they appear to have amounted to a fraud on depositors. Disclosure of the resolutions was unnecessary and would have added nothing."

300. The significance of this role of the Supervisory Board is two-fold. First it is another example of the Supervisory Board's role being much wider than the Shareholders suggest. But secondly, and importantly, it means that the Shareholders were well aware that there was a specific process to be followed for the approval of related-party transactions – indeed they followed this process for relatively minor dealings between the Bank and companies in its own holding structure, and for personal loans); but they singularly failed to do so for "balance sheet management" transactions or loans to what the Shareholders now admit were their own companies (including SiberianKD, Business Group, Priangarskiy, WR and RCP). The consequence (quite apart from the Shareholders' failure to follow that process) is that such transactions, which were related-party dealings which would clearly require disclosure and approval, appeared instead, in the Bank's audited accounts, to be genuine arm's length commercial lending.

301. It is quite clear that the role of the Supervisory Board was not limited to giving general strategic overview and ensuring the Bank complied with its business plans and budgets, and I reject Mr Yurov's evidence in that regard. Such evidence is inconsistent with the terms of Article 17 which makes clear that the Supervisory Board's role and responsibilities were wider than that. Equally, and whilst Mr Belyaev's evidence was that the Bank's Charter *"was a very dry, long document, I do not believe I really paid a lot of attention to it"* (which may say something about Mr Belyaev's attitude to his responsibilities as a member of the Supervisory Board if he really did not pay a lot of attention to it), the Bank's Charter does set out the competencies i.e. responsibilities, of the Supervisory Board – and they included matters of particular relevance to the allegations against the Shareholders in this case.

302. Equally it is clear that the Supervisory Board was involved in lending at a transactional level, as shown by its involvement in approving *"large transactions"* and *"transactions with interest in execution"*, in the *"classification of loans (determining the borrower risk category)"*, *"writing off bad debts and/or those recognized to be uncollectible"* and *"taking the decision on lending to related persons"*, as well as its role at the AGM in relation to related-party transactions.

303. The overall impression I have formed, in particular given the terms of the Charter and the matters I have identified above, is that Mr Yurov (and the other Shareholders) unjustifiably downplayed the role of the Supervisory Board and that they did so in an attempt to distance themselves from the transactions in issue (given their membership of the Supervisory Board). I consider that a similar (equally unjustified) approach was adopted in relation to the Credit Committee decisions to which they were party.

E.1.2 THE MANAGEMENT BOARD

304. The Management Board was a collegiate executive body, which was overseen by the chairman of the Management Board (otherwise referred to as the CEO) who was

responsible for the daily operations of the Bank. None of the Defendants were at any time a member of the Management Board.

305. Pursuant to Article 18.5 of the Bank's Charter the competence of the Management Board included providing information to the Supervisory Board about the Bank's financial state, the implementation of priority programmes and transactions and making decisions which might have a significant impact on the Bank's affairs. Article 18 sets out the competences of the chairman of the Management Board, which include the general management of the Bank's activities (Article 18.9.1) and organising accounting, tax accounting, reporting and document circulation at the Bank (Article 18.9.14). Below the Management Board was a Management Committee. Other committees also reported to the Management Board, such as the Asset & Liability Committee, the Credit Committee (CC), the Risk Committee and the Audit Commission.

E.1.3 THE CREDIT COMMITTEE

306. The Credit Committee reviewed and approved individual lending transactions, including all of the relevant transactions in the present case. The Shareholders were at all material times members of the Credit Committee. At least one of them was present at each of the Credit Committee meetings at which the relevant transactions were considered. Mr Yurov acted as the chair of the Credit Committee at every meeting he attended and, when Mr Fetisov was present and Mr Yurov was not present, Mr Fetisov acted as the chair.

307. The CC Regulations are of particular relevance as the Articles of the CC Regulations define the parameters in which the Credit Committee operated, and speak for themselves as to the Credit Committee's role, and the responsibilities of members of the Credit Committee.

308. Articles 1 and 2 provide:

> "1. Purpose
>
> These Regulations describe the status, authority and decision-making procedures of the collegiate competent authority – the Credit Committee of [the Bank].
>
> 2. Application scope
>
> These Regulations shall be applied by the Members and the Executive Secretary of the Credit Committee of the Bank, as well as by the staff members of all subdivisions of the Bank during preparation and execution of resolutions issued by the Credit Committee of the Bank."

309. Article 6.2 provides that "*the Credit Committee is created for the purpose of implementing Bank's credit policy and making decisions concerning the credit risk management"*.

310. Article 6.3 provides, *"Activities of the Credit Committee are governed by the effective legislation of the Russian Federation, regulatory acts of the Central Bank of Russia, Bylaws of the Bank, resolutions of the Board of Directors Management of the Bank, regulations on the Bank's credit policies, as well as these Regulations and other regulatory documents of the Bank."*

311. Article 6.4 provides that: *"Implementation of resolutions issued by the Credit Committee is **mandatory** for all structural subdivisions and Bank's staff members participating in the credit transactions"* (emphasis added). Notwithstanding this express provision of the 2010 CC Regulations it apparently remains part of the Shareholders' case on Russian law (as addressed in Section M.6 below) that decisions of the Credit Committee approving the making of loans were advisory only and that the decision actually to issue a loan or to conclude an agreement was ultimately that of the relevant executive officer (such as the CEO).

312. However, there is no evidence in fact that anyone (including any executive officer such as the CEO) did consider resolutions passed by a Credit Committee and whether they were in the best interests of the Bank (the lack of such consideration is consistent with the express language of Article 6.5, as implementation is expressly stated to be mandatory). Indeed, Mr Yurov appeared to accept that, as a matter of fact, this did not take place as it was stated at paragraph 103 of his Written Closing Submissions that, "*since approval was essentially a formality because the Loans and Transactions had been arranged within the Bank and were known to be for the benefit of the off balance sheet network no further independent consideration was required after approval by the Credit Committee*". Whilst this is based on the premise that there was nothing wrong with balance sheet management (and also that what was being done was for the benefit of the Bank rather than Shareholders), each of which is said to be a false premise by the Bank, it is a recognition that there was no independent consideration by anyone after approval by the Credit Committee as to whether the loan was in the Bank's best interests.

313. If there was to be any approval of Credit Committee decisions, Article 6.5 of the 2010 CC Regulations suggests that it would be by the Supervisory Board. Article 6.5 provides (at least per the Bank's translation thereof): *"Resolutions of the Credit Committee are approved by the Board of Directors of the Bank"*, although it was suggested by Mr Yurov in evidence that this was a mis-translation and that, on a proper translation of Article 6.5, it was regulations (rather than resolutions) that were required to be approved by the Supervisory Board. It is in any event common ground that the Supervisory Board did not in fact approve any of the Loans and Transactions that are in issue.

314. Article 7.1 contains detailed provisions concerning the authority of the Credit Committee. Article 7.1.4 addresses decisions of the Credit Committee in relation to corporate borrowers.

315. Article 8 governs the decision making procedure, and also provides for the organisation of the Credit Committee and the appointment of its Chairman, Pursuant to Articles 8.4 to 8.7:

> "8.4. The Credit Committee is authorised to make decisions if the voting is attended by more than one-half of the members of the Credit Committee, whose votes participate in voting in accordance with paragraph 8.2. of these Regulations (unless stipulated otherwise by the Board of Directors).
>
> 8.5. Members of the Credit Committee can vote "in favour", "against" or "abstained". The resolution is adopted in the wording submitted for voting if a simple majority of voters (50% +1 vote) have voted "in favour". If the number of "in favour" votes is equal to the total number of "against" and "abstained"

votes, the final decision on the wording submitted for voting shall be made by the Chairman of the Credit Committee.

8.6. If any member of the Credit Committee has interest in the adopted resolution, such interested party must leave the meeting while the matter is being debated and he or she cannot participate in voting.

8.7. If the interested party is the Chairman of the Credit Committee, he or she cannot participate in voting. In this case, the resolution is adopted in the wording submitted for voting by simple majority of votes".

316. The operational procedures of the Credit Committee are set out in Article 11. Article 11.1 provided that *"meetings of the Credit Committee are usually held on the weekly basis, each Wednesday. Meeting start time is at 16:00. If necessary, the Chairman of the Credit Committee can change the date and time of the meetings, schedule additional meetings or cancel the meetings."*

317. Article 11.3 provided that:

"11.3. In order to add a matter to the Agenda of the Credit Committee, a subdivision of the Bank that proposes such issue must submit, no later than at 14:00 on Monday, the wording of the issue to the Executive Secretary and to indicate the speaker. Bank's subdivision that proposes the matter must submit the following documents to the Executive Secretary in the electronic format no later than 12:00 on Tuesday: - draft of the Credit Committee resolution; - credit memorandum (report) prepared by the credit subdivision of the branch or the headquarters (in case of credit limit establishment for a client or execution of a singular credit transaction with a client); - report from the Risk Management unit (in case of credit limit establishment for a client or execution of a singular credit transaction with a client); - report from the Legal Department (if necessary); - report from the Managerial Accounting unit (if necessary, in case of matters related to the risk of violation of Bank's regulations); - reports from other Bank's subdivisions (if necessary); - other documents (if necessary). Reviewing the matter without the documents listed in this paragraph is not allowed."

318. However, and whilst I bear well in mind the possibility that not all documentation is before the Court (a point stressed on behalf of the Defendants), I am satisfied that the reality was very different to that contemplated under Article 11.3 in terms of the provision of supporting documentation. In this regard there is an absence of any actual documentation justifying the commercial rationale and credit risk of most of the loans in issue in the present case, contrary to what would be expected if a bank, and its credit committee, was acting in a normal commercial manner considering the risks of a loan on its merits (which is what was clearly contemplated in the context of the provision of the documentation identified in Article 11.3). To take one example (as identified by the Bank), when the Credit Committee approved a RUB 3 billion loan to Stivilon in March 2010 (approximately US$100 million at the time) there is no evidence that the Credit Committee had <u>any</u> reports assessing matters relevant to the risk, including assessing the Gelendzhik project, its anticipated timeline and Stivilon's ability to generate the revenues that would be needed to service the loan and pay it back within the loan period (3 years).

319. In other cases, I am satisfied that such paperwork as was produced as purported justification for the loans was, in fact, positively misleading, as I address below in the Erinskay/Baymore and LBSC Borrower Sections below (Sections R.2 and R.3 respectively).

320. The Shareholders claimed that, notwithstanding the lack of such documents in evidence, they did exist. Mr Fetisov's indicated that, to the best of his recollection, up to about 2012 when he attended physical CC meetings, the documents were circulated by email but following 2012, when he attended meetings *in absentia*, the documents came as a physical stack of papers which he would look at when he returned to the office. Mr Yurov's evidence was that such documents were circulated to members of the Credit Committee. Mr Stanley suggested that the documents may have been uploaded onto the Bank's intranet rather than emailed, as envisaged by Articles 11.5 and 11.6. It is also suggested that it is unlikely that the credit committee minutes sprang fully formed without any preceding documents (albeit that that presupposes that the Credit Committee meetings, as recorded in the minutes, involved any real consideration of the merits of the loan or transaction under consideration).

321. Notwithstanding the Shareholders' evidence (which is not supported by any corroborating contemporary documentation) the fact is that no such documents were found following an extensive disclosure process. The credit files for all the borrowers relevant to the claim were within the body of material searched for the purposes of standard disclosure. Due diligence documents were found for Erinskay and Baymore (albeit in positively misleading terms) so I consider that had credit memoranda and risk reports been created for other borrowers they would be in the material before the Court. It is also notable that the Defendants did not take issue with the predictive coding used by the Bank during standard disclosure, and have not made any requests for specific disclosure in the 18 months since standard disclosure took place. The Bank's case has always involved a claim of lack of due diligence and so the relevance of this category of document has always been apparent.

322. I consider that it is inherently improbable that such documentation did in fact ever exist. If it did exist then one would have expected not only that a substantial number of examples would have been revealed in the disclosure exercise (even if not a complete picture of all such documentation), but also that at least some such documentation would have been referred to in the minutes (even making allowance for the fact that the minutes were formal in nature containing a record of the terms that were considered and the decision).

323. There is also the fact, already alluded to, that any due diligence documents which were available were fictitious and deceptive documents, giving the false impression, for example, that Erinskay and Baymore were genuine commercial borrowers (falsely suggesting that they had a real independent business with management offices and employees and the like), the clear purpose of which was to mislead anyone reading the credit file.

324. It is also difficult to see how, in fact, there could have been genuine due diligence documents addressing the merits of particular proposed loans given the recurring theme of lending what amounted to hundreds of millions of dollars to offshore companies with no assets, no genuine commercial business and no security. The likelihood is that if any

other similar documents were generated, they would have had to be similarly deceptive, otherwise they could not have justified the lending, and terms, proposed.

325. Mr Willan, as counsel for Mr Fetisov, referred to certain documents in relation to Priangarskiy which were sent by email to Bank employees (and therefore were said to be in the Bank's custody). These included documents relating to a December 2013 Audit and an April 2014 analysis of the competitive position of Priangarskiy, undertaken by Pyroy (an industrial consultant). He also referred to certain correspondence with the CBR which alluded to due diligence having been undertaken for a number of borrowers. However, no such due diligence emerges from the documentation that has been disclosed. Equally the documents referred to do not appear to have been the type of documents that it was envisaged would go before a credit committee, and there is no contemporary documentary evidence establishing that due diligence was considered at any Credit Committee meeting to determine whether it was in the Bank's best interests to lend the money to the borrower in question.

326. In the above circumstances I reject the Shareholders' evidence that such documentation was generated and was provided to members of the Credit Committee, such evidence coming from witnesses none of whom I have found to be witnesses of truth, and each of whom had every reason to give untruthful evidence in this area. It is inherently improbable that no such documentation would exist or be referred to in minutes if, as alleged, it was provided in relation to every Credit Committee meeting.

327. There is also a history of back-dating of Credit Committee meetings and the recording of matters as discussed which were not discussed at the time. Thus, whilst there was a procedure (in Article 11.9) in relation to the changing of Minutes of meetings that had already taken place, there is evidence of the widespread production and approval (other than in accordance with the Article 11.9 procedure) of back-dated Credit Committee meeting minutes so as to include matters that were never even discussed at the time, but were (falsely) represented as having been discussed, in such subsequent back-dated documents.

328. I have already addressed Mr Yurov's involvement in relation to this when commenting on the evidence of Mr Yurov, and why I am satisfied that Mr Yurov gave untrue answers concerning documents that he was involved with which had clearly been back-dated and/or which misrepresented what had occurred (or when), no doubt in order to distance himself from conduct which he recognised was inappropriate. The example I gave related to correspondence on 13 August 2012 in relation to a resolution of the Credit Committee on 25 July 2012. However many other examples exist.

329. By way of further example, on 23 May 2012 Mr Postnov wrote to Mr Yurov (via his secretary) asking him "*coordinate and instruct the secretary of the CC*" to:

> "1. To include the decision regarding the provision of a loan to the company Arelwind Investments Ltd. amounting to 300 million roubles **in the minutes of one of the Committee's previously held meetings**. The loan will be used for satisfying margin call requirements by the Bank's borrowers carrying out operations in the federal loan bonds market…
>
> 2. To insert a change proposing the reduction of the share of the cession price, paid for by the purchaser of the claims on the date that the deal was made, from 25% to 15%, into the previously adopted decision regarding the making of a deal on the

cession of the right of claim under the retail loan portfolio by the collection agency Pravo i biznes...

3. To include the decision regarding the completion of a foreign exchange forward transaction amounting to $10 million with the company TIB Investments in the minutes of the Bank's Credit Committee's meeting that took place previously on 25/04/2012. The aim of the transaction is to manage the foreign exchange position of the Bank and of its clients and is already taking place at the present time…

4. To include the decision regarding the extension of the aforementioned forward transaction in a part consisting of $2 million in the minutes of one of the previously held meetings".

330. It could not be a more blatant example of the falsification of minutes of Credit Committee meetings than to suggest that the decision be put in "*the minutes of one of the Committee's previously held meetings"* (i.e. it did not matter which, as plainly no such decision had taken place at a particular meeting). Equally the reference *to "the loan will be used for satisfying margin calls requirements by the Bank's borrowers carrying out operations in the federal loans market"* is clearly a reference to "balance sheet management" and no doubt the need for more money to be lent to the offshore network to meet margin calls on REPOs.

331. Mr Yurov went along with this dishonest charade. The next day, Ms Sidorova replied with a scanned image of the page signed by Mr Yurov and the words: "*I. S. Yurov's consent*" which I am satisfied she would not have done unless Mr Yurov had consented.

332. Such back-dating and falsification of Credit Committee minutes was clearly rife. As the Bank identifies, there were multiple examples in November 2012 including on 8 November 2012, 16 November 2012 and (probably) on 23 November 2012 (though no back-dated minutes including the proposed resolution have been found in the disclosure).

333. The relevance of the back-dating and falsification of Credit Committee minutes is four-fold. First, it shows that Mr Yurov was not prepared to be honest in the discharge of his responsibilities (and was also cavalier in the discharge of those responsibilities). Second, it sheds light on the fact that Credit Committee minutes were used, on a number of occasions, to provide an approval "paper-trail" (as the Bank accurately puts it) rather than as a forum where there was a genuine and bona fide consideration of a particular loan on its merits. Third, it rather tells the lie to Mr Yurov's evidence that his role as a member of the Credit Committee was to manage credit risk and ensure not a single kopek of Bank money was lost due to credit risk, and that he had to be convinced by all the materials available to him that the credit risk had been properly reviewed, valued and calculated, and that making a loan would not harm the Bank due to credit risk. That is hardly consistent with the conduct of someone who was prepared to back-date and falsify documents approving a loan seemingly unaccompanied by any materials, and not even considered at a particular Credit Committee meeting yet to be (dishonestly) recorded as such. Whilst there is no evidence that this practice took place in relation to the approval to make any of the loans in question in the present case, such practice, and Mr Yurov's involvement in it, is part of the backdrop against which Mr Yurov's role in relation to the loans under consideration is set. Fourthly, given that such requests for back-dating and

inclusion in minutes after the event (and in some cases even without regard to the subject matter of a particular meeting) were directed by Mr Postnov to Mr Yurov, this shows that the management looked to him (as opposed to the other CC attendees) to approve such matters – which is of relevance in the context of Issue 17 (Shareholders causing and/or procuring and/or agreeing Loans and Transactions, as addressed in due course below).

334. I would only add that there is no evidence to support Mr Yurov's assertion, when examples were put to him cross-examination, that there would or must have been discussions between or approvals of other members of the Credit Committee approving of such further resolutions. Given the clear paper trail between Mr Postnov and Mr Yurov it is plain that had there been involvement with, or approval by, other Credit Committee members, this would feature in the contemporary documents – yet there is no such documentation. The fact that Mr Postnov contacts Mr Yurov and no one else itself evidences, I am satisfied, a recognition that back-dated and falsified resolutions were in the gift of Mr Yurov rather than the Credit Committee as a whole following proper consideration thereof.

335. The 2010 CC Regulations also govern attendance and when a resolution *in absentia* could be obtained. First, all members of the Credit Committee were obliged to attend meetings, except for in exceptional circumstances (Article 11.8). Second in case of an urgent need to obtain a resolution, the Credit Committee could provide approval in absentia by means of a questionnaire ballot (Article 12).

336. However, it is plain that, in reality, meetings often took place *in absentia*, and had nothing to do with urgent need. Indeed, Mr Fetisov (albeit, I am satisfied, over-stating the position) even went so far as to say in evidence (despite being shown as being present at meetings) that *"I'm pretty certain that within the last two years of me being in the Bank, 2014 and 2013, there was not a single time, not a single time when I went in person to sit at any Credit Committee. I signed some ballots, definitely I did that, but I just say that this somehow document -- probably the real process was slightly different to what it was. So I do not remember being there."* I am satisfied, however, given the distinction that is drawn in the documents between actual meetings and absentee ballots/voting protocols, that where the documents state that a meeting took place it is most likely that a meeting did take place albeit that I cannot rule out that the document (falsely) recorded that a meeting took place when it did not, given the propensity for documents to be produced after the event that recorded matters being discussed that were not discussed.

337. In the context of a vote *in absentia*, the procedure, was that members of the Credit Committee provided their approval by means of the collecting signatures on a questionnaire ballot. In this regard Article 12.4 *provided "in case of interest of any members of the Credit Committee in the adopted resolution, the interested member of the Credit Committee is excluded from voting"*. There is no evidence of this happening in reality in relation to the Shareholders and the Borrowers under consideration, as addressed in the Borrower Specific Sections. Article 12.4 also provides that, *"The Chairman of the Credit Committee signs the questionnaire ballot after all members of the Credit Committee have expressed their opinion on the debated matter".*

338. The Bank's case is that Credit Committee resolutions for the transactions relevant to this claim were passed by the Shareholders sitting on the Credit Committee without any scrutiny of the purpose of the loan, its terms or the ability of the borrower to repay the loan – certainly there is no evidence that this took place – and if it did it is difficult to see

how such loans could have been approved as being in the Bank's best interests (as addressed under Issue 17 and in the Borrower specific sections below).

339. Mr Yurov and Mr Fetisov's evidence was that in relation to borrowers held for the benefit of the Bank (which they say includes most of the borrowers in issue in these proceedings), the Credit Committee approval process was largely a formality, as it essentially amounted to an internal transfer of funds within the Bank, which everyone on the Credit Committee was aware of. The difficulty, however, with this evidence (quite apart from the fact that it would, itself, suggest a lack of appropriate scrutiny), is that it is predicated on the basis of a distinction between "Bank Companies" and "Shareholder companies" (as opposed to all the companies being treated as if they were beneficially owned by the Shareholders) and the (false) premise that "balance sheet management" was in the Bank's best interest (which it was not), as has already been foreshadowed and as is addressed in relation to Issue 17 below as well as in the Borrower specific sections.

340. In cross-examination, Mr Yurov's evidence was that the first loan to each borrower was not a pure formality (even in relation to companies said to be held for the benefit of the Bank), as the Credit Committee had to be sure it was prepared to accept the initial credit risk. However, subsequent decisions to advance loans to the same borrower were a formality, as the credit risk had already been assessed and accepted.

341. All of this, says the Bank, is a recent invention by Mr Yurov. The reality, says the Bank, is that there was no discussion of the commercial merits of loans, or the ability of borrowers to repay any of the loans. Further, when one looks at first loans advanced it can be seen, for example by reference to the case of Erinskay, that the first loan advanced involved the use of a positively false and deceptive risk report which misrepresented the company's true position. The loans are considered in the Borrower specific sections – suffice it to note at this point that there is no evidence of any actual discussion of the commercial merits of loans or the ability of borrowers to repay loans.

342. Mr Belyaev claimed that generally he would follow the decision of other members of the Credit Committee, who would be the ones to analyse the issue of credit risk in depth, including by way of a balance sheet analysis and by reference to managerial accounting ratios. One difficulty with this evidence (quite apart from the lack of evidence that anyone on the Credit Committee was analysing the issue of credit risk in depth) is that it comes close to Mr Belyaev admitting, if not averring, that he did not put his mind to the appropriateness of individual loans at all, and that he was abrogating the responsibilities he had. His evidence was also that if the matter before the Credit Committee concerned a roll-over of an existing loan, a change to the currency of the loan, interest rates or drawdowns within existing and pre-approved credit lines, he would not have considered credit risk in any detail as these sorts of changes would not create additional credit risk for the Bank. Again, this does not suggest that Mr Belyaev was, in reality, putting his mind to the appropriateness of particular decisions of the Credit Committee.

E.2 THE EMPLOYMENT OF THE SHAREHOLDERS

343. The Agreed Facts and Issues record agreement as to certain facts as to the employment history of the Shareholders at paragraphs 1.9 to 1.11 which I have already quoted in Section B.1 above.

E. 2.1MR YUROV

344. Mr Yurov executed contracts of employment on 8 February 1999, 15 October 2003, 18 January 2010 and 18 January 2013. It is common ground that Mr Yurov was an employee until at least 15 October 2003. The Bank disputes that he was an employee after this date, primarily because it contends that under Russian law it is not possible to employ an individual as a member of the Supervisory Board. Mr Yurov was employed as the Chairman of the Supervisory Board and did not have a separate employed capacity. I consider this issue further in my consideration of Russian law in Section M.

E.2.2 MR BELYAEV

345. Mr Belyaev executed contracts of employment on 26 April 1999, 18 January 2010 and 18 January 2013. The Bank initially put Mr Belyaev to proof as to the validity of his 2010 and 2013 employment contracts, but following the evidence acknowledges Mr Belyaev had a defined executive role in addition to his membership of the Supervisory Board and was an employee at all relevant times.

346. Mr Belyaev admits that he was involved in overseeing the Bank's proprietary portfolio, including making decisions on the Bank's proprietary and securities positions (having actively managed them up at least until 2010), working on the Bank's Asset and Liability Committee, which was responsible for defining the Bank's policies in terms of currency risk and setting general guidelines with respect to liquidity management. His evidence was also that he was involved in internal working groups, including heading up a group responsible for addressing the repayment of fees charged by the Bank to retail customers after such fees were declared impermissible.

347. However, and as already addressed when considering Mr Belyaev's evidence as a witness, he made quite incredible attempts to downplay what his responsibilities actually were at the Bank under his employment contacts. In this regard I repeat for ease of reference my findings in this regard:-

(1) Despite his 2010 employment agreement containing a bespoke Appendix prepared for him and listing under the heading "Functional Responsibilities of the Executive Manager" (emphasis added) a set of roles and responsibilities that he had and was to perform (and in return for which he was being paid US$2.5 million per annum), his evidence (which I reject) was that these were not *"responsibilities"* but merely *"competences"* which gave him *"the right to participate in discussing those issues".* His reason for doing so was clear enough – to distance himself so far as possible from the Bank's business and his responsibilities in relation to the same.

(2) He repeatedly obfuscated and refused to accept that his responsibilities were as per his 2010 employment contract stating variously (when particular responsibilities were put to him), *"the description of my duties is not exactly as they were even at the time"*, *"my evidence is that I was performing a function which this description would not be a very precise description of what I did at the bank"* and *" I didn't know exactly when I was signing that document what my responsibility would be in that regard but what this document says, that this is one of the competencies of my position. It doesn't say that this is my responsibility"*.

(3) He denied that he was performing functions that were set out in the main body of his employment contract. Clause 1(a) of the 2010 agreement provided, *"The Bank is hiring*

the […] Manager (a) for the purposes of performing the functions of the President of the Bank's investment unit until the moment of the transfer of the rights of title to more than 50 percent of the shares of the Bank in favour of OAO NK Rosneft (or its affiliated entity)". Yet Mr Belyaev's evidence was that the description in Clause 1(a) was inaccurate, did not record his true role, and that the "*investment unit*" (of which he was stated to be President) did not exist at the time. As he put it, the 2010 agreement was *"somewhat misleading"* because *"there was no as such an investment block at the bank, as a defined unit at the time"* and he had *"stopped trading or taking positions"* after 2010. Either the employment agreement was a sham to justify paying Mr Belyaev US$2.5 million a year, or he did have the responsibilities (and with it the knowledge that would come from the exercise of those responsibilities). The balance of the evidence favours the latter. If one looks to the contemporary documentation, for example in May 2012, Mr Worsley was describing Mr Belyaev's role in an email to a Mr Heiner of VP Bank as "*…Sergey runs investment block" w*hich is entirely consistent with Mr Belyaev's contract, but not his evidence.

E.2.3 MR FETISOV

348. Mr Fetisov executed contracts of employment on 1 June 2005, 18 January 2010 and 18 January 2013. As with Mr Belyaev, the Bank initially put Mr Fetisov to proof as to the validity of his 2010 and 2013 employment contracts, but now accepts he was an employee at all material times.

349. As well as being a member of the Supervisory Board and Credit Committee, Mr Fetisov was President of the Bank (from 2006 until early 2014), Chair of the Management Committee and a leading member of the distressed assets group which formed following the financial crisis in 2008 (other members of the group included Mr Buyanovsky and Mr Nazarov, as well as members of the Bank's legal, finance, risk management, accounting and security departments). It appears that the distressed assets group was concerned with the projects themselves, as opposed to how they were held or how their financing was structured. Mr Iskandyrov agreed that the decisions taken in the group were ones of high level principle rather than detail.

350. I have already addressed Mr Fetisov's responsibilities including his role as President of the Bank when commenting upon Mr Fetisov as a witness, and I will not repeat here my findings in Section C.3.3 above about his evidence and about his responsibilities. He too attempted to distance himself from events, and from involvement in the Bank's activities as was well illustrated by his omission of his role of President of the Bank in his written evidence and the denial of various responsibilities set out in his contract employment. In this regard Mr Fetisov does not mention, anywhere in his Defence or in two witness statements that he was President of the Bank, as well as being the chairman of the Management Committee for significant periods of time, and as already addressed I am satisfied that this was a deliberate omission and not something that "*must have slipped through".*

351. So far as Mr Fetisov's positive plea in his Defence that he was *"not … involved in the day-to-day management of the Bank"* I have already noted that this is difficult to square with his contractual responsibilities as set out in his 2010 employment agreement (and his 2013 employment agreement which is materially identical). As to the former it provided, amongst other matters under the heading "Subject of the Agreement" that (Clause 2.1), "*The Bank shall hire the Manager (a) for performance of the functions of the President of*

the Bank…" whilst the accompanying Annex, entitled "*Functions of the Manager's Position*", provided for numerous responsibilities as President of the Bank, as already quoted in Section B.1 above. I am also satisfied, despite Mr Fetisov's denial of responsibility for risk management in his Defence (at paragraph 8(4), supported by a Statement of Truth), that he was indeed involved high up in the reporting chain in relation to risk management as evidenced by the statements in the Bank's IFRS accounts that I have already quoted, and which I am satisfied accurately identified his involvement. Mr Fetisov was also keen to distance himself from the audited accounts that he himself signed in 2008, 2009 and 2011, and gave evidence that I did not consider to be credible about not reading the same. Again the reason is plain – he wanted to distance himself from the offshore companies and their associated loans.

F. THE BORROWERS AND OTHER COMPANIES WITHIN THE NETWORK (ISSUES 5A-8)

352. The issues that arise in relation to the Borrowers and the other companies under Issues 5A to 8 are inextricably bound up with the chronology of the development of the offshore network which will be set out and addressed at this point. It is appropriate also to include within that chronology the Bank's dealings with the CBR given that the development of the offshore network is set against the backdrop of the Bank's dealings with the CBR. Indeed it is the Bank's case that the impetus for restructuring the network, including recruiting Mr Worsley in late 2009, was questioning and pressure from the CBR (which I also address below). Those issues that relate specifically to Mr Belyaev (Issue 5A and the second sentence of Issue 7) are considered separately after considering the other issues under this Section.

353. It will be recalled that it is common ground between the Bank, Mr Yurov and Mr Fetisov that the companies in the network were originally managed by Mr Drozdov (the Bank's Head of Legal) and others. In about December 2009, Mr Worsley was engaged for this purpose. During 2011, Columba took over the administration of the network (paragraph 4 of the List of Agreed Facts and Issues).

354. It is also common ground between these parties that Willow River, RCP, SiberianKD, Business Group, Priangarskiy, Taransay and Moscow River were beneficially owned by the Shareholders (paragraph 5 of the List of Agreed Facts and Issues).

355. So far as Mr Belyaev's position is concerned, Mr Belyaev is prepared to agree the above facts as common ground from the case materials he has seen, without prejudice to his case that (i) as regards paragraph 4, he was unaware of these facts and matters at the material time; (ii) as regards the companies listed in paragraph 5, he was aware that he had an economic interest in all of the underlying commercial projects barring Taransay, and in respect of Taransay he was entitled to and did split profits from its trading with Mr Yurov and Mr Fetisov but he says he was unaware at the material times that he owned a beneficial interest in the companies and was unaware of how precisely his economic interest was held.

356. The issues that arise for determination in this Section are:-

(5A) What was Mr Belyaev's contemporaneous knowledge and belief of the facts set out in paragraphs 4 and 5 above.

(6) Were the following companies beneficially owned and/or controlled by the Shareholders (as contended by the Bank) or by the Bank itself (as contended by Mr Yurov and Mr Fetisov): Erinskay, Baymore, LBCS, Mourija, LLC5, Gofra, Stivilon, Stroyecologiya, Belenfield, Wave, Edenbury, Black Coast, Oldehove, Crylani and NRT/Yaposha? (the "Disputed Companies")

(7) Did the Shareholders believe, contemporaneously, that the Disputed Companies were beneficially owned and/or controlled by the Bank? What was Mr Belyaev's contemporaneous knowledge and belief of the beneficial ownership of the Disputed Companies?

(8) Were the Disputed Companies held and/or used for the benefit of the Bank and, if so, what if any relevance does this have for the pleaded claims?

F.1 COMPANIES IN THE OFFSHORE NETWORK

357. Of the seventeen companies which entered into pleaded loans and transactions, it is common ground that three of them were beneficially owned by the Shareholders. These were: SiberianKD, Business Group and Priangarskiy (which together formed a corporate group with interests in a project to construct and operate a timber processing facility).

358. It is also common ground that further companies held in the offshore network were beneficially owned by the Shareholders personally. These were: Willow River/RCP; Moscow River; and Taransay. The Bank does not plead in relation to specific loans or transactions entered into by these companies, but they are relevant to the claims as a whole and in relation to Willow River/RCP they are said by the Bank to constitute similar fact evidence.

359. As to the remaining fourteen companies which entered pleaded loans and transactions, the parties disagree as to for whose benefit they were held. The relevant companies are: Erinskay, Baymore, LBCS, Mourija, LLC5, Stivilon/Gofra, Stroyecologiya, Belenfield, Wave, Edenbury, Black Coast, Oldehove, Crylani, Yaposha. These are referred to in the List of Agreed Facts and Issues as "the Disputed Companies". At times in this judgment I will also use the terms "Bank companies/assets/projects" and "Shareholder/Personal companies/assets/projects". This is a shorthand to distinguish between companies, assets and projects said to be held for the benefit of the Bank and those said to be held for the Shareholders personally.

360. There were broadly two different categories of company in the offshore network. Firstly, what the Shareholders have referred to as "treasury" or "balance sheet management" companies, which were used for balance sheet management purposes and did not relate to any underlying commercial projects. Secondly, companies which held commercial projects or assets. I set out the project companies in the following table:

	COMPANY	PROJECT
ADMITTED SHAREHOLDER COMPANIES	SiberianKD/Business Group/ Priangarskiy	Timber processing facility project in Siberia.
	Willow River/RCP	Held retail properties in Moscow (predominantly property leased to German supermarket chain Billa).
	Moscow River	Real estate development project at Barkli Plaza.
	LLC5	Held office building at 5 Spartakovskaya Street

		(occupied by the Bank as its head office).
DISPUTED COMPANIES	Stivilon/Gofra/Black Coast	Development project in Gelendzhik, Russian Black Sea Coast.
	Stroyecologiya	Construction project near Glukhovo village in the Moscow region.
	Oldehove	Held real estate assets: Pokrovka and Degunino (aka Otradnoye).
	Crylani	Held real estate assets: Veshnyaki and Perevedenovsky.
	Yaposha	Held a chain of fast food sushi restaurants in Russia.

F.2 THE ESTABLISHMENT OF THE OFFSHORE NETWORK

F.2.1THE 2008 FINANCIAL CRISIS

361. It is clear that even before the 2008 financial crisis off-balance sheet structures, including offshore companies, were already being used. Mr Fetisov's evidence was that prior to the 2008 financial crisis under the leadership of Mr Eggleton, the Bank used such structures in order to hold interests in investments, issue structured loans and establish hedge funds. The Bank also made use of fiduciary lending schemes through East West United Bank in Luxembourg (EWUB) and VTB/Donau Bank in Austria (Donau). These schemes, and the purpose of such schemes, are addressed below.

362. It appears that the 2008 financial crisis had a significant impact on the Bank (in common with many other banks), and that it was after the 2008 financial crisis that the use of "balance sheet management" intensified. As already noted Mr Fetisov was head of the "Distressed Assets" group following the 2008 crisis. He describes how the Bank was *"hit especially hard"* by the crisis and that the Shareholders *"needed to find a solution which would allow the Bank to continue operating through difficult market conditions".* However whilst the impression he seeks to portray is of the Bank taking over investment projects whose owners had defaulted on their loans i.e. the Bank acquiring the ownership of such projects or the project company for itself, I am satisfied that this version of events is incorrect. Only Stivilon and StroyEcologia could be said, even theoretically, to fit this pattern, and it appears that in fact those projects were taken over and owned not by the Bank but by the Shareholders personally (although the evidence is that the Shareholders procured the Bank to purchase 19% of Stivilon).

F.2.2 THE STRUCTURE AS OF LATE 2008

363. On 2 September 2008 Mr Drozdov (the Bank's Head of Legal) (who was described by Mr Fetisov as "*like a computer*" and "*very accurate*" sent corporate structure diagrams to the Shareholders under cover of a "FYI" email. As Mr Drozdov was responsible for running the offshore network at this stage (as is common ground) I can see no reason why he would mis-describe the structure, nor why Messrs Yurov, Belyaev or Fetisov would not write back to him if they considered the structure to be wrong (not least since the diagrams are being sent to them for information – i.e. it is contemplated they will have regard to them).

364. From the first of the diagrams it was apparent there were six offshore holding companies at the top of the main structure called Jermanta, Zosimal, Nikilin, Sapkont, Nomiranta and Agalid (all Cypriot limited companies). These six companies in turn owned a network of further offshore and Russian companies, including companies relevant to the transactions at issue in this case such as OOO Jermanta (the Russian company), Business Group (the Borrower in this case admitted to be a Shareholder Company), Gofra, Oil Group, Crylani, Sapkont and Elis Trade.

365. It is apparent from the second diagram that the Shareholders (in the usual proportions) were the direct shareholders of Tactio Developers Limited ("Tactio"), which owned 60% of NRT, the holding company for the Yaposha Group. There was an attached narrative at page 6. Amongst the matters stated was that Tactio was "the company of the shareholders". Tactio was also the vehicle for the Otradnoye (aka Degunino) business centre development that came to be owned by Oldehove (which the Shareholders now claim (falsely says the Bank) to be a "Bank Project").

366. Mr Drozdov circulated further structure charts to the Shareholders on 17 December 2008. These again recorded that the Shareholders directly held Tactio, which in turn owned 60% of NRT and the Yaposha group; and that they also owned TIBI through Tactio (as to 99%) and 100% of EuroGroup, which owned the Otradnoye/Degunino property. Again, there would not appear to be any reason why Mr Drozdov would make errors as to the ownership of such companies. Equally the Shareholders did not respond to express surprise or to suggest that Mr Drozdov had got the ownership structure wrong.

367. I consider these early documents to be of particular significance. They show in documents provided directly to the Shareholders, that at that time the Shareholders themselves were the direct owners of 60% of the Yaposha group and 100% of Eurogroup, which owned the Otradnoye (Degunino) office development. Realistically, there is no room for argument or ambiguity in this regard. As such, these charts are highly significant documents. None of the Shareholders suggests that there was ever any difference in beneficial ownership as between Yaposha and Otradnoye/Degunino, on one hand; and any of the other disputed companies/assets (including the other commercial property assets) on the other hand. They maintain that they are and were always Bank Companies. But if, as these documents show, Yaposha and Otradnoye/Degunino were Personal Companies then (1) the Shareholders have lied about Yaposha and Otradnoye/Degunino being "Bank Companies", (2) the fact that these were Personal Companies strongly supports the conclusion that <u>all</u> the disputed companies/assets were Personal Companies, and (3) this also supports the conclusion that there was never any distinction between the two (and such distinction is a later invention).

368. There is also the fact that Business Group was always a Shareholder Company and it appears in the main structure chart as owned by Jermanta Limited which again leads to the same conclusion, namely that the entire structure was the Shareholders' and not that of the Bank.

369. At this time, and as the Bank points out, the offshore companies were administered by Totalserve Cyprus which was the legal shareholder of the top-level companies including Jermanta Ltd. From the charts sent by Mr Worsley to Mr Stennett of SMP in March 2010 it appears that Totalserve itself held the shares on trust either for TIB Holdings Ltd (owned by the Shareholders) or for the Shareholders – either way not for the Bank.

370. The Shareholders' response to the structural diagrams and what they show is somewhat mute and less than convincing. Mr Yurov does not address the structural diagrams in his Closing Submissions at all (other than in the specific context of the section on Oldehove/Crylani).

371. Mr Belyaev predictably (given his approach of denying reading just about anything) asserts that he does not recall seeing the emails and that their contents do not reflect his contemporaneous knowledge. It is said the latter email, in particular, was sent by Mr Drozdov at the height of the 2008 Russian financial crisis at a time when Mr Belyaev was working intensively to address the accompanying difficulties being experienced by the Bank. It was in this context, indeed, that Mr Belyaev gave his unbelievable evidence that he would generally not pay particular attention to any emails from Mr Drozdov, and even went so far as to say that he would delete emails from Mr Drozdov without reading them (evidence that I have already addressed earlier when commenting on Mr Belyaev's evidence as a witness). Mr Belyaev's evidence in this regard is simply not credible given that as Mr Fetisov acknowledges, Mr Drozdov was a *"senior member of the Bank's management"* and "*in charge of the shareholding structure of the bank"* and I reject Mr Belyaev's evidence in this area, for the reasons I have already given.

372. Mr Fetisov also seeks to distance himself from the contents of the structure charts saying that he did not pay a great deal of attention to precise corporate structures. I do not consider this evidence to be credible either. The structure charts were sent to the Shareholders by Mr Drozdov. To say that he trusted Mr Drozdov (who he says reported principally to Mr Yurov) to make the "*necessary arrangements*" is no reason not to read what was specifically sent to him and the other Shareholders. In this context Mr Fetisov relies upon his evidence that particularly during the financial crisis from late 2008 onwards, Mr Fetisov had *"far more urgent issues requiring his attention"*.

373. It is also submitted on behalf of Mr Fetisov that the label "non-affiliates" structure which was held through companies like Jermanta and Nikilin was *"presumably used to describe companies used by and for the <u>Bank</u> but not formally affiliated to it*" (and it is said that it would be a strange way of describing Shareholder Companies). However, such submission ignores what is actually stated about ownership in the structure charts which shows that particular companies are owned by the Shareholders not the Bank, and this is of rather more significance than any description of "non-affiliated" which could perfectly well simply be a contemporary euphemism. It is no answer to say that Mr Fetisov "*always considered these companies to be Bank companies and Bank investments. It could have been an SPV type of arrangement or whatever Drozdov decided at the time. He was the*

guy who organised the holding structures and he knew well that… to do…". Again that answer (which is no more than a bare assertion as to what Mr Fetisov considered) does not grapple with, still less explain what is clearly shown – namely ownership by the Shareholders themselves of particular companies.

F.2.3 OFF-BALANCE SHEET LENDING AS AT LATE 2008

374. By late 2008, before the financial crisis hit, there was already a massive amount of "off balance sheet" lending being carried on. This is illustrated by an email from Mr Fetisov to Mr Eggleton dated 14 October 2008. The perceived propriety (or rather lack of it) in relation to such lending is rather well captured by what Mr Fetisov himself said at the time to Mr Eggleton namely that what he attached was *"one more version of assets we hidden assets and financings"* (emphasis added). Such description somewhat speaks for itself as to what Mr Fetisov thought about what was being done. Unsurprisingly, when asked, Mr Fetisov struggled for an answer as to why he was referring to "hidden assets" replying, *"And then I don't know why I wrote that "hidden". It might have been used by probably someone with a – but that's not forwarding, that's me. So I don't know why I used that word or that particular strange English here. But I forwarded to Eggleton something that has been assembled for BNP Paribas presentation."*

375. In any event the Table that was attached showed the sheer scale of lending that had been undertaken through the EWUB scheme through TIB Equities, TIBI and other companies – some 21.3 billion RUB (or around US$819 million) including variously, over RUB 500 million of personal loans to Shareholders, over RUB 1.1 billion of lending to the Yaposha group, a RUB 56 million loan to Mr Eggleton and substantial loans to companies involved in real estate projects, specifically Morledge, Eurogroup, Filenta and Royston.

376. The sums deposited with EWUB and Donau Bank were characterised as "*cash or cash equivalents*" in the Bank's accounts – that is as liquid assets that required no provisioning. The accompanying table of "*acceptable assets*" and "*unacceptable assets*" spelled out various reasons why particular loans could not be included on the Bank's balance sheet. For example, the personal loans to Shareholders could not be included by reason of N6, N9 and N10.1 standards (because it would reveal lending to connected parties) whilst other loans would have required large provisions if included on the Bank's balance sheet (amongst others, loans to Yaposha and Nikilin), and in relation to companies holding real estate, there would be a violation of N6 standard if they were included on the Bank's balance sheet.

377. Why such "off balance sheet" lending was being undertaken at this stage is clear enough and was acknowledged, and attempted to be justified, by Mr Yurov, at an interlocutory stage, *"in 2008 there was considerable concern that if those losses had all been recorded on the Bank's balance sheet, it would have had its licence revoked by the Central Bank of Russia and consequently been declared bankrupt. For obvious reasons, the Bank's management wished to do everything possible to prevent this from happening, and took steps to manage its balance sheet using its pre-existing offshore structure."* (Mr Yurov's second affidavit para 30) and *"The key in the short term was to ensure that, in the interim, the Bank did not have to enter all of this bad debt on its balance sheet and so*

risk bankruptcy… Revocation of the Bank's licence would of course have been a disaster for the Bank and its customers, and so I believe that this action was justified as an attempt to avoid this disaster…" (Mr Yurov's second affidavit paras 60-61).

378. Whilst the Bank sought to advance a case that the fiduciary lending arrangements involving EWUB and Donau were inherently dishonest (a plea that I have ruled the Bank is not entitled to advance), the existence and use of such arrangements remains of relevance as part of the other pleaded issues including the relationship with the CBR and whether the CBR was misled, false accounting, and the circumstances in which it became necessity to expand (and develop) the offshore network of companies.

F.2.4 THE REATIONSHIP WITH THE CBR IN 2009

379. The Bank's case is that the Bank was coming under increasing pressure in 2009 from the CBR in relation to what appeared to be circular lending to "technical companies" in the context of concealment of back to back lending in the EWUB scheme. Further the Bank says that the Bank's problems in this regard were compounded when in September 2009 Ernst & Young performed an audit of the Bank on behalf of a company that was considering a merger with the Bank (Rosneft), and soon (correctly) identified not only the Bank's poor financial state but lending on a massive scale to the Shareholders' projects, and a risk of licence revocation by the CBR. Ernst & Young's "General Conclusions" included:

> "About 50% of the Bank's assets are loans granted to companies of the Bank's shareholders for implementation of their projects (including regulation of the Bank's standards).
>
> Net assets of the Bank, excluding transactions with the companies of the Bank's shareholders as of 30 June 2009, were negative. The scope of the Bank's liabilities to third parties exceeds the scope of the Bank's assets under unrelated transactions by 22.5 billion roubles.
>
> Reveal by the Bank of Russia of financing of subordinated loans out of the Bank's funds may entail fines; rejection of financing by the Bank of Russia; revocation of the license.
> …
>
> To ensure repayment of short-term liabilities of the Bank (up to 6 months) as of 30 June 2009, the need for monetary resources amounted to 35 billion roubles."

The Bank says that it was against that backdrop that Mr Worsley was recruited to establish a new ownership structure designed to conceal what it says was the Shareholders' ownership of companies borrowing from the Bank and to make it difficult or impossible for anyone (including the CBR) to link such companies to the Shareholders.

380. In contrast, Mr Yurov and Mr Fetisov claim that "balance sheet management" was disclosed to the CBR who were not misled, that there was nothing wrong with "balance sheet management", and that the Shareholders did not own the companies that the Bank now alleges they owned. As will appear, none of these claims bears examination. However

it is first necessary to address the chronology of events over this period of time, and what the documentation (which largely speaks for itself) shows.

F.2.4.1 REAL ESTATE PROJECTS AND THE CBR

381. It is clear that in 2009 the Bank was heavily committed, as lender in respect of various real estate projects in Russia (such as the Gelendzjik project, the Yaposha restaurant group and the Priangarskiy timber project) and was in correspondence with the CBR about such lending. However, what is equally clear is that what was being stated to the CBR about such lending was misleading, that the true position was not revealed, and that the CBR was suspicious about what was going on.

382. Thus, following a meeting on 20 April 2009, on 22 April 2009 the Bank wrote to the CBR stating that it was sending "requested information". Amongst other matters it addressed loans to "non-resident" (i.e. offshore) legal entities as counterparties, and did so in terms that did not reveal that what was actually going on was the making of loans to companies owned by related parties be that the Shareholders or (per the Shareholders in relation to particular companies) the Bank, and was not, on any view third party arms-length lending to independent third parties.

383. That letter provided, amongst other matters as follows:-

> "As communicated previously by the Bank in letter no. 1/45-20-1362 dated 18.12.2008, sent to the Bank of Russia in accordance with the results of the meeting held on 15 December 2008, in connection with the crisis situations in the economy, in order to reduce credit risks, active work is being carried out by the Bank to change the funding structure of a number of the Bank's clients' business projects, and also of real estate investments in the territory of the Russian Federation, having been carried out previously under the principle of syndication with the involvement of non-resident banks. The main aim of this restructuring is to gain full control over quality assets, including guarantees in the form of pledged assets and guarantees from the recipients of funds and asset owners.
>
> As part of this strategy, over the course of February and March 2009, the Bank performed a number of loan transactions, where non-resident legal entities were the counterparties. A distinctive feature of these transactions was that borrowers, who from the perspective of the nature of their activities were financial companies, used the Bank's loan resources for investments in commercial enterprises located in the territory of the Russian Federation. In the majority of cases, the investments were carried out by means of the borrowers acquiring shares in capital of Russian economic businesses or of a foreign holding company, being the owners of such shares.
>
> The funding of transactions in the form of loans provided by the Bank to non-resident companies is explained by the fact that at the time of their completion, the Bank's counterparties did not have sufficiently developed infrastructure to conduct business in Russia. So far, companies registered in accordance with Russian legislation, that the Bank 23.04.09 [Signature] D8/17T/1 2 is planning to extend loans to, have come into their corporate structure. On account of the funds provided by the Bank, the companies will buy back assets from non-resident companies, which in turn will pay off the loans to the Bank. The Bank believes that this funding structure is final and

allows the Bank to protect its creditor's rights in the Russian jurisdiction and, if necessary, initiate foreclosure procedures and exercise its rights in accordance with the legislation of the Russian Federation. Therefore the structure of the transaction, including the pledge, shall be preserved, which eliminates the appearance of additional risk for the Bank."

(emphasis added)

384. The impression given is not of lending to the Bank or to its Shareholders, but rather the Bank as lender to "non-resident" companies who were acquiring the projects with funds that would allow the underlying Russian debtors to pay back their loans to the Bank. The reality, however, which was not revealed to the CBR, was that the offshore borrowers were in fact vehicles of the Shareholders, the companies that were borrowing for these purposes being Jermanta LLC, Elis Trade LLC, Sapkont LLC, Oil Group LLC and Zosimal LLC.

385. What was actually occurring was that in April 2009 there were a series of transactions by which one set of Shareholder companies was "purchasing" project companies from another set of Shareholder companies using large loans that had been taken out from the Bank, and whilst particular loans were mentioned in the letter as "*part of the implementation of the programme*" that was referred to, what was not made clear is that this is what was happening. Thus:-

(1) The CBR was told in the letter that "*A loan in the amount of $35 million was provided to the company Mourija Trading Ltd. for the acquisition of 100% of the share in capital of Biznes Grupp LLC"* i.e. that US$35 million had been lent to Mourija (now said to be a "Bank Company") so that it could purchase 100% of the shares in Business Group (now said to be a "Personal Company"). There is indeed a share purchase agreement dated 17 April 2009 by which Mourija was to purchase the shares in Business Group from LLC Jermanta (which was actually another Shareholder company) for US$16.5 million. The letter describes Business Group's interest in the Priangarskiy timber project but does not mention the Shareholders' beneficial ownership. Nor is the actual purpose of the US$35 million Mourija loan identified, which was to provide funds to TIBI to buy back the Bank's loan notes which were then supplied to the Western Banks that had provided the US$140 million loan facility to MC Trust.

(2) The letter also refers to, *"Loans in the amounts of $19 million and $38.6 million were provided to the companies Nikilin Investments Ltd. and Zosimal Investments Ltd. for the acquisition of shares in capital in the company NRT Holdings Limited. NRT Holdings Limited is the head subdivision of the Yaposhka Group, which has been carrying out commercial operations relating to the food service organisation since 2005."* In circumstances where Mr Drozdov's structure charts in September 2008 show that the Shareholders already owed 60% of NRT through Tactio, this suggests that the shareholding of NRT is simply being passed from one Shareholder company to another.

(3) The letter also refers to, "*The company Nikilin Investments Ltd. was also provided a loan in the amount of $50 million for buying a share amounting to 51% of the capital of Stivilon LLC. Stivilon LLC is the operator of an investment project proposing the construction of a residential and hotel complex in Gelendzhik."* The documentation available at trial shows that in April 2009, Gofra sold 51% of Stivilon to TIBI, which

then sold it to Nikilin, which then sold it to Elis Trade, which paid for that stake with a US$69.5 million loan from the Bank.

386. The appearance created was of external investors coming in to buy into the projects and taking them over, using loans from the Bank, whereas the reality is that what was actually occurring was simply that a stake in a project company was being transferred from one Shareholder company to another. Thus, it appeared that the Bank was acting as a true lender to the likes of Mourija, Nikilin and Zosimal and was not itself acquiring a stake in these projects, portraying the anticipated outcome for the Bank as simply being the loans being serviced and repaid rather than the Bank having the opportunity and right to participate in the profits on any upside. Indeed, the 22 April 2009 letter specifically spelled that out:

> "Therefore the funds provided by the Bank to borrowers as part of the aforementioned loan transactions were ultimately directed towards different sectors of the Russian economy – to the manufacturing sector, consumer services and construction. The selection of the transaction structure was determined by objective factors, the most significant of which was the elimination for the Bank of the risks that accompany direct investments, which are not part of its core business. The Bank's risks are also lowered on account of the pledge of assets acquired by borrowers, which are in the course of being registered." (emphasis added)

387. It is clear that the CBR was suspicious about the loans and asked questions at a meeting with Mr Yurov and others from the Bank on 22 July 2009. The Minutes of the meeting record amongst other matters:-

> "Within the meeting an issue of assets quality and Bank's liquidity state was discussed …. As the Department consider that the Bank's portfolio is not transparent (actually all the loans aim at the replenishment of the circulating assets of the borrower, which prevents from the real perception on the ways of their use, large scope loans are issued for a long term (for three (3) years) under non-market rates (5% - 7%)), the Bank representatives were asked during the meeting on the activity of a number of major borrowers of the bank and the risk appraisal on them.
>
> According to the information provided by I.S. Yurov actually all major loans were extended to purchase property rights, claims and shares in the capital of various companies, carrying out an economic activity. Crediting of real economy sector makes inconsiderable part in the bank's credit portfolio. Pledge of property rights, claims and shares in the borrower's authorized capital is as a rule the security on the loans mentioned above.
> …
> The securities portfolio of the bank mainly consist of the credit notes of non-resident corporations (Cyprus, Netherlands, Luxembourg). According to the representatives of the Bank, the investments into notes are connected with development projects funding.
>
> Responding the question of the representatives of the Bank of Russia on the securities bank transactions, considering that technical default occurred on the securities of a number of issuers in RUB 2.4 bln, the Bank representatives explained that the calculated reserve for these securities amount to 100%, but considering the security, actually formed reserve amounts to less than 1%." (emphasis added)

388. The Bank was subject to a CBR audit/inspection which resulted in a report being produced. The CBR was clearly concerned about the large volume of debt securities held by the Bank whose value "*cannot be determined reliably*" (these were securities relating to Gofra, Loughran, Crylani, Oldehove, RTM, Amelside Comnet and the Bank itself).

389. The Report provided that:

> "The working group paid special attention to the loans granted in April 2009, including to: Elistrade LLC, Jermanta LLC, Zosimal LLC, Oil-Group LLC, Sapkont LLC. It has been established that the loans of these borrowers (except for Oil-Group LLC) were a source to repay loans of non-residents, granted in the first quarter of 2009. During the analysis of financial situation of Elistrade LLC, Jermanta LLC, Zosimal LLC, Oil-Group LLC, Sapkont LLC, as well as LLC Collecting Agency Law and Business and NRT Holdings Limited, it was noted that the performance indicators improved significantly in the first quarter of 2009 (with respect to NRT Holdings Limited - in the fourth quarter of 2008), including the growth of net asset value due to undistributed profits, incomparable with the received net profit. According to the bank's explanations, this circumstance was due to the founders' contributions to the companies' assets. In addition, the above borrowers (except for NRT Holdings Limited, LLC Collecting Agency Law and Business) have the following similar characteristics: absence of revenue, insignificant net profit in 2008, growth of financial result in the first quarter of 2009, actual location at the addresses of mass registration, performance of functions of the sole executive body by management companies (including Elistrade LLC, Jermanta LLC - Akonit LLC, Sapkont LLC - Tandem LLC, Zosimal LLC - Titan LLC), absence of the position of chief accountant in the staffing chart of the companies. The powers of the sole executive body of LLC Collecting Agency Law and Business were assigned to the management company - Titan LLC, the obligations of the chief accountant were assigned to the director general.
>
> The audit showed that the main part of the portfolio of loans to legal entities consisted of investment loans. The purpose of granting a number of loans (Oil-Group LLC, Jermanta LLC) was to acquire risks and benefits from the bank on CLN belonging to it, subject to classification into the 5th quality category with formation of provision in the amount of 100% according to the requirements of Regulations of the Bank of Russia No. 283-П dated 20.03.2006 due to the technical default of issuers (delay in redemption of coupons on the notes over 30 calendar days). Thus, the economic essence of the operation was to transform the risks of financial instruments into credit risks. The amounts of financing deposited in the bank (formed by credit resources) were used by the bank to minimize the estimated provision for CLN to ensure the first quality category. However, the analysis of the legal structure of agreements on participation in CLN showed that the amounts of financing received by the bank did not meet the criteria established in clause 6.2.1 of Regulations of the Bank of Russia No. 254-П dated 26.03.2004 to ensure the first quality category." (emphasis added)

390. It is clear, therefore, that the CBR had identified suspicious features of the loans in question and that the CBR believed that bad debts were being transformed into loans to offshore companies of higher quality resulting in a need for lower provisioning. This is not consistent with the CBR being told of, and approving, "balance sheet management" as a legitimate practice.

391. Indeed, it was clear from the evidence of Ms Podstrekha that she suspected that there was artificial lending with the involvement of technical companies going on but far from admitting this (i.e. making full disclosure of "balance sheet management") the Bank was denying it:-

> Q. …Isn't the pattern obvious, that these are companies where there are constant dealings between these various borrowers that you were talking about in the meeting that you had in August, which I'll come back to in a minute?
> A. Yes.
> Q. And the connections seem to cross projects. So we can see, for example, that Elis Trade is related to Stivilon but it's also got dealings with Oil-Group.
> A. Yes, I can see this.
> Q. So we have all of these technical companies owning each other and dealing with each other. Do you agree with that?
> A. Yes.
> Q. And wasn't it obvious to you -- and I mean by this you personally, Mrs Podstrekha -- that all of these companies were related to each other?
> A. We surmise that could be the case.
> Q. It's obviously the case, isn't it?
> A. Well, in order to confront this, we needed the bank's position and for the Bank to say yes, but the Bank was always saying no."

392. The report considered that the Bank was showing signs of bankruptcy and (by reference to a table) that many loans should be reclassified as being of lower quality with higher provision:

> "During the analysis of quality of the loan and equivalent debt, the working group made an interim conclusion on the presence of bankruptcy signs in NB TRUST (OJSC) as of 01.07.2009 in accordance with art.4 of Federal Law No. 40-FZ dated 25.02.1999 On Insolvency (Bankruptcy) of Credit Institutions, due to the absolute decrease in the value of own funds (equity), as compared to their (its) maximum value achieved in the last 12 months, by over 20 percent with simultaneous violation of one of the obligatory norms established by the Bank of Russia (H6). This conclusion was based on the results of the analysis of debts of the following borrowers: Elistrade LLC, Jermanta LLC, Oil-Group LLC, Sapkont LLC, NRT Holdings Limited, Yaposhka LLC, Yaposhka-City LLC, Mourija Trading Limited. Information on the value of loan exposure of

these borrowers as of 01.07.2009, the amount of the provision formed by the bank and the amount of the provision to be formed according to the assessment of the working group, as well as the grounds for reclassification, are presented in the table…"

The conclusion of the working group was that the Bank should make over RUB 3.85 billion of additional provisions.

393. The Bank rejected the suggestions of the CBR, and indeed in a letter to the CBR on 19 August 2009 continued to portray the lending as normal, and legitimate, commercial lending:

> "Regarding the composition and quality of the Bank's loan portfolio, we report the following. The Bank provided several large loans directed towards funding investment projects. The amount of information for these projects exceeds the content of a usual credit file to a significant degree, and part of the documents that the Bank had at the start of the inspection were only in English. According to the Bank, this created specific difficulties when carrying out the analysis of the loan portfolio and led to the formation of a misinformed opinion regarding its 'opacity'. The Bank actively cooperated with authorised representatives of the Bank of Russia and members of the inspection group, offered all the necessary additional documentation at their request, and arranged informative meetings with employees directly involved in the completion of loan transactions. The Bank believes that this allowed a sufficient level of transparency of the loan portfolio to be ensured.
> …
> What must be taken into account as far as the corporate loan portfolio is concerned is that operations formally arranged in the form of acquiring shares in capital in economic businesses and property rights are actually investments in different sectors of industry and the services sector." (emphasis added)

394. On 19 August 2009 there was also a further meeting between the CBR and the Bank. I have already referred to Mr Fetisov's denial of being present, together with Mr Yurov, at this meeting despite attendance as "President" of the Bank being stated in the minutes. As already addressed, and notwithstanding his suggestion that he was not in Moscow at the time of the meeting the weight of the evidence is that he attended this (and a later) meeting with the CBR, this being another illustration of Mr Fetisov seeking to distance himself from a matter by saying he was elsewhere at the time. The minutes of the meeting state, amongst other matters:

> "Within the meeting an issue on the Bank assets quality was discussed.
> According to the viewpoint of the working group, which carried out the audit in the Bank as of the moment, the credit portfolio was not transparent. The risk appraisal on the loans of Jermanta LLC, Ellis Trade LLC, Sapkont LLC, Oil Group LLC and Zosimal LLC (totally amounting to RUB 9.6 bln) is inadequate, the additional formation of the reserves for possible losses is needed under loans of the indicated borrowers. the indicated loans possess the similar features:
>
> – authorized capital of the borrowers amount to RUB 10 thous;

– overlapping of positions of General Director and Chief Accountant;
– conducting of functions of the executive body of the managing companies;
– the loans were extended against 5 % per annum and were sent to purchase the shares in the authorized capitals of various companies or to purchase securities etc.;
– the terms for interest payments are 6 months;
– the debt servicing is considered "good" due to the receipt of RUB 1 thous of fees from the borrowers.
Besides other Bank major projects raise questions, including those, which are aimed at their use, financial standing of the borrowers etc.

In its turn the Bank expressed its disagreement with the viewpoint of the working group and informed that the loans extended to Ellis Trade LLC, Zosimal LLC and Jermanta LLC were sent to fund the investment projects. the loans of Oil Group LLC were used to purchase the rights under the debt securities, which are mainly connected with the investment project.
….
The Bank expressed its readiness to furnish the working group and the Department with the appraisal reports of the projects mentioned above, their budgets, cash flow schedules and other managerial information."

395. Ms Podstrekha's evidence in relation to this meeting (in her first witness statement), which I accept, is that although the CBR expressed concern about the transparency of a number of the loans made by NBT in that they had similar characteristics (notably the loans to Jermanta LLC, Elis Trade LLC, Sapkont LLC, Oil Group LLC and Zosimal LLC totalling RUB9.6 billion), *"NBT's senior management disagreed with our concerns and provided explanations to us, which, in the absence of cogent evidence, we could not rebut"*. What is apparent is that the CBR was not told that these companies were owned by the Bank or (as I am satisfied was the case) that they were owned by the Shareholders – if either of such matters had been told to the CBR its suspicions about related party lending and associated issues about reserves would have been confirmed.

396. In this regard it is important to appreciate that what was of most concern to the CBR was not ownership *per se* or related party lending *per se* (though it did expressly ask about ultimate beneficial ownership, contrary to what was submitted on Mr Yurov's behalf in closing – see the CBR's later letter to the Bank dated 19 October 2012) but what the implications of that were for reserving. This was expressly addressed by Ms Podstrekha in her oral evidence (in relation to a later meeting on 24 February 2011):-

"Q. […] the whole topic of discussion had nothing to do with how these companies were controlled, did it?
A. Because for us the main thing was not how they were controlled but **how the risk related to the companies would be evaluated**. They could be controlled by the shareholders indeed **but please do 100 per cent reserve for them** and **reflect that in the profits** and then you can issue loans to whoever."
(emphasis added)

397. This also emerged clearly from the following series of questions and answers in the cross-examination of Ms Podstrekha:-

"… it is very important to assess the risks correctly. I wanted to draw your attention to this fact, that there is no prohibition to provide loans to repay loans, provided that the risks are adequately assented, mathematically it turns out that the capital is decreased in the Bank and then there will be reasons to give rise to bankruptcy. If we were to provide adequate reserves, adequate provisions for the loans provided.

Q. And I think that's -- put it differently. Your real concern wasn't who was running these companies, your real concern was whether the reserves were reasonable reserves, wasn't it?

A. Our main concern is the adequate assessment of risks of those companies. If a company has no possibility to repay the loan and it is obvious from whatever we have read in the inspection report, then the reserve for the company, the provision, should be formed in accordance with 254B, not less than 21 per cent and preferably more, up to 50 per cent. That is how the reserves should be formed. The Bank always sets the reserve as 1-2 per cent for those companies. The Bank thought that they were risk-free loans, practically, despite all the things that we saw now that one pays the other, they pay the third and it goes round in circles.

Q. But you raised that with the Bank and the answer that they gave you is that underlying these loans there were investment projects which the loans were financing. That was what they told you.

A. Yes, that's correct. And we were telling them the risk is high in those loans and they were saying, no, it's not high.

Q. But that wasn't because of whether they were owned or run by the Bank. You've just told my Lord that that didn't matter; it was all down to the judgement that you made about the underlying investment projects, wasn't it?

A. What is important is the essence, the substance, the form or the shape, the semblance, is secondary.

Q. Well, the essence and the substance here, as was obvious from the report, was that the bank was running these investment projects, wasn't it?

A. The Bank was managing them but they never acknowledged it at our meetings. They were always saying, no, no, they are not our projects."

(emphasis added)

398. As Ms Podstrekha also explained:-

> "If the balance really reflects what's happening, how it should be, the balance is simply a reflection of the operations that are being carried out. So if it's honest and transparent, there is no need for balance management. It reflects the picture in fact but when they are hiding the losses, hiding the losses and the myriad of technical companies, that is -- that is balance sheet management. Why? So nobody would get to the bottom of it. What's really happening."

399. The essence of Ms Podstrekha's evidence (which I accept) is that lending for paying back other loans is acceptable as long as it is properly provided for in the relevant amount (which may be up to 100%). It is not (improper) "balance sheet management" if proper provision is made – it does not benefit the balance sheet – the consequences of concentrated lending risk, related party lending and capital adequacy are expressly taken into account in that scenario. But if proper provision is not made then that is (improper) balance sheet management which is neither legal nor honest as identified by Ms Podstrekha in her witness statement.

400. It is in that sense that Ms Podstrekha refers to balance sheet management at paragraph 34 of her witness statement (after confirming that the Bank never stated in any meetings that she attended that it had an offshore network of companies that it used for balance sheet purposes) and states that *"'Balance sheet management' is not legal. It is fraudulent and deceives not only the CBR but auditors and depositors."* Ms Podstrekha confirmed this evidence when cross-examined (Day 6/94:10-Day 6/95:25). It is also in that context that her evidence is that *"If this information had been disclosed to the CBR (formally or informally) it would almost certainly have led to the immediate revocation of NBT's licence (both because of the breach of formal requirements and also due to the concealment of this)."*. I address the evidence she gave when cross-examined about this, in due course below when addressing Issues 22 to 23 (in Section I below).

401. It is also equally clear that the Shareholders knew that (improper) balance sheet management was not lawful, and that this was precisely what was going on from 2008 onwards, as is apparent from what is said in Mr Yurov's memo of 28 June 2015 to the other Shareholders expressly referring to losses not being recorded in the Bank's books as otherwise the CBR would have had to withdraw the Bank's licence, and a decision being taken to start submitting false accounts to the CBR.

F.2.4.2 EWUB LENDING AND THE CBR

402. Over the same time period in 2009 the CBR was asking the Bank, about the EWUB scheme which it (rightly) suspected was being used to conceal related party (long term) lending. Thus the Minutes of the meeting with the CBR on 22 June 2009 that Mr Yurov attended, that has been referred to above, also recorded:-

> "Besides the representatives of the Bank of Russia asked concerning interbank loans extended regularly to VTB Bank (Austria) and East-West United Bank S.A. I.S. Yurov agreed to the Department's supposition that these transactions in their essence are not interbank loans but are related with funding of the Bank transactions, but has not provided any detailed explanation."

403. It is apparent that the CBR also contacted EWUB in relation to the lending, as is apparent from an email from Ms Krivosheeva to the Shareholders (cc'd to others within the Bank) in relation to an "*action plan to resolve the situation with the N3 requirement in the context of the CB audit*" which referred to a request and response from EWUB. The request asked EWB to confirm that the transactions between EWUB and the Bank were short term borrowing with a term of 30 days and referred to transactions with a value of about US$90.7 million + RUB 7 billion. The response from EWUB referred to "*short-term funding…. in the form of interbank deposits*" and stated: "*The funds raised from NBT are used for onward lending for the respective tenors*". It was true that money was being lent on a short-term basis to TIB and Tactio but what was not stated was that those companies were then lending it on a longer term basis to other entities including in relation to the Shareholders' own projects and the Shareholders personally. Ms Krivosheeva continued: "*We tell the CB that we have a plan to change the structure of our liquid assets, that we plan reduce short term interbank credit until the end of the year by 4.4 bn roubles and replacing it with a higher-yield portfolio of liquid assets – FLBs – and we make a schedule with our plans…."* and she requested that the Shareholders approve the plan.

404. The inter-bank lending was also discussed at the 19 August meeting and it is apparent from the Minutes that the CBR suspected that the EWUB inter-bank loans were in fact being used for longer term funding, but the Bank continued to deny this:

> "Concerning the interbank loans, which were regularly extended to VTB Bank (Austria) and East-West United Bank S.A., the representative of working group informed that these banks credit the Bank loans in comparable amounts (TIB INVESTMENTS LIMITED (Cyprus) and T&B EQUITIES LIMITED (Cyprus)). Besides the interbank crediting is made under non-market rates, the calculations on the issue and repayment of the loans between the indicated banks and National Bank TRUST, by the indicated banks and Bank clients (TIB INVESTMENTS LIMITED (Cyprus) and T&B EQUITIES LIMITED (Cyprus)) shall be conducted simultaneously. The presence of the cash flows, which coincide by time (from National Bank TRUST to non-resident bank, from non-resident bank to National bank TRUST) and conducting of the transactions under non-market prices may testify on the technical character of extension and recovery of loans to conceal real term for interbank loan extension and liquidity loss risk, incurred by the bank.
>
> Besides the character of interrelations between the Bank and TIB INVESTMENTS LIMITED (Cyprus) and T&B EQUITIES LIMITED (Cyprus) is obscure, considering the purchase transaction by the Bank of credit notes from the indicated clients issued by C.R.R. B.V.
>
> In its turn the Bank expressed the disagreement with the opinion of the working group and readiness to furnish the additional documents to confirm its position on the short-term and namely interbank character of transactions held with VTB Bank (Austria) and East-West United Bank S.A." (emphasis added)

405. The Bank maintained that stance in the letter to the CBR the same day:-

> "The Bank does not agree with the Banking Regulation Department's suggestion, documented in the Minutes of the working meeting, that by

definition operations to invest funds in the banks VTB Bank Austria and East West United Bank are not inter-bank loans. Detailed explanations of this issue with the presentation of all the requested documents were provided by the authorised representatives of the Bank of Russia and by members of the inspection group. Additionally, we consider it necessary to emphasise that despite the long-term nature of cooperation with the banks VTB Bank Austria and East West United Bank in the inter-bank loans market, the agreements that regulate the relationship of the parties when concluding each specific operation in no way limits the Bank's right to dispose of the invested funds in the period corresponding to the reflection of this asset in the Bank's balance sheet in accordance with the terms of the concluded agreement. This, in particular, is confirmed by the attached letters from the aforementioned counter-party banks, which they drew up at the Bank's request in order for them to be provided to the Bank of Russia on request.

The decision regarding the total amount of funds invested in the aforementioned borrowing banks in the next period is made on a quarterly basis, taking into account other
factors that determine the status of the Bank's balance sheet and the dynamic of its resource base and planned assets operations. The Bank believes that operations carried out by the Bank to invest funds in the inter-bank market are an effective instrument for managing liquidity, particularly for the purposes of fulfilling the requirements of the Bank of Russia to observe the compulsory N3 ratio. The provided inter-bank loans are a low-risk asset, which can be converted into liquid resources in a period established by corresponding contracts and, generally, consisting of no more than 30 days. Over the previous months, the Bank has consistently cut this balance sheet item. Over the course of August 2009, the Bank cut the amount of provided inter-bank loans by 1.5 billion roubles and intends hereafter to adhere to the selected strategy."
(emphasis added)

406. The result is that throughout this period the CBR suspected that the EWUB scheme was being used to conceal longer term lending (as it was) and the Bank (to the knowledge of the Shareholders), continued to deny this.

F.2.4.3 ERNST & YOUNG

407. A further snapshot of the offshore network at this time can be gained from a due diligence report of the Bank produced by Ernst & Young in September 2009, as well as the Bank's reply to that report. Ernst & Young prepared the report on behalf of Rosneft, who were at that time considering a takeover or merger of the Bank. It is clear that Ernst & Young was provided access to the Bank's documents, and they readily identified that a very large proportion of loans were in relation to the Shareholders' own projects.

408. The report concluded, amongst other matters *"Lending to corporate clients is substantially focused on lending to the Bank's shareholders and related parties."* The report went on to distinguish between *"Core Banking Business"* and *"Group's (shareholders') business"*, concluding that related-party lending made up 62% of the

Bank's loan portfolio. The report listed a number of *"shareholder projects"* in the Bank's loan portfolio, including financing the acquisition and maintenance of three buildings rented by the Bank for business operations (which Mr Yurov agreed probably referred to Spartakovskaya, Perevedenovskiy and Veshnyaki); development projects of the shareholders; and the acquisition and operation of the Yaposha restaurant chain. The report also reclassified "*short term deposits with other banks*" (which likely reflected the EWUB and Donau schemes) as loans rather than cash or cash equivalents.

409. The report also concluded that about RUB 31.8 billion out of a total asset base of RUB 87.7 billion was in fact related-party business, reclassified the Bank's 19% equity stake in Stivilon as a loan and concluded that 62% of the loan portfolio was related party business with only 2% of the corporate loan book representing "*unrelated parties*". Ernst & Young attributed 35% of the loan book to Group/Shareholder projects but only 12% to "*Projects on troubled loan restructuring*" and it was stated that it was believed that RUB 22.8 billion was outstanding from "*Shareholders' Projects*". It also stated that the Bank did not have its own property in Moscow and rented their buildings from "*companies under control of the Bank's shareholders*". It also expressed a concern that the Bank was facing potential licence revocation if the CBR became aware of the financing of subordinated loans out of the Bank's own funds and concluded that a number of adjustments to the figures in the IFRS accounts were necessary to reflect the Bank's true financial state including a reduction in its net assets of RUB 21.8 billion (equivalent to about US$700 million at the time).

410. Ernst & Young's "*General Conclusions*" were expressed in remarkably percipient terms:

> "About 50% of the Bank's assets are loans granted to companies of the Bank's shareholders for implementation of their projects (including regulation of the Bank's standards).
>
> Net assets of the Bank, excluding transactions with the companies of the Bank's shareholders as of 30 June 2009, were negative. The scope of the Bank's liabilities to third parties exceeds the scope of the Bank's assets under unrelated transactions by 22.5 billion roubles.
>
> Reveal by the Bank of Russia of financing of subordinated loans out of the Bank's funds may entail fines; rejection of financing by the Bank of Russia; revocation of the license.
> …
>
> To ensure repayment of short-term liabilities of the Bank (up to 6 months) as of 30 June 2009, the need for monetary resources amounted to 35 billion rubles."

411. In cross-examination, Mr Yurov criticised the Ernst & Young Report, claiming that it was not a proper due diligence exercise and made a number of mistakes. He pointed out that Ernst & Young were not acting as auditors and that their report was simply for the purposes of preliminary discussions with Rosneft, and argued that Ernst & Young were mistaken on many of their findings, and pointed to a letter written in response to the report, signed by Mr Yurov himself.

412. In fact the Bank's lengthy letter in response (signed by Mr Yurov) stated as follows in relation to the ownership of companies:-

> "Following the Annex G, E&Y made a conclusion that the Bank's shareholders control the business of a number of Russian and foreign entities. We assume that such a conclusion is based upon the Bank's close partnership relations with a number of its clients, as well as upon the actual disposition of participation interest in capital of the companies at the Bank's shareholders. However, the conclusion made by E&Y is incorrect in relation to the following companies.
>
> [The letter then referred to CRR BV, FTC CJSC, Eglington Trading, IBK International, Cluster Logistics, BSC Logistiv, and Omsk Trade Alliance.]
>
> Meanwhile, as far as other companies listed in Annex G concern, it should be noted that they are not affiliated with the Bank or its shareholders in terms of the Russian laws and their financial statements are not subject to consolidation into the Bank's statements in terms of the IFRS rules. **However, the opinion that the Bank's shareholders have operational control over the companies listed below is correct in general, as the Bank arranges project financing through these companies**."
>
> (emphasis added)

413. The letter proceeded to list companies including: Crylani, Oldehove, LBCS, Oil Group, Zosimal, Sapkont, Elis Trade, Jermanta, Mourija, Filenta, NRT/Yaposha, Nomiranta, Nikilin and Jermanta.

414. In cross-examination, Mr Yurov suggested that the reference to "*operational control*" in the original Russian text should be read as monitoring, rather than strict authority, but I do not see how this changes the sense of what is being admitted. The Shareholders contend that the fact the Bank was described as "*arranging project financing through these companies*" supports the idea that, whilst according to Russian Law the Disputed Companies were not related to the Bank, they were used by the Bank for its own purposes. I do not consider that this description supports such an idea.

415. However, I am in no doubt whatsoever that this letter in fact contains a clear contemporaneous (and unguarded) admission (in a document signed by Mr Yurov) that the Shareholders, and not the Bank, had control of companies in the offshore network, including the specified companies (which include many of the "Disputed Companies" for the purpose of Issues 6 and 7), which is also consistent with these companies being not only controlled, but also beneficially owned, by the Shareholders. Certainly, it is neither stated, nor is there anything to suggest, that they are beneficially owned by the Bank.

416. Once again it is notable that the alleged distinction between "Bank Projects" and "Personal Projects" is not made and the projects that are dealt with by the Bank (rightly, I am satisfied) being presented as lender to the projects or as a provider of "project finance" and not as owner of the projects themselves. For example, in relation to NRT/Yaposha, which the Shareholders now say was always a "Bank Project", the letter refers to loans granted to Zosimal, Elis Trade, NRT and the Yaposha companies before purporting to analyse the finances of the underlying business and its ability to generate

the funds necessary to repay the loans. There is no suggestion that the Bank itself owns NRT or any part of it (the Bank bought 19% of NRT over a year later in November 2010) nor that the Bank would be entitled to the profits of the restaurant chain, were it to make any. The letter is therefore recognising that the Bank is being used to fund the Shareholders' business ventures but is seeking to argue that they are high quality investments that would generate the funds necessary to pay back the loans.

F.2.4.4 THE FURTHER MEETINGS WITH THE CBR ON 12 NOVEMBER AND 7 DECEMBER 2009

417. There were then further meetings between the Bank and the CBR on 12 November 2009 and 7 December 2009. In the former the Bank informed the CBR that deposits with EWUB had decreased considerably as noted in the Minutes:

> "On the transactions on the repayment and extension of interbank loans to non-resident banks – EAST-West United Banc S.A. (Luxembourg) and VTB Bank (Austria) AG, the representatives of the Bank informed on the considerable reduction of the conducted transactions. Assets and Liabilities Committee of the bank resolved to increase the shares of the public securities in the structure of tools to support the liquidity."

418. Under the heading "Outcome of the Meeting" it was stated that:

> *"*– transactions on the repayment and extension of interbank loans to non-resident banks –
> EAST-West United Banc S.A. (Luxembourg) and VTB Bank (Austria) AG, including indicating the scopes of transactions, interest rates effective during the audited period, incomes received by the Bank on these transactions, considering the current situation;"

419. In a letter to the CBR the same day the Bank again informed the CBR that deposits with EWUB had decreased considerably whilst characterising these deposits as funds invested by the Bank "in these non-resident banks" (i.e. without regard to the lending-on from EWUB or the term of such loans):-

> "In accordance with the strategy to manage liquid assets, selected and approved by the decisions of the Bank's Assets and Liabilities Management Committee, over the course of 2009 the Bank reduced the amount of funds invested in the form of inter-bank deposits in non-resident banks according to plan.
>
> In particular, for the examined period, the amount of funds invested in VTB BANK (AUSTRIA) AG and EAST-WEST UNITED BANK S.A. was reduced by 5,035 million roubles.
>
> On 04/09/09, VTB BANK (AUSTRIA) AG settled its obligations towards the Bank in full by a deposit amounting to 45 million US dollars on 04/09/09. For the period that passed since the end of the inspection, the amount of funds invested by the Bank in EAST-WEST UNITED BANK S.A. was reduced by 1,730 million roubles. For the two aforementioned banks the total investment for the period that passed since the end of the inspection was reduced by 2,047 million roubles. Therefore, since the start of the year the amount of funds invested by the Bank in

these non-resident banks was reduced by 7,082 million roubles, i.e. almost twofold." (emphasis added)

420. Thereafter, the Bank wrote to the CBR on 25 November 2009 in relation to provisions that had been made in respect of loans to, amongst other companies, Elis Trade, Zosimal, Filenta (and Oil Group (Quality category III: 22%)). The letter then sets out arguments as to why the Bank submits that other loans should not be downgraded in their quality (which would lead to larger provisions) as recommended by the CBR in its 2009 audit.

421. There then followed a further meeting with the CBR on 7 December 2009. It will be recalled that the minutes state that both Mr Fetisov and Mr Belyaev were present. I have already addressed Mr Belyaev's claim that he did not attend this meeting and identified why I am satisfied that Mr Belyaev's evidence in this regard is not truthful and that he did attend (consistent with the Minutes (sent to all attendees for approval), Mr Fetisov's pleaded case, Mr Fetisov's witness statement and his recollection when cross-examined by Mr Belyaev's counsel). Equally I am satisfied that the reason why he denied being present at the meeting was because he wished to distance himself from both the "balance sheet management" schemes and the deception of the CBR.

422. The meeting itself is of importance and it is in issue what was discussed and said at that meeting. I consider that the Minutes are the surest guide as to what was said at that Meeting. The purpose of the meeting is clearly identified at the start of the Minutes:-

> "Contents of the Meeting:
> The meeting discussed the issues related to the assessment of credit risks of the Bank based on the results of inspection, as well as dubious transactions of a number of the Bank's clients."

The "dubious transactions" are clearly those that the CBR are concerned about and which it wishes to discuss.

423. It is apparent from the Minutes that what occurred at the Meeting was a discussion of the quality (category) of the various loans addressed including Oil Group, Elis Trade, Stivilon (although it had not borrowed directly at this stage), NRT (i.e. Yaposha), Filenta, Law and Business Debt Collection Agency, Jermanta, Mourija and Sapkont. In terms of Jermanta, this was discussed in connection with the Priangarskiy timber project and the project of Business Group, in these terms:-

> "According to the Bank, Jermanta LLC belongs to the II quality category, has average financial condition and good quality of servicing the debt; the reserve formed amounts to 5%. The borrower is financing the project of Business Group LLC, which has changed its owners several times. This project is a project of a high-tech woodworking production (the settlement of Kodinsk, Krasnoyarsk Territory). At the moment the complex is operating in commissioning mode and its driving up to the rated capacity is planned for the 4th quarter 2010. Pledge – 43 hectares of land, the building of 33 thous. sq. m., and equipment. The total value, according to independent experts, as on 1 January 2009 amounted to 1,300 million rubles."

424. What is not mentioned is that the Shareholders personally were the beneficial owners of Business Group and the Kodinsk (Priangarskiy) project (as the Shareholders now admit). Equally, there was discussion of a loan to Oil Group being used for the "acquisition of securities" in a company called RTM Vermogens (RTM), which was part of the Shareholders' personal acquisition of the Billa property portfolio, and was refinanced and ultimately came to be held through Willow River and RCP, but no mention of the fact that these transactions were for the personal benefit of the Shareholders (as is now admitted). If there had been any such disclosure this would self-evidently have been of considerable interest to the CBR and would have been recorded in the Minutes. I am quite satisfied that there was no such disclosure.

425. Nor is it recorded that the Bank informed the CBR that the Bank itself owned or controlled the various borrowers under discussion or that ownership was being kept "off balance sheet" for the purpose of "balance sheet management". Again such matters would have been of considerable interest to the CBR and would have been recorded in the Minutes.

426. Contrast Mr Fetisov's account in his witness statement:-

> "92. At the meeting the other representatives of the Bank provided explanations of many of its loans on a transaction-by-transaction basis. In doing so they made clear that several such loans were made to companies which the Bank controlled, but which the CBR knew were not held on its balance sheet. Insofar as I can remember, both Mr Postnov and Ms Krivisheeva made presentations, but I did not do so myself. It was a long meeting, lasting from lunchtime until well into the evening. This was my only visit the CBR's headquarters.
> 93. The representatives of the CBR did not suggest that there was anything wrong with loans to off-balance sheet companies (this was not surprising, as the use of such structures was widely accepted commercial practice within Russian banks at the time). To the best of my knowledge, no-one at the CBR suggested that the Bank should stop using off-balance sheet structures until December 2014."
>
> (emphasis added)

427. There is no support for this account in the Minutes, no mention of the CBR being told that loans were being made to companies that the Bank controlled but which were off balance sheet, nor that the CBR knew this, nor of anyone from the CBR going along with this. I am satisfied that Mr Fetisov's account is untruthful. It is inherently improbable that detailed Minutes would not record such matters – they would have been of obvious interest to CBR, and I am satisfied they would have (contrary to the impression sort to be conveyed by Mr Fetisov) have provoked a strong and, for the Bank, unpleasant reaction from the CBR. Indeed the true position (as recognised by Mr Yurov in Mr Yurov's memo to the other Shareholders in June 2015) is that the Bank started submitting false accounts from 2008 as a result of the balance sheet management that was being undertaken and *"if such losses had been recorded in the bank's books back in 2008, the CBR would have had to revoke NBT's banking licence".* The suggestion that the CBR would have reacted with equanimity to any such revelations in the meeting on 7 December 2009 is not credible, and defies belief. The reason for Mr Fetisov's lies are clear enough – a desire to portray "balance sheet management" as unobjectionable when the reality is that it was anything but (as addressed in relation to Issue 16 in Section G.3 below), and to distance himself from what actually occurred in that meeting (i.e. the painting of a false picture as to the

lending that was taking place) coupled with a failure to reveal Shareholders' ownership of particular companies.

F.2.5 MR WORSLEY

F.2.5.1 MR WORSLEY'S APPOINTMENT

428. In December 2009 Mr Worsley was recruited by the Shareholders to take over the administration of the offshore network. The Bank's case is that the catalyst for Mr Worsley's recruitment, and the move out of the Bank of the management of the offshore network of companies and its expansion, was the need for more secrecy prompted by the unwelcome attention of the CBR in mid-2009 that has been addressed above. In contrast Mr Yurov and Mr Fetisov say that the decision was due to a loss of confidence in Mr Drozdov, including a suspicion that he had been involved in covering up the embezzlement of funds by Mr Maximov from the offshore network. This rather begs the question as to why Mr Drozdov continued to be employed by the Bank in a senior position – which is no doubt why Mr Yurov's evidence was that he did not believe Mr Drozdov was actively involved in the embezzlement, but that he had failed to operate proper control functions over his subordinates. Given Mr Maximov's alleged wrongdoings, it is notable that he continued to be copied in on emails in the immediate aftermath of Mr Worsley's appointment. I do not find the explanation for the replacement of Mr Drozdov to be credible even taken in isolation, but in context, and with the obvious need for the appointment of a "Mr Worsley" and the setting up of a more opaque and labyrinthine offshore network given the increasing scrutiny from the CBR, I reject the reason given by Mr Yurov and Mr Fetisov as an untruth.

429. I am satisfied, and find, that the catalyst for Mr Worsley's appointment was indeed the increasing scrutiny the Bank was under from the CBR as a result of which it would have been plain to Mr Yurov and Mr Fetisov (Mr Belyaev's knowledge is a separate issue, addressed below) that the practice of undertaking lending to an offshore network run by Mr Drozdov from within the Bank and use of the EWUB scheme to conceal further related party lending was not going to be a sustainable approach going forward.

430. Mr Worsley's background was in corporate recruitment, and he had previously assisted the Bank recruit a number of senior managers, including Mr Eggleton as CEO. Mr Fetisov's evidence as to the appointment of Mr Worsley includes that:

> "in mid to late 2009 and after consulting Mr Belyaev and me, Mr Yurov decided to take the administration of the network away from Mr Drozdov and run it from outside the Bank…. during the early 2000s Mr Worsley had worked as a head-hunter and had assisted the Bank in recruiting several senior managers. As a result, I knew him to be both well connected and knowledgeable about the Russian banking sector. By 2009 Mr Worsley still had his headhunting business but was also managing offshore companies for some high profile people in Russia (including, as I understood it at the time, former Alfa Bank CEO Alex Knaster). He had told me that he was also looking for new opportunities, as his recruitment business was focused on the Russian financial sector and had been hit hard by the 2008 financial crisis. 103. This led me to think that Mr Worsley might be an appropriate person to take over the administration of the offshore network (with the assistance of the existing team, save for Mr Drozdov). I suggested him to Mr Yurov and he agreed. In late 2009 I therefore

contacted Mr Worsley, to say there was a potential opportunity for him with the Bank, and that we should meet to discuss it when he was next in Moscow" (emphasis added)

431. Mr Fetisov's evidence may or may not be true in terms of Mr Worsley's previous experience, but I see no reason to disbelieve his evidence that Mr Yurov did consult with both him and Mr Belyaev about taking away the administration of the network from Mr Drozdov and running it from outside the Bank by someone, and that the person that was alighted upon was Mr Worsley. Mr Belyaev's evidence, which was confirmed by Mr Yurov, was that although he was told of the decision to hire Mr Worsley, he was not consulted about it. I do not consider that anything turns on this.

432. However, Mr Belyaev claimed he believed Mr Worsley was tasked with establishing a family office which would include him, being one of the Bank's shareholders, as a client, whilst denying knowledge that Mr Worsley was recruited to manage the offshore network. I do not find that evidence credible. I accept Mr Fetisov's evidence that Mr Belyaev was consulted about the replacement of Mr Drozdov (as was also Mr Yurov's evidence) and was told about the appointment of Mr Worsley. The role of Mr Worsley (replacement of Mr Drozdov) meant that Mr Belyaev must have known that he was going to do what was done before. In any event, as appears below Mr Belyaev in due course was a recipient of emails from Mr Worsley from which his role in the offshore network, and its use for "balance sheet management" and for the Shareholders' benefit was clear, and the documentation equally shows that Mr Belyaev knew about that. In this regard I have already referred to the very telling email from Mr Worsley to Mr Belyaev alone (to his private email address) dated 19 December 2012 – i.e. when balance sheet management was in full swing with a network of offshore companies set up or controlled by Mr Worsley, which shows that Mr Belyaev knew very well what was being done by Mr Worsley in relation to an offshore network for balance sheet management with fake nominee UBOs and the like (*"Sergey, Hi. FYI - the 5 copies of the paperwork in storage for the new people are of course already in place…."*).

433. There is an issue as to what it was contemplated Mr Worsley would do and what Mr Worsley was instructed to do. What actually happened with the management of an offshore network transferred to a separate external Russian company set up headed by Mr Worsley (Columba) is not in dispute and speaks for itself. Whilst Mr Yurov claimed, in his oral evidence, that Mr Worsley was recruited as the Shareholders could not understand how they owned their assets and needed someone to restructure them, this account does not bear analysis given that Mr Drozdov had sent the Shareholders the structure charts in September 2008 that have already been referred to, and he could no doubt have answered any questions they had. More fundamentally, I am satisfied that the restructuring that took place was clearly designed not to simplify the structure but to make it more opaque with the use of multiple nominee UBOs with the result that true ownership was concealed which facilitated (amongst other benefits for the Shareholders) being able to treat companies as their own, and also to circumvent CBR requirements on related party and concentrated lending.

434. Mr Fetisov and Mr Yurov met Mr Worsley in Moscow on or around 10 December 2009. Mr Worsley confirmed he would like to take on the role and Mr Fetisov then introduced him to Mr Iskandyrov and other Bank employees. It also is clear that in addition to undertaking the restructuring and running the restructured network Mr Worsley also became a close personal friend of Mr Yurov, as Mr Belyaev confirmed in

his evidence. Mr Yurov put matters in these terms, *"Mr Worsley became a very close friend of mine… Our relationship was not only professional but also one of absolute trust and close friendship."*

F.2.5.2 EVENTS FROM DECEMBER 2009 TO MAY 2010

435. It is clear from the contemporary documentation that Mr Worsley was not simply taking over the existing structure, but rather undertaking a restructuring. Thus, in an email of 22 December 2009 from Mr Fetisov to Mr Drozdov and others he stated, "*someone got to talk to Ben to comment on the proposed structures and explain which things he needs to check on*". What was to be done is also described as "*first part restruct*[*ur*]*ing… of structure ownership*" in the subject line of an email from Mr Iskandyrov to Messrs Maksimov, Drozdov and Worsley, copied to Mr Fetisov, on the same day. Mr Fetisov was clearly very much in the loop in relation to the contemplated restructuring.

436. On 22 December 2009 Mr Drozdov sent a further email to Mr Worsley, copied to Mr Fetisov, Mr Iskandyrov and Mr Maksimov. The email attached additional structure charts and stated:

> "(…) The main target is to create a new representable holding structure of some projects of Group TRUST and of major shareholders and starting to transfer holding and assets to the new structure.
>
> Stake in the bank will be possessed by major shareholders (Yurov, Belyaev and Fetisov) threw [sic] the RBT Management Limited (BVI) (Russian BANK TRUST Management Limited).
>
> Holding in other projects near the Group Trust will be under the level of RHT Management Limited (Russian Holding TRUST Management Limited) which also be holding by major shareholders (Yurov, Belyaev and Fetisov) but on the nondisclosure basis to third parties."

437. This email mentions the Yaposha restaurant group, stating: "*Now we are holding 60% of Yaposha's stake threw [sic] the 2 RUS SPV*" and that Yaposha would be transferred to the "*invisible*" RHT. Similarly, it was stated that TIBI would be transferred "*under the hidden RHT level with the interface of nominee (individual or company)*".

438. Three PowerPoint slides attached to the email show the existing structure and proposed changes to it, including that: (a) the Defendants would become the beneficial owners of RHT (proposed to be a BVI company) in the usual 3:2:2 proportions; and (b) Mr Worsley would act as a nominee to hold corporate assets on behalf of RHT. Further slides sent to Mr Worsley in January 2010 anticipated that RHT (and so the Shareholders) would become the owners of a large number of Shareholder companies.

439. The diagrams show:

(1) The new Shareholder vehicle, RHT, as the intended owner of Crylani, Royston, Morledge, Filenta and other companies.

(2) RHT owning Jermanta and the Priangarskiy timber project on the one hand; and also Elis Trade and Stivilon, (despite this the Defendants now say that one half of this diagram shows a "Shareholder Project" whilst the other, in the same proposed structure, shows a "Bank Project").

(3) The Shareholders as the UBOs of LBCS, Nikilin Investments and Oil Group.

(4) RHT taking over the ownership of 41% of NRT on behalf of the Shareholders personally.

(5) TIBI being moved from the ownership of TIBH and Tactio to the RHT structure.

440. On 23 December 2009 Mr Worsley sent an email with comments to Mr Drozdov, which was copied to Mr Fetisov and later forwarded to Mr Yurov. The email provided:

> "(…) RE the RHT Structure: There is no problem with this concept. However, we need to look ahead: I do not currently have details about the companies that are held by TIB Investments at the moment. We discussed 57 companies. Is this the main vehicle that will hold the majority of these companies, or is TIB Investments the hedge fund vehicle? I lack information here to comment properly. My current comments are as follows: We need to look ahead now, in order to minimise future risks. The main issues are around share transfer to ensure 'good title' (see above), and the disclosure of beneficial ownership (IE the identity of the final Shareholders). IF there are going to be many companies under the RHT structure, we should look at the possibility of several identical structures. EG if later, a hedge fund, or Yaposha, needs to be financed, or sold, then it may be better to have separate structures for some of the entities, so that each transaction is individual, and risks around identity are minimised. In such a case, each individual structure would be such that the final beneficial owners (the Shareholders) would have the same level of security that is required…"
>
> (emphasis added)

441. On 23 December 2009, Mr Worsley informed Mr Yurov he was *"communicating with Nikolay [Mr Fetisov] on day to day issues about the structure"* and asked if Mr Yurov would like to be copied into such communications. Mr Yurov replied, indicating that he did.

442. Mr Worsley attended a meeting in Moscow on 28 or 29 December 2009 with Mr Iskandyrov and (the Bank suggests) the three Shareholders. It is not clear who was in fact present. Mr Yurov's evidence was that he did not recall attending the meeting and that he doubted such a meeting took place. Mr Belyaev denied attending, claiming he was out of the country at the time (Mr Belyaev's passport records show he was in Finland between 21 December 2009 and 10 January 2010). An email from Mr Worsley to the Shareholders on 14 January 2010 begins, *"Since we met on the 29th"* (emphasis added). It appears that this email was overlooked by those instructed on behalf of Mr Belyaev at the time of the drafting of Mr Belyaev's Opening Skeleton Argument which (wrongly) asserted that the *"first email communication that Mr Worsley had with Mr Belyaev was on 28.3.10"*. I consider it likely that a meeting did take place in late December in Moscow, but I am not in a position to conclude who was present at that meeting. Nothing turns on this.

443. Notwithstanding the fact that Mr Fetisov was clearly involved in discussing the structure with Mr Worsley and was copied into correspondence attaching the associated charts and diagrams (including on 22 December 2009 and the further correspondence in January 2010), by the time of trial he was attempting to distance himself from any such involvement (or associated knowledge gained or affirmed thereby) stating that whilst in the course of preparing his evidence for trial he has been shown the structure charts sent to Mr Worsley in early 2010, at the time he did "*not appreciate that Mr Yurov, Mr Belyaev and I had been named as the owners of the companies*" and that he "*assumed*" that all of the offshore companies were owned by the Bank "*to the extent I gave such matters any thought at all*". I reject such evidence as untruthful.

444. Mr Fetisov was clearly involved in the contemporary email traffic, it was Mr Fetisov himself who instructed Mr Iskandyrov to talk to Mr Worsley *"to comment on the proposed structures and explain which things he needs to check on"*, Mr Fetisov received the 22 December 2009 email and associated charts and diagrams (which clearly showed the proposed ownership structure), and the following day Mr Worsley told Mr Yurov, in a contemporary email that he was, *"communicating with Nikolay [Fetisov] on day to day issues about the structure"*. I did not find credible his oral evidence that he was not in fact in communication with Mr Worsley on such matters, or that he was not directly responsible for giving instructions to Mr Worsley at this time, or that he would not have followed the discussions closely whilst they were a work in progress. I am satisfied, and find, that Mr Fetisov did appreciate that he had been named as owner (with the other Shareholders), that he was well aware of what was being proposed and that he did not assume that all the offshore companies were owned by the Bank.

445. Mr Belyaev was equally keen to distance himself from knowledge of what was going on, and it was in the context of Mr Worsley's 14 January 2010 email to the Shareholders including Mr Belyaev, which contained a detailed update of the progress made by Mr Worsley in relation to restructuring the offshore network, that led to what I am satisfied was Mr Belyaev's untrue assertion, as already addressed, that he could not read emails whilst out of the office. In fact not only could he do so but in response to an email from Mr Worsley on 18 January 2010 stating *"I will be in Moscow soon let's catch-up (about hunting as well as the business issues)* (emphasis added), Mr Belyaev responded by email the same day, *"Hi Ben! Coming back to Moscow next monday. Let us talk about it. Regards! Sergey"*. Given that a meeting was contemplated in Moscow between Mr Worsley and Mr Belyaev later in February, I consider the likelihood is that it took place. Certainly, Mr Worsley met with Mr Fetisov and in Mr Yurov in January on 22 January 2010 before a further meeting with them in Moscow on 9 February 2010.

446. The email of 14 January 2010 from Mr Worsley to the three Shareholders provided:

> "Dear All,
>
> Since we met on the 29th I have had many meetings in Europe and in London. I am in London today and I plan to be in Luxembourg on Monday.
>
> We will have access to banking relationships in Luxembourg Switzerland. We will also be able to set up banking relationships in other territories as required. I have potential advisors in Cyprus. I am meeting a bank in Luxembourg, and as well as providing banking relationships they will also be able to offer advice.

I have sourced an international tax advisor in London (via my lawyers). They are a boutique firm who specialise in strategic international tax structuring. They work with major companies, and can provide umbrella advice on the whole structure - risk, jurisdictions, and related topics. my feeling is that it is critical that we have this 'overview' strategic advice from an independent firm. As well as overview advice they are also able to offer execution of the structure via other firms. However, we can decide slightly later on how we split the execution side.

I have briefed this firm on the general situation. I will be sending them a non-disclosure agreement to sign later today. I will also send them cleaned versions of the existing structures (with company names and Shareholder names removed). They will then revert with pricing for their work. Ballpark numbers are GBP7-10K for the overview. I feel that this is money well spent. This is a new structure, and we need to take into account all of the international legal and tax issues in one view before we move ahead to execute the structure. I will act as a central point to bring together the advice, and then the structure itself.

The firm in question is well respected in the City, and yet it is not a large legal/accounting firm who will run up huge costs. Of course, if so required, we can also move ahead ASAP with individual companies at any time.

Please let me know your thoughts."

447. The following day, on 15 January 2010, Mr Worsley sent an email to Mr Iskandyrov, copied to all three Shareholders stating:

"I am seeing the advisors later this morning.

They will be instructed to advice on ideas for the new structure, taking into account legal and tax issues.

They will also be instructed to point out current risks, and also potential future risks."

448. It is clear that both Mr Yurov and Mr Fetisov were themselves involved in advancing the new offshore structures around this time. On 22 January 2010, Mr Worsley met with Mr Yurov and Mr Fetisov in London. Mr Yurov and Mr Fetisov's evidence was that they did not specifically recall the meeting, but Mr Yurov agreed there was a high probability that it took place. Mr Belyaev did not attend. On the evidence I am satisfied that such a meeting took place (there is also a reference to points having been discussed with Shareholders in a meeting in London in Mr Worsley's 3 February 2010 email to Mr Stennett of SMP).

449. Immediately prior to the meeting:

(1) Mr Worsley communicated with Mr Iskandyrov indicating *"I am meeting Nikolay and Ilya tomorrow in London. Things are ready to start executing company transfers".*

(2) Mr Iskandyrov sent Mr Worsley a number of structure charts which appeared to show the Shareholders owning a number of companies personally through RHT Management. These include Royston, Morledge and Filenta (through Crylani Trading Limited); Business Group and Priangarskiy (under the umbrella of a new company named Siberian Timber Enterprises); Stivilon and Elis Trade (under a new company named Gelengic CC).

(3) Mr Worsley indicated: "*When I meet Nikolay and Ilya, I will ask them which advisors they prefer to use. I think that we need to have one London advisor who knows multiple jurisdictions, and who will give overall strategic advice.... We then use other individual advisors for different territories and jurisdictions."*

(4) Mr Iskandryov replied: *"l am waiting on <u>decision</u> of Nikolay and Ilya."* (emphasis added)

450. Mr Worsley subsequently communicated with a number of other tax advisors. On 27 January 2010, he indicated to Mr Iskandyrov:

> "I met the tax advisors today. They need three weeks to come up with their results. It feels too long. I am pushing them to get results sooner. Until they agree to a shorter time scale I have not mandated them. Tomorrow I am talking to other advisors who can take their place.
>
> I am also talking to other people. These are people who can execute the structures in all jurisdictions.
>
> In this way, we can get to a stage where in 3 weeks, we can start active executing the new companies.
>
> I am coming to Moscow later this week. Let's meet to discuss all details"

451. By early February 2010, Mr Worsley had drafted a memorandum to the Shareholders giving an overview of his work to date. The metadata of the document shows it was created on 1 February 2010. The document provided:

(1) That as a next step, privacy should be protected, including minimising email traffic ("EG you are reading this in hard copy not on email.") and setting up a secure line of communication.

(2) That shareholdings in the vehicle for the Bank needed to be transparent for the CBR.

(3) That for shareholdings in other companies, privacy was paramount. The document explained (i) that Mr Worsley would start a *"fake email dialogue with Marat [Mr Iskandyrov] to negotiate the purchase of TIB so as to start a*

paper chain that supports the sale of TIB"; (ii) that the companies coming under RHT would be split into different groupings (including a structure for restaurants, and a structure for retail and other assets); and (iii) That the work would be divided between different groups of advisors and different formation agents/company administration agents, and lawyers for each structure (so that the people handling the Bank structure were different to those handling RHT).

452. Mr Yurov agreed that at some point he was given a thick hard copy document comprising advice on jurisdiction and tax issues, although he could not say whether the memorandum formed part of that document. Mr Fetisov's evidence is that he did not recall reading the document at the time. Mr Belyaev's evidence was that he could be "pret*ty sure*" he did not. In circumstances in which Mr Worsley clearly prepared the document for the Shareholders I consider that it is more likely than not that it was provided to each of the Shareholders. I view with circumspection the evidence of Mr Fetisov and Mr Belyaev that they did not read it. I consider it more likely than not they would have read it given that it concerned both what they considered to be their own personal assets, and the methodology by which they were seeking to preserve the Bank.

453. Meanwhile, on 3 February 2010, there was another meeting between the Bank and the CBR attended by Mr Yurov. Ms Podstrekha also attended this meeting. The purpose of the meeting was to discuss the CBR's "*audit findings*". Per the Minutes:

> "Within the discussion, the representatives of the Bank of Russia confirmed the opinion stated before on the adequate appraisal by the bank of the credit notes on a number of loans. The Bank representatives were informed of the need to additionally form the reserves for the possible losses on the loan and similar debt on a number of loans, namely on the loans to Jermanta LLC, Sapkont LLC, ElisTrade LLC, Law and Business Debt Collection Agency LLC, Nomiranta Limited, Zosimal LLC. Oil Group LLC, Mourija Trading Limited. The relevant request will be sent to the Bank by Moscow Main Territorial Department of the Bank of Russia."

454. After discussion of the possible acquisition of the Bank by Rosneft before Mr Yurov is recorded as making the following statement:

> "I.S. Yurov supposed that the negative publishing appeared in mass media concerning the Bank are related to the union of the banks. **Besides concerning the Bank's loan portfolio, I.C. Yurov informed that the borrowers of the bank are not related to the Bank owners and the investment projects, which are credited by the Bank are not the business of the Bank owners.**
>
> (emphasis added)

455. That was, of course, an opportunity for Mr Yurov to tell the CBR the truth about ownership of off-balance sheet companies by the Shareholders but it is clear he did not do so, and instead told a blatant lie. Mr Yurov accepted in cross-examination that he had no reason to doubt that he said these words. Ms Podstrekha also stated in her oral evidence that she had a vivid memory that Mr Yurov had "*looked me in the eye – I said* "*Are they your companies?*" *and he looked me straight in the eye and he said,* "*No they are not ours*". Ms Podstrekha's evidence (which I accept) is that she understood Mr Yurov's statement as applying to the entire loan portfolio. I reject the suggestion (advanced in Mr Yurov's Skeleton) that the statement related only to those borrowers that are specifically referred to at the start of the Minutes. That is not consistent with the wording of the

Minutes (which the Bank would have had the opportunity to comment on and correct) and which encompasses all borrowers and "*investment projects*". In any event, even if that were so, (and I am satisfied it was not), the evidence is that the likes of Jermanta, Sapkont and Elis Trade were owned by the Shareholders, so it was a lie to state that those companies were not related to the Bank's owners. Even had the borrowers been beneficially owned by the Bank (but concealed off balance sheet) it could not honestly be said that such borrowers were "*not related to the Bank's owners*".

456. There was some suggestion, in the cross-examination of Ms Podstrekha, that the CBR should have seen through Mr Yurov's lie. This is not an attractive suggestion. Whatever the CBR's suspicions, it had received an express assurance from Mr Yurov that the borrowers were not related to the Shareholders and the off-balance sheet structure meant that the CBR was not in a position to disprove what was stated. The restructuring that was in train would make that even more difficult (if not impossible), as I have no doubt Mr Yurov was aware.

457. Simultaneously, on 3 February 2010, Mr Worsley was writing to Mr Stennett of SMP to seek to instruct his firm to provide strategic advice in relation to the restructuring (a previous London firm had quoted for the work but had apparently let him down). It is plain from the correspondence with SMP that Mr Worsley had told them that the existing holding and ownership structure of the relevant assets was to be transferred into a new structure under the Shareholders' personal beneficial ownership. In the 3 February email, Mr Worsley referred to "*some obvious points, as discussed with shareholders in London*", stating:

> "Our basic idea is to have a structure as follows:
>
> Russia company owned by a company in one of the jurisdictions listed below
>
> That owned by a co in a place such as BVI or Belize etc
>
> That in turn owned by the shareholders via a fund, another offshore co, or a foundation etc.
>
> In some cases we need confidentiality for the shareholders, in some instances we need
> transparency.
>
> FYI: At the moment there are multiple companies in Russia, owned via Cyprus by companies in other places. It is quite a complex current situation. See attached presentations with names removed.
>
> The shares in (say) a current Cyprus company would be transferred to a new Cyprus co, or a Luxembourg co (and up into the structure that own that New CO) etc, thereby effectively transferring the beneficial ownership of the Russian asset"

458. The reference to the "*presentations with names removed*" is a reference to those prepared by Mr Worsley and referred to in his email of 14 January to the Shareholders. The presentations show the proposed transfer of the Yaposha group companies under the new BVI structure, using Mr Worsley as a nominee through a trust deed, the Cypriot Jermanta, Nomiranta, etc. holding structure, to be restructured under the new BVI company to be held by the three Shareholders personally (these were anonymised versions of the slides sent by Mr Iskandyrov to Mr Worsley (cc Mr Fetisov) under cover of an email on 15 January).

459. In response, Mr Stennett proposed to provide:

> "● A holding company matrix for Russian investments summarising the relevant tax implications including withholding tax rates and capital gains for Cyprus, Luxembourg, Netherlands and Offshore holding companies with participations in Russian trading and real estate entities;
> …
> ● A summary of suitable structures to hold the relevant Cyprus, Luxembourg or Netherlands holding company to minimise tax leakage;
>
> ● Answers to the "Questions/issues for each multiple jurisdiction structure".

460. The final point was a reference to a document with that title prepared by Mr Worsley on 22 January 2010. This covered:

(1) taxation issues, including:

> Personal taxation issues for Shareholders and nominees in each jurisdiction. Forward planning for Shareholders who may want to live outside of Russia in the future (EG UK)
>
> Choices/options for types of companies that satisfy legislative requirements for each type of asset class
>
> Provision of structures that allow for future sales of assets, and that also allow for this to happen in a tax efficient manner."

(2) under the heading "Control":

> "For each part of each structure there are two broad issues: How the 'real' control is exercised and how 'nominee' control is set up so that taxation mechanisms work properly
>
> Risk around control issues (EG the need for controlling nominees in jurisdictions where offshore offices 'run' the structure as nominees for taxation purposes)
>
> Trust and Shareholder agreement issues: Need for security, and also future flexibility

In structures where complete privacy is required, control and nominee issues must be addressed with attention to detail so as to protect Shareholders."

(3) under the heading "Transfer of Shares":

"Russian valuation issues around transfer of shares to new structures

Taxation and funding issues around the acquisition of new shares by new structures (will depend on tax legislation in each jurisdiction)

Taxation issues around share transfers, in the case of structures where complete privacy for final Shareholders is required (loans etc to implement share transfer)"

4) under the heading "Other":

If required, provision of further bank accounts for family members and provision of other family office services

Discussion of structure at Shareholder level. Possible provision of separate offshore companies that then own the top level Shareholder companies in relevant percentage amounts.

461. On 8 February 2010, Mr Worsley sent an email to Mr Yurov and Mr Fetisov, stating:

"I am still in Moscow.
Can we find a time for the three of us to catch up this week pls? Maybe tomorrow or Wednesday? I can come to the Bank, or we could grab a quick dinner?
There are a few (not many) key questions that I need to ask you prior to next steps next week (see below).
Update: The London based tax people went on holiday instead of working. So, I found new consultants in the Isle of Man, and fired the London specialists. The Isle of Man people have a lot of experience with Russia, and are good.
They are also cheaper, and faster. I will have their first report tomorrow or Wednesday.
I plan to go to the Isle of Man to meet them for further meetings. I guess I will be there Monday and Tuesday next week. After that we will have a good picture of how the final structure could look. I will have several options, that we can then discuss.
I may have to go to one or two other places for related meetings, before coming back to Moscow to discuss it all with you face to face.
There is research going on about which Cyprus companies to use. They are like commodities.... Best to go there, and I will choose the most efficient and cheapest people around. That is easy to do, and comes after the overall structure is agreed in first principles."

462. It appears from the correspondence that Mr Worsley met with Mr Yurov and Mr Fetisov the following day, on 9 February 2010. Mr Fetisov's evidence was that he did not recall such a meeting. Mr Belyaev was not involved.

463. On 11 February 2010, there was an email exchange between Mr Worsley and Mr Iskandyrov in which Mr Worsley referred to requests from Vassiliades for information about the beneficial owners and commented: "*it is too early to start to disclose beneficial ownership to Vassiliades. We need to stop that process*". Mr Iskandyrov replied in the following terms:

> "Ask IOM guys how will they opening account in the bank? Are they need information about final beneficiary?
> As a variant we need to find real reach [rich?] person who will be nominee beneficiary (with trust deed from our shareholders), but who will be talk all of around that he real owner"

464. This is clearly a reference to what in fact happened with the "nominee UBOs". This email exchange ended with Mr Iskandyrov saying that a conference call would be arranged with Mr Fetisov on 12 February 2010. The likelihood is that the subject matter of any such call would be what was quoted above – that is how the companies would open bank accounts and provide KYC information without revealing their true (final) beneficial owners who would be the Shareholders with a trust deed between them and nominee beneficiaries (the "nominee UBOs"). However I cannot be sure that this call actually took place (in his oral evidence Mr Iskandyrov could not recall whether it did). If it did the likelihood is that such matters would be discussed though again I am not convinced it would be a call about Mr Fetisov "approving" the recruitment of nominee UBOs. The fact is, however, that that is precisely what Mr Worsley went on to do, and it is inherently improbable that he was on a frolic of his own and was not doing so with the knowledge (and approval) of the Shareholders.

465. The Bank claims that the three Shareholders communicated about and approved Mr Worsley proceeding to re-structure the offshore network using predominantly Cypriot companies, nominee UBOs and secret deeds of trust up to the Shareholders personally.

466. Mr Yurov's and Mr Fetisov's case is that the proposal to restructure and use nominee UBOs came from Mr Iskandyrov and/or Mr Worsley themselves. Mr Yurov and Mr Fetisov claim they received high level progress reports on restructuring, but did not engage with any of the details. Mr Fetisov's evidence was that he believed the discussions related to transferring Bank projects and assets into orphan SPVs or trusts for the benefit of the Bank.

467. Mr Belyaev's evidence was that he did not have knowledge of any proposed restructuring of the offshore network. He was not copied into a majority of the correspondence and did not attend any of the meetings, and as such was not aware what Mr Worsley was doing at the time.

468. Whether or not the Shareholders knew, at this stage, the precise manner in which the restructuring was going to take place (and on balance I consider the likelihood is that they did, given that Mr Worsley would no doubt have ensured they were aware of, and content,

with what was proposed), I am satisfied, in the light of subsequent correspondence and meetings, that they became aware, if they were not already aware, that an offshore network was being created in relation to which they would be the ultimate beneficial owners of the companies concerned.

469. In an email on 15 February 2010, Mr Worsley indicated to SMP *"Our goal is to create a final structure where the identities of any final beneficial owners are completely private"*. What was envisaged was a structure whereby a *"Russian asset"* was owned through a series of offshore companies owned by a *"public nominee"* such that *"the final beneficial owners would then own shares in the final offshore company"*.

470. At some point after this Mr Worsley (though not the Shareholders) attended a meeting in the Isle of Man with SMP following which SMP produced a memo dated 26 February 2010. The memo outlined the "next steps" and provided inter alia:

> "1.3 *METHOD OF TRANSFERRING ASSETS*:
>
> It will be necessary to determine how the assets will be transferred from the current structure to the future structure. We will need to understand whether there will be:
>
> - a gift or sale of assets
> - a transfer at full value, under value or nil value
> - It will also be necessary to determine at which level the transfer will take place e.g. will the beneficial owner gift the existing structure into trust or will the Russian entities be transferred into the future structure.
>
> 1.4 *OTHER ISSUES*:
>
> - We understand the current structure is owned by three Russian resident individuals
> - The ultimate ownership is split 40%, 30% and 30% between the three individuals
> - We can recommend appropriate Russian lawyers based in Russia or alternatively we can recommend Russian lawyers based in the UK. We would liaise with the Russian lawyers to ensure that the assets are transferred into the structure in an effective way
> - We would need to consider these steps for each separate asset class
> - We understand the separate asset classes are:
>   - The Russian bank
>   - A Fund
>   - Assets acquired by the bank on the default of loans: real estate / retail / other trading operations"

471. Mr Fetisov referred to this final paragraph (and in particular the last bullet point) obliquely in cross-examination and expressly when taken to it in re-examination in these terms:-

> "A. Well, that's, I think, very telling from this paragraph, Russian bank is National Bank Trust. A fund is a clear reference to a Florin fund or some other holding fund for the assets, which were funded by the Bank, and assets acquired already by the Bank on defaulted loans, I think there can be no disagreement on what that means. That just bank acquired assets on the default of the initial loans. So the assets went under the control of the Bank and according to what I understand, and what I remember, there was -- should be a discussion on how to hold these different type of assets in the proper way".

472. The Shareholders rely on the last bullet point which they say shows that the assets held in the offshore network belonged to the Bank. They also rely on section 3 of the memo, which comprises advice as to the establishment of an orphan trust for the Bank. Mr Fetisov contends this reflects his general understanding that SMP were advising on the use of orphan trusts/SPVs to hold assets acquired by the Bank for its own benefit. For its part the Bank contends that the none of the assets belonged to the Bank. To the extent that the memo suggests otherwise, SMP misunderstood or misstated the position, or were misinformed by Mr Worsley.

473. I consider the most likely explanation is indeed that SMP were misinformed by Mr Worsley due to a misunderstanding by Mr Worsley as to the historic origin of particular companies. First, Mr Worsley made a similar suggestion to SMP in October 2010 after SMP (in a compliance context) queried which assets were being placed inside the new structure and Mr Worsley replied with a list that included Stivilon, Willow River/RCP, Yaposha, the commercial real estate and Priangarskiy/Business Group stating *"Mainly assets seized by the bank during the crisis"* when in fact there is nothing to suggest that Yaposha or any of the commercial real estate projects had been acquired on the default of any loans. Second, the documentation that has already been referred to that Mr Worsley was sent and which he passed on to SMP (in anonymised form) clearly showed that Yaposha was directly owned by the Shareholders not the Bank, and Business Group (identified in the structure charts) and the Billa (that is the Willow River/RCP) property portfolio was (per the Shareholders themselves) never acquired by the Bank.

474. It is also the case that no such structure actually came into fruition, and it was not suggested in other correspondence sent at the time (which refers to the use of a BVI holding company and nominees, holding assets on trust for the defendants personally). I reject Mr Fetisov's evidence that the reference in section 3 of SMP's letter to an *"orphan trust"* structure to *"own Bank assets"* and his evidence that this represented *"my general understanding how the assets of the Bank were supposed to be handled"* as it is simply inconsistent with all of the proposals in the multiple structure charts and emails circulating previously, which refer to the use of an "*invisible*" BVI holding company RHT and nominees holding on trust for the Shareholders personally, and even more fundamentally, it is not consistent with any of the structures subsequently put in place including by or through SMP, Boston or Vassiliades (see below). Equally the SMP "*orphan trust*" proposal involved the orphan status being achieved by the trust having a charitable

beneficiary (not the Bank or Shareholders) with a real transfer of asset held by the Bank to the trust structure at full market value with a profit share agreement with the Bank so that the Bank had an economic interest. Quite clearly this is not what happened.

475. SMP proposed an alternative structure in Section 3.2 of the letter which contemplated not "*an orphan trust*" but rather at the top of the structure an Isle of Man trust of the Shareholders – described by SMP as *"a simplified version of the structure and in practice it would be structured so that ownership of the Isle of Man Co is split between the three beneficial owners"* - with any profits from the sale of the assets being paid up through the structure to the Shareholders. Whilst this assumed the acquisition of the Russian assets at full market value using loans from the Bank (which never happened and the assets were not transferred for value) this is much closer to what actually happened subsequently.

476. On 13 March 2010 Mr Worsley informed SMP that the "sales" of assets would in fact be only for nominal consideration, stating:-

> "The ongoing work in the next few days is all about the corporate assets i.e. everything except the bank itself. This is because the Russian lawyers here need to work on the logistics around the CBR before any changes can be made to the Bank holding structure…
>
> Here are the key points:
>
> 1) There will not be a 'gift' of the corporate assets to a new trust. Instead there will be a sale. The local Russian valuations mean that the assets will be sold for nominal prices. However nonetheless we will need to organise a financing structure so that it is a proper sale.
> …
> 4) Due diligence implications and process.
>
> I need complete clarity about this process. I understand that if we set up the trusts, and then the trustees set up the whole structure, then each formation agent will know the details of the UBOs.
>
> However, if I (using SMP) set up the Cyprus/Lux Cos, then set up the next level (e.g. Dubai), and at the same time set up the related bank accounts, and I then sign the nominee agreement after the companies have been set up, would I be correct in saying that in this instance the formation agents in Cyprus/Dubai/Lex/Ireland, and the bank managers etc., will not know the identity of the UBOs??? This would be because until I sign the nominee agreement, I am in fact the UBO of the companies…
>
> FYI obviously I would sign the nominee agreement prior to the actual sale taking place…"

477. On 28 March 2010 Mr Worsley sent the three Shareholders an email to their work email addresses with a password-protected Word document. The email provided*: "let's consider flying to London for the 16th, or agree another date for London (see notes*)." The Bank suggests that the document contained details of how the offshore network was to be restructured. It has not been possible to see the contents of that document. Whilst I cannot be sure what was enclosed, in the context of the proposed meeting and what it is apparent

was discussed in that meeting I consider that the overwhelming likelihood is that the document did address the proposed restructuring.

478. Before the meeting in London, Mr Worsley prepared a series of charts described as "Silos" of companies divided up into "Property", Financial", "Corporate" and "Restaurant" assets, each with "Shareholder Offshore Co" at the top of the structure. There was no distinction drawn between "Bank Companies" and "Personal Companies" (again supporting the conclusion, that I have reached, that there was no such distinction). If there was such a distinction then I consider it would have been reflected in the charts, and would not have resulted in "Shareholder Offshore CO" at the top of each structure.

479. Correspondence refers to a meeting taking place on 16 April 2010 at a hotel in London which the Bank says was attended by all three Shareholders together with Mr Worsley and SMP. All three Shareholders gave evidence that they did not specifically recall the meeting, but accepted based on the documents that it was likely that it took place. Mr Belyaev claimed that no specific assets would have been discussed and that the meeting would have been no more than a general theoretical discussion of how the Shareholders could hold their assets and business. I am satisfied that all three Shareholders did attend the meeting in London and that there was discussion of assets (even if not at the level of specific assets) and how the Shareholders would benefit from income generated by the companies, and that the Shareholders are seeking to downplay their knowledge of what was discussed, and envisaged, at that meeting.

480. As to the former Mr Stennett's email to Mr Worsley of 19 April 2010 provides, *"Thank you for arranging the meeting on Friday in London. It was a pleasure to meet with I, N and S".* As to the latter, this clearly emerges from what is described as a synopsis of the meeting from Justin Scott of SMP to Mr Worsley (cc'ing others at SMP including Mr Stennett) dated 19 April 2010. I see no reason why what was recorded is anything other than a summary of that meeting (given that the accompanying email refers to a *"synopsis of your recent meeting"* and it begins *"To summarise our recent meeting*"). It provides, amongst other matters:-

> "To summarise our recent meeting we agreed that while a discretionary trust directly holding Russian situs commercial/trading assets does offer administrative advantages and an element of asset protection, the level of asset protection from a Russian perspective is limited where it involves Russian creditors. In addition the trustee responsibilities and therefore the costs are greatly increased when the rust holds commercial/trading assets.
>
> Instead, a bespoke company (or companies) acting as nominee / bare Trustee on behalf of X, Y and Z should sit at the top of the commercial structures. In this way, an ownership veil is ostensibly created and costs are kept to a minimum. In relation to the Bank assets, as there would be a clear Declaration of Trust in relation to the nomineeship, it would be difficult to envisage resistance by any Russian authorities.
>
> It then becomes important to ringfence upstreamed income (to the nominee) generated by income generating businesses. To that end,

> X, Y and Z should each establish their own separate irrevocable discretionary Trust which would then receive cash from the nominee by appointment (either directly or via another nominee), which would be held outside Russia. These Trusts would afford proper **asset protection** for X, Y and Z and act as an investment pool to invest in / hold non Russian situs assets — cash, properties, yachts, aircraft, other investments. These Trusts would not be registered anywhere." (emphasis added)

481. It is clear from this document that what was being discussed at the meeting was how income from the relevant assets would end up beneficially with the Shareholders and how this would be achieved/structured culminating in each of the Shareholders having their own irrevocable discretionary trust to receive income generated by companies. It is the ultimate beneficiary who receives dividends and the structure that is being contemplated (as I am satisfied each of the Shareholders must have known from attendance at the meeting and what was discussed) envisages the Shareholders themselves being the beneficiaries, and thus the true ultimate beneficial owners of the companies concerned (in contrast to the Shareholders' case). Once again there is no distinction between "Bank Companies" and "Shareholder Companies" – it is envisaged that all benefits would go to the Shareholders' personally as is reflected under the headings "Nominee Company" / "Discretionary Isle of Man Trusts x3":

> "…
> - Dividends and other payments arising from the underlying commercial assets will flow upwards to Nominee Company;
>
> - Funds held within the Nominee Company will be appointed to the relevant discretionary Trust to be settled by the beneficial owners.
> …
>
> No payments will flow directly from the companies holding the commercial assets directly to the Trusts; there is thus no discernible trail from the Russian situs assets to the offshore assets."

482. There is a reference to the *"Bank assets"* in the context of stating that, *"there would be a clear Declaration of Trust in relation to the nomineeship, [so] it would be difficult to envisage resistance by any Russian authorities."* It is not clear what is meant by this and it may be that SMP was not fully in the picture as to what the current position was and what was intended – there was no intention to tell the Russian authorities of the nominee structure, indeed, to do so would have defeated one of the very purposes of the contemplated structure.

483. Whilst Mr Yurov suggested in his oral evidence that the envisaged structure must only have been intended to relate to Willow River and RCP there is no such discernible distinction in the document, and it seems inherently unlikely that there was any such distinction not least given that Willow River was not even incorporated until 23 July 2010. It is interesting, however, that Mr Yurov makes this distinction. In doing so he is recognising (rightly in my view) that the structure as described is one through which assets would be held for the Shareholders' personal benefit, rather than the Bank's. I am quite satisfied that this is indeed what was discussed at the meeting, as reflected in this contemporary document.

484. The same theme can be seen in a memo of a possible "*final structure*" produced by SMP on 13 May 2010, including an analysis of "*nominee issues*". The memo proposed a structure with discretionary trusts for the Shareholders at the top (which would "*receive cash from the nominee by appointment (either directly or via another nominee)*"), and holding in turn: a "*UBO Nominee co*" – a "*Final Holding Co*" (offshore) – a "*BW Nominee Co*" – a "*Holding Co*" (in Cyprus)" – and finally a "*Russian Co*". The memo contained a diagram which appeared to show dividends flowing up from a Russian or Cypriot Company to three separate trusts at the top. The memo contemplates amongst other matters:-

> "…Nominee Co. 2 would hold the shares in Isle of Man Co under a simple Declaration of Trust therefore dividends and other payments arising from underlying assets will flow upwards to Nominee Company.
>
> Any funds held within the Nominee Company would generally be appointed over to the X, Y and Z Rollover Trusts…
>
> …We have assumed that X, Y and Z Rollover Trusts will be Isle of Man Discretionary Trusts. These Trusts would afford proper asset protection for X, Y and Z…" (emphasis added)

485. I consider that the synopsis, and this document, supports the Bank's case that the proposal at this stage was for the Shareholders each to have an offshore trust which would receive income generated by the companies in the offshore network (including companies said to be "Bank Companies") and that they proceed on the basis that the associated assets are the Shareholders' ("*asset protection*" pre-supposes that the assets being protected are beneficially owned by the Shareholders). Such documentation is not consistent with the Shareholders' contention (which I reject) that they believed SMP to be advising on the use of orphan trusts/SPVs for the Bank's own assets and/or tax issues relating to proposals to move their Bank shareholdings into offshore trusts.

486. It is also clear that from this stage on, shareholder vehicles were used by Mr Worsley (and in due course others) as nominee UBOs to conceal the true beneficial ownership resting with the Shareholders. Further (consistent with what was previously envisaged, and what occurred thereafter) the Shareholders were aware that UBOs were being used for their benefit and to conceal their beneficial ownership of companies.

487. Indeed it is clear that Mr Fetisov was himself aware of the very first such shareholder vehicle that utilised Mr Worsley himself as a nominee UBO, and must have been aware, though he denied it, that this would involve a (dishonest) pretence on Mr Worsley's part whereby he acted as a nominee in the on-going acquisition of the RTM CLN's for the Shareholders' benefit through Costells Holdings Limited. Thus, on 14 April 2010, Mr Litvyakov of the Bank emailed Mr Worsley (copying Mr Fetisov, as well as Mr Buyanovsky) about "*a new project*". Mr Litvyakov wrote:

> "We will prepare drafts of the trust deeds and send you for execution. In the meantime, we will appreciate receipt of the scanned copies of your passport, a recent utility bill and a brief CV."

To which Mr Worsley replied, "*In order that the cv 'looks' right, could you tell me more about the project pls?*", to which Mr Litvyakov responded:

> "…the project includes two parties: Costells Holdings Limited (CHL) (which interest you represent) and R2. The project's aim is to arrange assets exchange between CHL and R2. This will include involvement of the Escrow Agent (Julius Baer, subject to completion of a satisfactory KYC). CHL will hold on the escrow account opened with the Escrow Agent a) cash and b) defaulted notes. R2 will on the escrow account opened with the Escrow Agent its 95% stake in a newly set up company called R1 (the other 5% will be owned by CHL). At a certain point provided in the Escrow Agency Agreement the Escrow Agent will transfer a) cash and b) defaulted notes to R2 and 95% in R1 to CHL. For KYC and commercial reasons you will be a registered owner of CHL. All companies names mentioned above are indicative, save for CHL."

488. This was an accurate description of the final stage of the Shareholders' acquisition of the Billa portfolio, which was refinanced by the loans to, and acquired by, Willow River and RCP later in 2010 ("R2" refers to RTM and "R1" was Vorsa).

489. What then occurred reflects the use of declarations of trust up to TIBI Holdings, rather than the Shareholders naming themselves as beneficial owners. This matched the practice employed by the Cypriot structures held at this stage through Totalserve in Cyprus (with Cypriot holding companies such as Jermanta and Nomiranta at the top).

490. Thus on 19 April 2010 Mr Litvyakov sent Mr Worsley Declarations of Trust for him to execute showing Costells owned by Ledra Nominees on trust for Mr Worsley, who was in turn to hold them on trust for TIB Holdings (i.e. for the Shareholders). The next day, Mr Litvyakov forwarded to Mr Worsley a request for more KYC information as to his *"- Education; -Family situation; -origin of wealth; -past/present sources of income; - description of business (if any website, presentation)".* To which Mr Worsley responded: *"Ok. For this transaction, how rich am I meant to be pls? i.e. how much is transaction 'cost' to me? It affects how I present myself to them etc."*

491. Mr Fetisov was well aware (as he admitted in cross-examination) that Costells was owned by the Shareholders. From this he must have been aware that what Mr Worsley was doing was a (dishonest) pretence, as I am sure he was (I reject his denial as both incredible and dishonest) – what Mr Worsley was doing was readily apparent from the face of the document that was copied to Mr Fetisov on 14 April 2010.

F.2.5.3 THE NEW HOLDING STRUCTURES ARE SET UP

492. In the ensuing months Mr Worsley set-up a number of the Borrower companies including (early on) Willow River, Moscow River and Black Coast. Associated bank accounts were opened with Piraeus Bank in Cyprus which thereafter provided banking

facilities to the offshore network. It is clear enough that it was willing to effect transactions without asking too many questions about the associated (in most cases sham) paperwork that was generated.

493. The next important event (so far as Mr Worsley's role and his relationship with the Shareholders' is concerned) comes with the preparation by Mr Worsley, in July 2010, of a draft "term sheet" for the Shareholders (entitled *"A safe-haven for assets"),* in which he proposed to *"run the complete nominee business for NBT's Shareholders"* and act as a *"legal UBO" "in order to add further layers of protection for NBT Shareholders",* in return for which he contemplated significant fees *(with "[c]ash amounts payable offshore under one or more contracts with offshore companies").* Mr Worsley also proposed an annual retainer of US$3 million, which he said could *be "structured"* to be "payable from Bank expenses".

494. Whilst the fee proposals were clearly just that (and not ones that found favour with the Shareholders) I am satisfied that the services he identified were indeed being provided by him to the Shareholders. There are numerous references to the services that he was providing to the Shareholders as opposed to the Bank. That he regarded himself (rightly I am satisfied) as acting for the Shareholders and their interests (as opposed to those of the Bank) can be seen from his contemplation as to what would happen if the Shareholders exited the Bank, *"Fees structured now so as to be payable from bank expenses. If NBT Shareholders exit NBT due to merger (EG in 3 years time), then annual fees to be reviewed/ re-structured so that personal cashflow of NBT Shareholders is not impacted unreasonably."*

495. It was accepted by Mr Yurov and Mr Fetisov that this email seemed to refer to the proposal in the draft "term sheet", but neither of them recalled seeing the specific document. However I consider that it is clear that the term sheet and included fee proposals were provided to the Shareholders as evidenced by an email from Mr Worsley to Mr Fetisov on 8 July 2010 in which he stated, amongst other matters, *"I hope that I did not offend either Ilya or yourself with my proposal. The things I am working on are important issues for you guys, and also for myself. I am sure that we will find common ground on the financial side."*

496. If Mr Worsley (and later Columba) were acting on behalf of the Bank, one would expect that there would be a contract in place between Mr Worsley and the Bank and/or between Columba and the Bank. However there was nothing of that sort. On the contrary (and as already addressed above) it was the Shareholders who recruited Mr Worsley and he was paid via Kuri Hills (i.e. out of loan proceeds to companies in the network) in effect on his own authorisation. Such payment terms as were agreed were between Mr Worsley and the Shareholders. For example (as reflected in a much later email from Mr Worsley to Mr Yurov dated 17 April 2014), *"my personal retainer that was agreed ages ago is USD750K a year. I pay it to myself quarterly"* to which Mr Yurov responded "*Yes that's clear*" and requested information about other items (cars, travel, holidays).

497. The documentation does not suggest that (as Mr Yurov suggested in his oral evidence") Mr Worsley was acting for the Bank as a provider of services and separately as a provider of services to the Shareholders in managing their "family offices" (though the latter is clearly part and parcel of what Mr Worsley was doing for them).

498. There are then events in late July 2010 which I consider again tell the lie to the Shareholders' case about the distinction between "Bank Companies" and "Shareholder Companies" and also fix the Shareholders with knowledge that the companies are their companies and not those of the Bank.

499. As noted, in the summer of 2010, Mr Worsley established a number of Cypriot companies with the help of Trusban (a BVI corporate service provider), including Willow River, Moscow River and Black Coast. As is apparent from a structure chart produced by Mr Iskandyrov around August 2010, Mr Worsley held a number of companies through Beauduc Capital, of which he was the nominee UBO. It appears the plan at that stage was for Beauduc Capital to execute a trust deed in favour of RHT Management, which the chart shows was held by the Shareholders personally. Mr Schildbach, who worked for Trusban, sent an email to Mr Worsley on 25 August 2010 attaching an engagement letter dated 29 July 2010 which was to be signed by the beneficiaries of the companies.

500. The Shareholders were asked to sign various documents in their avowed capacities as beneficial owners of the companies (including an indemnity to the Cypriot lawyers then acting as the corporate services provider, Chrysanthou & Chrysanthou) – which the Shareholders duly did. In particular, on 29 July 2010, Chrysanthou & Chrysanthou sent an engagement letter to Willow River, Moscow River and Black Coast which had been recently incorporated. On the Shareholders' case, the first two companies were "Personal Companies" whereas Black Coast was a "Bank Company". No distinction is drawn in the letter between the companies or their ownership and the "Beneficiaries" are defined as "The persons whose names and details appear on the Schedule 2 hereto" – namely the three Shareholders (with their shareholdings in the usual amounts handwritten in). The document itself is stated to be "Approved" by the three Shareholders who have each signed under their name.

501. Mr Yurov clearly sought to distance himself from this document variously suggesting that it may not have been his signature and even that Mr Worsley was using him as the UBO nominee of Black Coast owned by the Bank:-

> "Well, it's look like my signature but I saw, like you know, in the context of this trial quite a lot of signatures which was look like mine but I absolutely sure that I never signed such documents. I'm not talking about that document.
>
> Q. So are you saying that you did or did not sign this document?
>
> A. I don't have specific recollection of signing this document. So the signature is really very look like mine but I also cannot prove this 100 per cent honestly.
>
> Q. If you can turn over the page to page 7, please, {D1/344.2/7}, you will see that someone else has also added in in manuscript that you are the beneficiary as to 42 and a bit per cent, which is your traditional 3/7ths share in these sorts of companies, isn't it?
>
> A. Well, yes, but it should not be right -- again for my understanding for the Black Coast -- because my

understanding is that Black Coast was the company controlled indirectly by the Bank, so the shareholding there should be a bit different, at least, like, in context with the shareholding of TIB Holdings.

Q. If what you are saying is true, Mr Yurov, that's exactly what you would see here and the fact that you don't is one of the reasons why I say that you are lying about who you believed Black Coast was owned by.

A. You know -- as I said, I have only understanding as I described above, that if I am here put as an ultimate beneficial owner of the Black Coast property development, which for me is a company which I presume was the Bank company -- and this is not mistake and this is authentic document -- the only reason why I'm here is because Bank or Mr Worsley or, I don't know, somebody else decides to use me as a nominee UBO of this company."

502. I am quite satisfied that Mr Yurov's answers were not truthful, that he did sign this document (the authenticity of this document/his signature has never been challenged) and that in doing so he is acknowledging, as I am satisfied was the case, that he (and the other Shareholders) were the beneficial owners of Black Coast as well as Willow River and Moscow River.

503. It was soon thereafter, in September 2010, that the Shareholders and their wives, together with Mr Worsley enjoyed the first of the luxury yacht charters in the Med at the Bank's expense (some €500,000). I have already addressed the circumstances of this charter and my associated findings, when addressing the evidence of Mr Yurov, Mr Belyaev and Mr Fetisov. I am satisfied that Mr Yurov, Mr Belyaev and Mr Fetisov improperly used the Bank for their own personal benefit in relation to the yacht charters and that Mr Yurov was willing to invent a story, and lie on oath, in that regard, as was Mr Fetisov in support of such lie which is one of the reasons I do not consider either of them to be witnesses of truth. These are not pleaded allegation, but as already noted, it also says something about Mr Yurov's (and Mr Belyaev and Mr Fetisov's) attitude to their duties as directors of the Bank which is of resonance when considering those allegations which are pleaded, and do arise for determination.

504. On 27 October 2010, SMP wrote to Mr Worsley stating that the BVI companies were ready and in a position to undertake transactions, and

> "Debbie has the two BVI companies ready and they are now in a position to undertake any relevant transactions.
>
> We have the due diligence on the relevant ultimate beneficial owners and we can proceed with any transaction as required.
>
> From our compliance perspective and for control purposes we need to document the exact nature of transactions undertaken and the exact nature of assets held. This will not delay any transaction being undertaken, but ideally should be undertaken prior to the transaction or as soon as possible after the transaction takes place.

> The nature of the proposed acquisitions are not such that we would have any undue concerns at this stage. If we do have queries or concerns we would raise these in relation to specific transactions or assets and we would assume that you would be able to adequately deal with these queries. This enables us to have a full view of the activities and protects you as much as it does us.
>
> In the unlikely event that we cannot obtain sufficient comfort the entity in question could be transferred to another provider and the structure itself would remain unchanged." (emphasis added)

505. Mr Worsley responded, stating *"I will use another supplier. This is not because we have anything to hide - I have discussed the whole structure, the backgrounds of the UBOs, and the nature of the assists in great detail over many months with SMP."*

506. SMP replied that they were happy with the proposed structure and the details of the UBOs but that they had not been provided "*with specifics of the assets that will be held and in due course this information would need to be obtained as we cannot provide a structure to own an asset if we don't know the actual asset held*", adding that "[*a*]*ny other provider of suitable calibre would be required by their licensing and regulatory requirements to obtain similar information*"

507. On 28 October 2010 Mr Worsley provided some details to SMP about the assets.

> "As to details:
> Land for building outside Moscow
> Land for hotel development on the black sea
> Chain of retail stores in Moscow
> Chain of restaurants in Moscow
> Several large commercial real estate buildings in Moscow
> A leasing company
> A large residential development piece of land outside Moscow for about 200,000 people (flats)
> A timber company in Siberia
> Mainly assets seized by the bank during the crisis. And we may add other assets at our own discretion.
> Even the cypriots do not know the details.
> Is this info enough for you?
> Bottom line is that these are Russian assets. If SMP is not comfortable with such assets Its zero problem to us but please let me know to save wasting your time."

508. The list of assets accordingly included a mixture of admitted Shareholder assets and alleged Bank assets and (erroneously) states that *"mainly assets seized by the bank during the crisis"*. SMP's response suggests that it was intended, at that time, for BVI companies to acquire Wave (a supposed "Bank Company"), Moscow River (a supposed "Personal Company") and Black Coast (another supposed "Bank Company") before noting:

"What we need to ensure is that several years down the line we know what the assets and liabilities are and who owns what. The information will be required in Cyprus in order to meet the statutory requirements for the account and tax filings."

509. Whilst this correspondence only shows that as between Mr Worsley and SMP there was never any distinction between the two I can see no reason why Mr Worsley would make such a mistake. I am satisfied (by reason of the correspondence I have identified, and further identify below, involving the Shareholders) that this was not a case of Mr Worsley failing to maintain a distinction without the Shareholders' knowledge, authority or instructions, but rather that there was never any such distinction. and that the Shareholders knew and intended that there be, and had instructed Mr Worsley and SMP to implement, a structure in which, they personally (rather than the Bank) would sit at the top to receive any income and profits.

510. An example of Shareholders' knowledge of the structure in place is illustrated by the exchange between Mr Worsley and Mr Fetisov on 1 November 2010. Mr Worsley wrote:-

"…BVI Holding companies (the top level vehicles owned by the three of you): The first service provider was unreliable. We now have a choice: to use someone like the Isle of Man guys. That may mean a few more forms to sign and a bit of admin hassle. However they are rock solid and if there was ever a need to implement the Deeds and take control via that method, the Isle of Man people would do a 100% job to secure the assets…"

(emphasis added)

Mr Fetisov clearly read the email (and must have understood what was being stated) as he replied, *"…what would be the cost difference? If minor, let's go ahead with IOM dudes."*

F.2.5.4 THE NOMINEE UBOs ARE PUT IN PLACE

511. From about May 2010 Mr Worsley set about recruiting a team of individuals to act as nominee UBOs for companies in the offshore network. He recruited friends and associates, including Morgan Webb (a British Airways flight attendant), Nicholas Laing (a travel agent) and Spencer Rowe (a handyman at Mr Worsley's home in France). Mr Laing, for example, was the nominee UBO of Willow River. Mr Webb was not only a nominee UBO himself but he also recruited others, and payments to nominee UBOs were routed through Mr Webb with payment to the nominee UBOs being paid out of loan proceeds (routed through Kuri Hills) – i.e. they were paid by the Bank, but in relation to companies which on any view included companies admitted to be Personal Companies/Shareholder Companies.

512. An example of the attempted recruitment of a UBO nominee can be seen in an email to Mr Echeverria on 4 May 2010. Mr Worsley indicated he was acting as a nominee for a group of shareholders in a Russian bank and invited Mr Echeverria to become a "second nominee". He explained that Mr Echeverria would be the public face of companies in Russia and that the arrangement would involve a Russian asset owned by a Cypriot company of which Mr Echeverria would be the legal owner, as well as another company which would be owned offshore.

513. Mr Worsley explained that the reasoning behind having a nominee was that Mr Echeverria *"could be seen as an individual whom has made money over the years in the City, and has now invested in distressed Russian assets".*

514. It is self-evident, to anyone with a modicum of financial knowledge and/or the slightest moral compass that not only are "nominee" UBOs a contradiction in terms (as they are not, in fact, the ultimate beneficial owner) but that to purport to be someone you are not, and to purport to perform a role that you do not perform (other than in name) is inherently dishonest and deceptive – and indeed the purpose of the use of nominee UBOs is equally obvious, namely to deceive third parties (be they other banks, auditors or the CBR) and to render opaque both the link between the Bank and particular companies/assets, and between the companies and the ultimate beneficial owners (the Shareholders under the structures that were set up).

515. That part of the role of nominee UBOs was to circumvent CBR connected lending regulations and deceive the CBR can be seen from Mr Worsley's reply when asked by the travel agent Mr Laing *"why do you not just front them all?"*. His response shows both one of the purposes of the use of nominee UBOs and his knowledge as to the deception being practised:

> "Good question.
> The Central Bank has lending limits to any one group of companies.
> Thus, if I start several companies (albeit that they would all be nominee companies), the total amount that can be lent to that group is limited.
> Hence the need for more nominees"

516. One potential recruit with a banking background immediately recognised both one of the purposes of the use of nominee UBOs, and why the same was misleading whether or not illegal:

> "I don't think that I could do this. Whereas the direct legal risks might well be modest (tho' assuredly not zero), the reputational and even physical risks look to be potentially of concern. These include:
>
> - the fact that the scheme is presumably 'window dressing'; designed to remove devalued assets from the bank's balance sheet to avoid the bank having to recognise a loss. Not sure if this is actually illegal in Russia, but it certainly appears to be designed to be misleading. As nominee, I would be party to this scheme and could easily find the regulator on my case as well as tax authorities querying why I was receiving fees for this ostensibly back-to-back arrangement;
>
> - based on past, bitter experience. I wouldn't lend my name to any scheme the UBO(s) of which, I didn't know and trust personally. When/if things go wrong, the nominee could well find himself hung out to dry and cries of 'I'm just a front' would cut no ice. I

> guess this rules me out of any such scheme that isn't that of a close family member and maybe not even then....;
>
> - your innocent nominee could become the target of the dispossessed former owner. This would not be funny at all. As you know, the distinction between nominee and beneficial ownership is not well-understood in Russia - ING, as a major depositary bank, is constantly being attacked in the local press because it is thought to own major slugs of Russian blue chips. As an individual ostensibly owning some mini-garch's former business, one would be wide open to such 'misunderstandings'.
> I'm sorry if my negative response seems unduly pusillanimous. Put it down to age-related risk aversion."

517. However this was not age related risk-aversion it was a recognition (rightly) that what was being done was misleading, and therefore dishonest.

518. There were, however, plenty of individuals willing to act as nominee UBOs in return for payments for (effectively) doing nothing – and indeed such were the numbers, and the need to track who was a UBO for which entity, that regular spreadsheets had to be created to keep track of matters.

519. I am satisfied that the Shareholders were well aware of the use of such nominee UBOs and the role that they were playing in concealing (their) ultimate beneficial ownership at the top of the structures. I have already referred to the email from Mr Worsley to Mr Belyaev on 19 December 2012 referring to *"5 copies of the paperwork in storage for the new people"* (which would be understood to be a clear reference to new UBOs to anyone who had knowledge of such matters, but making no sense in the abstract) whilst Mr Yurov expressly confirmed when cross-examined that, *"I was definitely aware that Mr Worsley established relationships with different nominees and they were paid some amount of money"* and Mr Yurov also acknowledged that he remembered the name of Jean Rene, who was contemplated, initially at least, to be one of the main nominees.

520. As for Mr Fetisov, he denied being aware that there would be nominee UBOs holding themselves out as the true owners of companies "*to deceive the CBR or anybody else*", but I am satisfied that Mr Fetisov was not telling the truth in this regard as to his knowledge of the use of such nominees which is what matters for present purposes. He himself referred to one incident where Bordier Bank informed him that Mr Worsley was holding himself out as the owner of a company (i.e. as an UBO) and what matters for present purposes is not whether Mr Fetisov had an intention to deceive, but whether he knew that persons were being used to hold themselves out as owners of companies, when in fact they were nominees for the UBOs in the form of Messrs Yurov, Belyaev and Fetisov. Mr Fetisov's denials of such knowledge are not credible given his knowledge of the structures being put in place with the Shareholders at the top, given the fact that the various companies end up in his (and the other Shareholders') family trusts and the fact that such a structure was put in place (hence the numerous Declarations of Trust in that regard such as that signed by a Maria Mylona in respect of SiberianKD that she was holding on behalf of the Shareholders including (expressly) Mr Fetisov).

521. In due course in June 2015, after the collapse of the Bank, all of the nominee UBOs signed further Declarations of Trust declaring that they held their shares in the offshore companies for certain BVI companies that were owned by the Shareholders (specifically Brora, Arlingham and Gingerson). Mr Worsley sent these Declaration of Trust to employees of Teos (the Cypriot corporate service provider he had set up) stating, "*As you will have seen, the investors have stepped back. Their assets are underwater financially, and they have 'thrown in the towel' and vested control of the companies. They see no future in Russia. Please update your KFC records for the companies in question.*"

522. I am satisfied that the purpose of the use of the nominee UBOs was to conceal the Shareholders' ultimate beneficial ownership of the companies – those companies (and the associated structures including the UBOs) were not under the control of and used for the benefit of the Bank (as suggested, for example, in Mr Fetisov's Written Closing) but for the benefit of the Shareholders – as evidenced by the structure charts and the fact that the assets ended up in the Shareholders' own family trusts (as addressed below). It defies belief that this was all Mr Worsley off on a frolic of his own under some fundamental misunderstanding as to what was required of him by the Shareholders, or indeed that the Shareholders would not have been aware had Mr Worsley been proceeding under some fundamental misunderstanding (which I am satisfied he was not). It is to be born in mind that the companies that the Shareholder admit being the beneficial owners of (such as WR and RCP) were treated in exactly the same way as all other companies.

F.2.5.5. THE TRANSFER TO COLUMBA AND THE INSTRUCTION OF VASSILIADES

523. In February 2011 Mr Worsley prepared a MS Word document describing the intended nominee structure:

> "The diagram shows the nature of the Nominee structure in use.
>
> We have used local Cypriot and Nevis/Offshore nominees to hold the shares of the Cypriot and Offshore Cos. The reason for this is that it makes it easier to sell the companies without the local authorities knowing that there has been a sale.
>
> The chain of ownership provides a clear picture to the outside world, and we can show that there is a UBO who has received a loan and has bought the assets.
>
> A Deed of Trust is signed between the Nominee UBO and an offshore Co that is owned by the NBT Shareholders.
>
> Protection of Ownership
>
> Under the new global due diligence rules, a service provider must know the identity of the UBO of a company.
>
> If one uses a structure such as the one shown, one also has to put in place a system whereby if you want to transfer the Beneficial Ownership, the Cypriot service provider knows about this possibility in advance.

If one was to turn up in Nicosia with a copy of the main Trust deed between the Nominee and the NBT Shareholder vehicle, the Cypriot provider would be entitled to say (and indeed bound to say, under Cypriot law): I have not previously been told about the fact that there is in fact a different UBO. I must there protect the rights of the UBO about whom I have been informed."
As one now sees, if a nominee dies, or goes rogue, this can be a potentially very serious problem.

Thus, as noted above, it is critical that the Cypriot provider himself helps to prepare the documentation that can change the beneficial ownership. In this way, it is impossible for the service provider to be surprised when the document is brought into use.

A reason for the document needs to be given to the service provider. This would normally be that the Nominee UBO has borrowed money in order to make the purchase, and the lender wants to protect their position. This is a plausible story.

As to the nature of the instrument to be used: Option, Charge Agreement. Such instruments would be specific to the company and the situation. They are more secure than a one paragraph bland instrument of transfer &. Because, by definition, there is a reason for the transfer in the eyes of Cypriot law. "

Aside from the new structures that are being put in place, we need to check that existing old structures are properly protected."

524. Whilst there is no document referring to this document having been provided to the Shareholders, it is reflective of the structure being put in place that I am satisfied that the Shareholders were aware of, and as such I consider that the overwhelming likelihood is that it was either shared with the Shareholders or reflected discussions Mr Worsley had with the Shareholders.

525. At the end of February 2011 Mr Worsley prepared a further memo summarising the work he had undertaken. He explained that Cyprus had been settled on as the jurisdiction of choice and proposed a Moscow office separate from the Bank where staff would handle the day to day management of assets and undertake a number of other functions. The memo provided:

"**Company Administration and re-Structuring:**

There needs to be i) an overall review of what companies there are (we started with discussion of 60 companies). ii) Discussion/decision about how each of those companies is to be treated (in terms of offshore/ownership issues/re-structuring etc.). iii) A list of actions for each company to be made, and then executed in a timely fashion. iv) A proper and secure system put in place that documents, and secures, the document chain, including trust Deeds and other important documents.

(…)

Moscow Office

Whilst the administration may be moved offshore, there needs to be a staff locally in Moscow that deals with the actual day to day/month to month management of the assets.

I would suggest that this office needs to be separate from the Bank itself - or, if inside the Bank's physical premises to save duplication of security coverage and rental payments, then it should be a separate, discreet unit.

In either case, this local office should not keep any sensitive paperwork on its premises.

There needs to be a strict management information system in place so that we can see what steps are being taken, what is actually happening, and what success there have been. This will evolve organically as the decisions in section (2) of this document are taken.

There need to be regular review meetings so as to discuss developments.

If you prefer to move even the asset management element offshore, this will incur travel costs as 2-4 people travel between the Office and Moscow. To be discussed.

Security

In moving the operation out of the bank, and offshore, we need to take extreme caution re security issues. This needs to include who is authorised to sign what/instruct whom, physical data and paperwork security, etc.

Communication Protocols will also be put in place. For example when a Nominee is purchasing an asset from NBT, using a loan from NBT, the Family Office needs to make provision for the fact that the Nominee needs to be seen as an independent UBO for the corporate service providers in Cyprus, the Bank needs to treat the Nominee as a borrower, and yet in fact will know that it is in reality a related party. Etc etc. At the moment the communication protocols are a mess. Emails chains are sent to CSPs in Cyprus with internal NBT comments on them, etc etc etc

The Family Office will implement and keep updated computer security and communication security systems. It is likely that a Mac based system will be used, as this allows for greater protections.

Corporate Structure etc

Rather than combining the assets into one fund, they should be held in individual company structures.

This reduces risk, and also allows for the fact that the assets are currently held/will be held under the names of various nominees who have 'bought' the assets with loans from NBT (and can also sell them as such).

The office will by definition organise all of the workings of the whole structure in such a way as to be as tax efficient as is possible in all and every instance on every issue.

For the purposes of the outside world, this Office will simply be a consulting company. The real purpose of the entity will be kept discreet in external terms. This is easy to achieve as the Office Company itself will not hold actual assets (assets to be in the structures discussed).

In order to facilitate transactions and structuring across the markets, the Office will develop a network of relationships with banks, service providers, lawyers, etc. These relationships will be key going forward.

The Family Office will need to have Shareholder time to discuss issues as needed. I suggest regular Board Meetings to review. This too is part of the discipline of the new structure.

Other

As positions are exited and revenues accrue, cash reserves will grow. Clearly, the Family Office can take on many different roles at that point: Using the existing expertise to re-invest in Russia, asset allocation in global listed funds, purchasing properties/homes for Shareholders using SPVs to protect tax positions, providing SPVs that enable Shareholders to have access to cash in a tax efficient manner, Etc

As required, and as time allows, the Office can also provide structures that will allow for revenue to be channelled out of other assets (EG the Bank) and to the Shareholders.

There are other practical issues that a family office can assist with - it can be a hub for family logistics when so needed, it can work with lawyers to look at issues around family Trusts, Etc.

As the Office develops there are many opportunities for the Shareholders to use the Office. You will remember the level of service and efficiency on Trident. One thought about something, one asked for something, and seconds later it was there. A Family Office can make your whole personal lives like that.....

As a new era of truly organised and disciplined situation management is brought in, it may also be that there can be an element of overseeing NBT problem areas. EG Family Office to bring on trouble-shooters on short term contracts to address specific problems, and indeed to address specific growth requirements. One thing at a time.

Risk Management - the Family Office should look at managing all risks in its operations. And finally - the more discipline we put into the Office, the more freedom you will have to travel without concerns. "It's being handled"…"

526. Once again there is no documentary evidence demonstrating that this memo was provided to the Shareholders, but it is addressing matters of direct relevance to the Shareholders themselves (including the "Family Office") and what was taking place (including the move to Columba) could not conceivably have taken place without the knowledge and approval of the Shareholders, and I am satisfied that this would have

occurred. Equally whilst Mr Fetisov and Mr Yurov's case is that whilst Columba did provide some services to them personally, its principal role was as a service provider to the Bank, that is not consistent with what was contemplated or what occurred. I find incredible (and reject) Mr Belyaev's case that he was not aware that Columba was taking over the administration of the offshore network in 2011. It is inconceivable that such a fundamental development would have occurred without the Shareholders knowing of it.

527. In due course in August 2011, on the instructions of Mr Yurov, Mr Iskandyrov resigned from the Bank in order to join Columba and become its General Director, working directly under Mr Worsley.

528. SMP were involved in the move to Columba, and in this regard Mr Worsley met them at the end of February, and then sent them an email on 3 March 2011 that provided, amongst other matters:

> "As discussed, once we take over the reins from the existing team, we will have opened a can of worms. I need to get admin in place in Moscow ASAP who can handle things. Also I think that once we start, we will need 1-2 weeks of solid work. It will be like a data room situation. We will have stacks of paper, and we will need to go through it all page by page, file it, organise it, analyse it, decide on next steps etc. etc. etc…"

529. It was contemplated that SMP would go to Moscow in April 2011 to address the necessary paperwork to be put in place, and the contemporary documentation shows that the visit did take place. In this regard there is an email from Mr Worsley to Mr Belyaev's secretary on 14 April 2011 asking whether "Ali" (that is Mr Stennett of SMP) could come down to see Mr Belyaev's passport.

530. Starting from March 2011 onwards, management of a large part of the offshore network was transferred from Totalserve, to Vassiliades & Co ("Vassiliades"), a Cypriot law firm which took over the role of corporate service provider from Totalserve. Mr Fetisov's evidence was that the decision to transfer management of the companies to Vassiliades was due to a scandal regarding Totalserve involving Bank documents which were thought to have been leaked to clients. It is not necessary to address whether that was so or not. What is relevant, and clearly established, is the Shareholders' knowledge and approval of the use of Vassiliades in relation to the management of the offshore network.

531. Thus, on 1 March 2011, the Shareholders personally signed an engagement letter with Vassiliades for three companies, instructing them to provide corporate services to three companies, Costells (the company involved in the acquisition of distressed loan notes relating to the Shareholders' acquisition of Willow River and RCP and the subject matter of Mr Worsley's first UBO a year earlier), Royston (a company that owned the Veshnyaki office development) and Goldstone. These letters were signed by the Shareholders as individuals – they were not signed on behalf of the Bank. Further they undertook personal liability for Vassiliades' fees and gave personal indemnities in respect of claims brought by third parties as a result of the services provided by Vassiliades (Clauses 3.3, 4 and 6).

532. On 2 September 2011, the Shareholders also personally signed an engagement letter with Vassiliades for a large number of other companies including: NRT/Yaposha, Crylani, Mourija, Oldehove, Morledge, Yeleran and LB Collection (all alleged to be Bank Companies) as well as RCP and SiberianKD (which are admittedly Shareholder Companies). The engagement letter also purported to transfer the administration of three companies agreed to be subsidiaries of the Bank (Fiennes Investments Ltd, TIB Consultants Ltd and TIB FS Ltd).

533. On 8 September 2011 Vassiliades wrote to Totalserve notifying them that they were taking over the administration of the companies and asking for documents relating to the companies to be handed over. The Shareholders personally signed instruction letters for all of the companies to be transferred, representing themselves as the beneficial owners of these companies. The instruction letters which they signed included letters in relation to the Bank subsidiaries identified above, as well as an instruction letter for Metcalfe Investments Ltd - which is agreed to be a company owned solely by Mr Belyaev, but was signed by all three Shareholders.

534. Whilst both Mr Yurov and Mr Fetisov questioned the authenticity of their signatures on the instruction letters, there again has been no challenge to authenticity and they ultimately accepted that if they had been given documents to sign in relation to the transfer from Totalserve to Vassiliades, they would have signed them. I am satisfied, and find, that all the Shareholders did indeed sign such documentation whether or not they focussed on the identity of every individual company.

535. In this regard the Shareholders argue that the inclusion in this list, and the existence of such instruction letters, in respect of three companies that were in fact subsidiaries of the Bank (i.e. Fiennes Investments Ltd, TIB Consultants Ltd and TIB FS Ltd) means that the Shareholders could not have been signing any of them as beneficial owners of the individual companies, as opposed to signing as "beneficial owners" of the Bank itself. I do not consider that such argument bears examination or is logical. First, the Shareholders are quite clearly signing as "beneficial owners" and there is no suggestion that they are signing on behalf of the Bank. Second, the Shareholders are not the only shareholders of the Bank, and so it would be neither appropriate nor rationale for them to sign personally on behalf of the Bank, as if they were. Third, a number of the companies are, indeed, avowedly admitted Shareholder Companies, such as RCP and SiberianKD and the Shareholders are (indisputably) the beneficial owners. Fourth, and fundamentally, the letters to Vassiliades were followed by Declarations of Trust over the shares in the companies in favour of the Shareholders personally (and not in favour of the Bank), but (tellingly) this was <u>not</u> done for the three companies that were subsidiaries of the Bank.

536. Thus, for example, on 13/19 September 2011, such Declarations of Trust were signed by nominee Cypriot shareholders in favour of the Shareholders <u>personally</u> in respect of Oldehove, SiberianKD, Arooj, Nikilin, Nomiranta, Crylani, Mourija, Zosimal and LB Collection Services. The lack of any distinction between the Declarations of Trust in relation to what are now alleged to be Bank Companies (e.g. Oldehove) and those admittedly Shareholder Companies (e.g. SiberianKD) again supports the conclusion that this alleged distinction is a recent invention. The consistent theme (and overall picture that emerges) from the documentation over time is that there was no contemporary distinction and that all the relevant companies were Shareholder Companies. I reject, in this regard,

the suggestion that documentation such as that signed on 8 November 2011 "testify to muddle" (as Mr Yurov's counsel put it) and that they do not go towards proving that there was no relevant distinction between Bank companies and Shareholder companies. On the contrary that is the constant theme that emerges.

537. I consider that the explanation for the Shareholders (wrongly) signing the letters in respect of Fiennes Investments Ltd, TIB Consultants Ltd and TIB FS Ltd is either (most likely) that they needed to do so (due to the manner in which Totalserve had originally been instructed), or erroneously did so whether on the basis that they thought they could sign for the Bank (which seems unlikely as they were purporting to sign as beneficial owners, and were not the only Bank shareholders) or (more likely) that it was a simple error and they did not pick the error up as virtually all the companies were beneficially owned by them and they did not spot the difference viz these three companies, perhaps because they did not read the documents sufficiently carefully (and the vast majority of the companies were beneficially owned by them so sight of their names would probably have meant that they did not focus on each company).

538. Whilst this was all going on, from 11 September 2011 onwards, the Shareholders and their wives were enjoying the second of the luxury yacht charters in the Med, at the Bank's expense. I have already addressed my findings in that regard when commenting on the evidence of Mr Yurov, Mr Belyaev and Mr Fetisov.

539. The Shareholders signed other documentation (dated 23 November 2011) as "beneficial owner" including to procure bank accounts for the companies in Cyprus, to declare that companies would not be used for money laundering and to consent to personal data use. Whilst Mr Yurov accepted that his signature and handwriting appeared to be authentic, Mr Belyaev (again) questioned the authenticity of his signature, though (again) there has been no formal challenge to authenticity and I consider this to be a yet further example of Mr Belyaev seeking to distance himself from documentation that he considered to be against his interest.

540. When cross-examined about an example of this documentation (in the form of an account opening form for Crylani – now said to be a Bank Company) Mr Yurov said he signed on the basis that he was the UBO of the Bank and so signing as UBO of the Bank Companies. I do not accept this (contrived) suggestion – it is not what is said, it is not how you would go about signing on behalf of the Bank, and it would not be appropriate to sign in such manner given that there were also other shareholders of the Bank, as has already been noted.

541. In December 2011, the Shareholders also signed deeds of indemnity to Vassiliades for 39 companies in the offshore network (including Disputed Companies), declaring that they were the beneficial owners of the companies and agreeing personally to indemnify Vassiliades in relation to the companies. Some of these bear a manuscript date of 8 December 2011, and on 15 December 2011 Mr Worsley wrote to the Shareholders' secretaries asking "Any news on the paperwork" (which would appear to be a reference to such documentation) to which Ms Sidorova replied, "Belyaevs' and Yurov's documents" are ready. Once again no distinction was made between Shareholder Companies and companies alleged to be Bank Companies – they were all signed by the Shareholders personally as "beneficial owner" of the companies.

F.2.6. COMPANIES SET UP USING MR WORSLEY'S NOMINEE UBOs

542. A separate (though parallel) structure was set up and implemented in relation to the companies set up or re-structured by Mr Worsley utilising the nominee UBOs he had recruited. These companies were also administered by Vassiliades – the position being represented to Vassiliades that the nominee UBOs were in fact the genuine UBOs (as opposed to the Shareholders).

543. It appears from Vassiliades' records that by the end of 2011 there were around 37 companies which Vassiliades understood (or at least had on record) were beneficially owned by Mr Worsley's nominee UBOs. The nominee UBOs had in fact executed deeds of trust in favour of companies owned by the Shareholders.

544. Of the companies set up using nominee UBOs two that were to become of particular importance were Erinskay and Baymore. These were incorporated on 11 and 12 October 2011 with Mr Chadwick and Mr Laws as their nominee UBOs. They were to be utilised for further "balance sheet management" from 2012 and were well suited to that purpose as they were unknown to the CBR – and they were (falsely) held out as genuine independent trading businesses with their own offices and employees, unconnected to the Bank or its Shareholders.

545. Although the initial proposal, as already identified above, was to incorporate a BVI company at the top of the structure (referred to as RHT), this company never came into existence and the Shareholders first held an interest in the offshore network through existing personal companies, including TIBH and Tactio.

546. On 20 March 2012, Mr Worsley wrote to Mr Zalevsky at the Bank:

> "Dear Alexander,
>
> Hello.
>
> As you may know, I run the non-banking assets / family office for the Shareholders of Trust.
>
> Ilya Yurov suggested that I get in touch with you to discuss the property projects that you are overseeing. lE Glukovo and Siberian Timber.
>
> I need to get a clearer understanding of the projects, and I am writing to suggest that we meet later this week.
>
> I do not know the full details of the projects, and it is best that I start from zero, so as to get a clear picture. I would like to ask Irma to put together some information for me - I imagine that much of this information is already available. Inna can translate it for me.
>
> Herewith are some thoughts on the sort of information that it would be useful to get. We can then discuss these points.

Does this make sense?" (emphasis added)

547. Two points emerge from this email. First, in this email, "Glukovo" (the name of the Stroyecologiya development) and "Siberian Timber" (a reference to Priangarskiy) are treated in precisely the same way and no distinction is made between them despite it now being alleged that one is a "Bank Company" whilst the other is admitted to be a "Personal Company" this being a further contemporary example of a lack of distinction between the two. Second, it is apparent, as Mr Yurov confirmed when cross-examined, that the same people were being used within the Bank to run both projects – a further illustration (like the yacht charters) of the Bank being utilised for the personal benefit of the Shareholders.

548. On 20 April 2012, Mr Worsley sent an email to the Shareholders indicating that there was an error in relation to four of the offshore companies (RCP, Tiesto, Arooj and Sapkont). The email is of some importance not only because it shows an awareness on the Shareholders part of the use of nominees (such as Mr Worsley himself and Mr Webb) but that what was contemplated was the production of false back-dated documents – which the Shareholders were prepared to sign, and did sign.

549. Mr Worsley stated:

> "Back in 2009 and 2010, when Drozdov was running the processes, 4 companies were transferred from TIB Holdings to two Nominees (myself and Morgan Webb). The properties are Retail Chain (Billa) [i.e. RCP], Tiesto… (a service company), Arooj and Sapkont.
>
> At the time Deeds were signed between the nominees (Worsley/Webb) and TIB. However at the time of the transactions the combination of Drozdov/Buyanovskiy/Maximov etc etc did not bother to follow up with SPAs to document the 'Sale' between TIB and the nominees. This has waterfalled down and now Vassiliades still has [you] three registered as the UBOs of these companies.
>
> This is not what is needed for the Billa sale. We need to re-register (on Cyprus) the UBOs as myself and Webb. Bear in mind that the Deeds between myself and Webb were signed in 09/10 already. SPAs have today been prepared and executed (back-dated) to document the transactions of 2009 and 2010. I will bring the letters in on Monday, plus copies of the Deeds that Webb and myself executed back in 09/10.
>
> FYI – a new full audit of all documentation has recently been started." (emphasis added)

550. It is plain that what the Shareholders are being told is that what was required were back-dated documents, in order to evidence an apparent sale of RCP and other companies from the Shareholders to nominee UBOs. This is what was prepared for the Shareholders' signatures:-

(1) The previous day (19 April 2012) Mr Worsley communicated with Mr Korneyev to arrange the production of the SPAs, indicating that the old addresses of the companies should be used, so as to reflect the position in 2010.

(2) On 20 April 2012, Mr Worsley sent an email to Mr Manko*: "We will send you the SPAs for Tiesto, Arooj, RCP, and Sapkont. Can you sign them all in different pens, and use different witnesses ...? They must 'feel' right too. Paper a lit bit damaged as it is 2-3 years old. Etc etc etc ....."*

551. Also on 20 April 2012, Mr Worsley sent an email to Vassiliades listing the supposed dates of the SPAs. Vassiliades responded attaching existing corporate documents and documents to be signed by the Shareholders to correct the deeds of trust. One document required the Shareholders to *"irrevocably, unconditionally and unequivocally confirm and declare that due to a clerical error, it was erroneously stipulated that we are the beneficial owners of RETAIL CHAIN PROPERTIES"* and this was superimposed onto the original deed of trust.

552. It appears from an email sent to each of the Shareholders' secretaries on 23 April 2012 that the relevant documents were signed by the Shareholders on the 24 April 2012. In this regard Mr Worsley emailed the Shareholders' secretaries in these terms:-

> "There are some papers that Ilya, Nikolay and Sergey need to sign. I can bring them in. When is a good time please… It will not take long (e.g., 10 mins) but it is important. Can we do it tomorrow…?"

Each of the Shareholders' secretaries confirmed that this was convenient.

553. It was suggested on behalf of the Shareholders that the email from Mr Worsley to the Shareholders showed a transaction had in fact taken place, and that Mr Worsley was therefore simply correcting a mistake by documenting something which had already happened. That suggestion does not bear examination. It is plain that what was being proposed was the production of false back-dated documentation purporting to show that such a sale had taken place when it had not.

554. It was also claimed that the Shareholders would not have paid much attention to the email from Mr Worsley or the documents which they were asked to sign. That claim does not bear examination either. It was quite apparent from the email what Mr Worsley was proposing, namely the back-dating of documents to mislead third parties (including Vassiliades) and it is not credible to suggest that the Shareholders did not read the email and were not aware of what was contemplated. Whilst Mr Yurov claimed that there was some distinction to be drawn between being the beneficial owners and the *ultimate* beneficial owners that appears to be no more than an attempt to distance himself from what was clearly dishonest conduct.

555. It was around this time that the first loans to Erinskay and Baymore were advanced which were to form part of a whole new phase of "balance sheet management" involving the lending of huge sums to Erinskay and Baymore. This is addressed in the Erinskay/Baymore Specific Borrower Sections, but in summary, on 24 April 2012, the

Bank advanced its first loan to Erinskay (US$28.8 million for 3 years on 24 April 2012) approved by Mr Yurov and Mr Fetisov at a CC "meeting" on 28 March 2012, followed on 2 May 2012, by a loan advanced to Baymore (US$31.2 million for 3 years). This loan was also approved by both Mr Yurov and Mr Fetisov at the relevant CC "meeting". In relation to these companies (set up by Mr Worsley in October 2011), no security was sought or provided. The full US$60 million was drawn down by Erinskay and Baymore on 18 May 2012 and transferred to a newly incorporated Cypriot company in the offshore network called Polendor.

556. In the immediate aftermath of the clear up of the "error" in the paperwork Mr Worsley instigated an "audit" of all of the documentation relating to the offshore network. In this regard, on 27 April 2012 Mr Worsley sent an email to Mr Manko (who ran the TIB companies in Cyprus) stating:

> "I am organising an audit of our structure. We will make sure we know where every piece of paper is for all companies.
>
> Part of this structure are the Deeds from the Cypriot Nominees, up to TIB Holdings. We will call this "The TIB Group"
>
> Also part of it are the Deeds that go from Worsley/Webb/Laws etc. to TIB Holdings. We will call this "The BW Group"
>
> The BW Group Deeds are very very private. We will have two audit systems – one for the TIB Group, and a separate one for the BW Group.
>
> The BW Group is only for discussion with myself, yourself, Marat [Mr Iskandyrov] and Andrey Grechishnikov. It is NOT for discussion with Vassiliades, or Ilya Korneyev or Irina Bronina etc" (emphasis added)

557. This was followed by a further email from on 10 May 2012:-

> "1) …The companies that should have Deeds from the nominees up to TIB Holdings are: RCP, Sapkont, Arooj and Tiesto.
> 2) All of the other companies that are owned by Y/B/F should have Deeds up to TIB Holdings, or another YBF entity.
>
> I am putting in place a major audit of all of our structure. This will include executing new deeds in many cases. The reason for the new deeds is that the new wording will allow for multiple copies. Then we will keep these new deeds in secure safes. Some in Cyprus and some offshore. I will then have them executed ASAP.
>
> We also decided to use an external legal firm to check the work of Vass etc…" (emphasis added)

558. The reference to an "*external legal firm*" was to Simcocks (a firm of Isle of Man lawyers) who were instructed by Mr Worsley around this time as well as Boston Limited ("Boston") (a further Isle of Man trust company which was retained in addition to SMP).

559. After instructing Boston (who in turn consulted KPMG in relation to the tax implications), it was decided to structure the offshore network such that the interests held by Mr Worsley and his nominee UBOs (i.e. the part described as the "*very very private companies")* through BVI companies, including Arlingham, Brora, Gingerson and Serrinson.

560. On 24 May 2012 Boston Nominees Limited ("Boston Nominees") (who were the legal owners of the shares in Arlingham and Brora) executed deeds of trust over those shares in favour of the three Shareholders (in the usual proportions).

561. On 27 June 2012, Mr Worsley informed Boston and Simcocks that some 20kg of hardcopy documents were being sent to them by DHL, comprising multiple copies of the Declarations of Trust for the various offshore companies, and asking that they compile an audit document to keep track of them all.

562. On 30 July 2012, Simcocks sent Mr Worsley that audit document. It is an important document as it shows (as at July 2012) which offshore companies were owned by which others (as a result of the Declarations of Trust) and the locations where hard copies were stored (in case it was necessary to assert ownership against a "rogue", or dead, "nominee UBO"). Once again it shows a lack of any alleged distinction between Shareholder and Bank Companies. It shows, (amongst other matters):-

(1) That the entire Isle of Man structure had been set up or overhauled in June/July 2012.

(2) Mr Worsley's gardener, Mr Rowe, was the supposed UBO or "*Trustee*" of Baymore, which sat underneath Gingerson in the structure.

(3) Mr Worsley was the nominee UBO of Beadon Investments, a company used frequently in the chain of payments around the offshore network.

(4) Mr Worsley was the supposed UBO of Edenbury Investments, which also sat under Arlingham.

(5) Moscow River (a Shareholder/Personal Company), also sat underneath Arlingham in the structure, with Mr Worsley as its nominee UBO – with no suggestion that Moscow River was held or owned differently from any other companies in the Boston structure;

(6) Polendor (the company to which the US$60 million loaned to Erinskay and Baymore earlier in the year had been transferred), was supposedly owned by Mr Rowe, also in the Arlingham structure.

(7) Yaposha Investments Limited was supposedly owned by Mr Creasey and sat underneath Brora.

(8) Willow River was supposedly owned by Mr Laing, and sat underneath Serrinson – with no suggestion that Willow River was held or owned any differently from any other company in the structure.

563. Willow River and RCP were Shareholder Companies generating significant sums for the Shareholders. I consider that as a result the Shareholders would have paid close

attention to such companies and how the ownership of them was structured. As a result, it is inevitable that they would also be aware of how the offshore network was structured generally and they would know that the structure was the same for all companies. They would therefore have been well aware that the structure adopted was one where they were the ultimate beneficial owners of all the companies. I am satisfied that they were so aware, and that the suggested distinction between Shareholder Companies and Bank Companies is a subsequent invention. In this regard a meeting in London at Claridges on Tuesday 20 November between the Shareholders, Mr Worsley and Boston is of particular importance, as addressed below.

564. In summary, the position by late 2012 was that many of the "nominee UBO" companies were ultimately beneficially owned by the Shareholders via Arlingham, Brora, Gingerson or Serrinson, in the Boston structures; and the other (mainly Cypriot) companies in the offshore network were ultimately beneficially owned by the Shareholders through the Vassiliades structures.

565. On 19 November 2012, the Shareholders were due to fly to the Isle of Man to meet Boston, but this was not possible due to weather conditions. Instead, Boston travelled to London for a meeting at a conference room in Claridges the following day. What was discussed at this meeting is very much in issue. The Bank submits that it is plain that the recent changes in the offshore network would have been discussed (including bringing a large number of offshore companies under Arlingham, Brora, Gingerson and Serrinson) as well as proposed changes to the structure (including the transfer of further companies under the Boston Structure, and the transfer of the Defendants' interest into personal discretionary trusts), which were actioned the very day after the meeting.

566. Mr Belyaev claimed that the meeting was (only) a general presentation about the idea of moving into personal trusts. Mr Fetisov claimed that the meeting covered Boston's services and gave an overview of different trust structures and pricing, without discussing any detail. Mr Yurov could not recollect the offshore structures being discussed. I consider it defies belief that the changes to the offshore structures already made, and that were proposed to be made (which would have revealed the ownership structures in place and to be put in place) were not discussed on an occasion when the Shareholders had travelled to London, and Boston had also travelled to London for a meeting between the Shareholders, Boston and Mr Worsley. That would be a lot of effort for a "meet and greet" which is also belied by the fact that a conference room was hired for the purpose and Mr Worsley emailed Mr Buyanovsky on Tuesday evening stating that he was in London "*with YBF last two days*".

567. I am satisfied and find that there must have been discussion of the offshore network and its structures so that if (as appears inherently unlikely) the Shareholders were not already aware of how that network was structured (culminating in their beneficial ownership of all companies) they would be by the end of the meeting. In the usual way the cost of this meeting was met through the offshore network through Kuri Hills (and therefore as part of a loan to one of the companies in the offshore network). If (which is inherently unlikely) the meeting was only about personal trusts – then the Shareholders would also effectively, have been getting the Bank to pay for advice to them in their personal capacity.

568. I consider that it is no coincidence that the very next day after the Claridges meeting Mr Worsley actioned the transfer of further Vassiliades companies into the Boston "nominee UBO" structure. The advantage of the Arlingham/Brora structures was that it had an enhanced level of separation from the Shareholders and other companies in the offshore network (which was ideal for further "balance sheet management").

569. It is also clear that what was being transferred were assets owned by the Shareholders personally. Thus, on Wednesday 21 November 2012, Ms Bronina of Columba wrote to Mr Worsley asking for *"clarification regarding the restructuring process"* and referring to the proposed transfer of Crylani. In Mr Worsley's reply he commented in relation to the necessary (fake) share purchase agreements that would need to be generated:

> "If YBF own the asset via (say for example) TIB Holdings, then it can be between TIB Holdings and Gigha (for example).
>
> Or if they own it direct, then between YBF and Gigha."

570. It is clear, therefore, that what was being addressed were assets owned by the Shareholders whether that was directly or indirectly. The same day Mr Worsley told Mr Iskandyrov: *"I want to avoid the new investors signing contracts with the YBF names on them if possible. I prefer that the new investor companies buy [from] YBF"*.

571. The contemporaneous documents show that the modus operandi for the transfer was by the Shareholders first transferring their existing interests in those companies to TIBH/Tactio and then causing TIBH/Tactio to transfer them to "new investors" who were either existing or further nominee UBOs. This resulted in Mr Worsley giving Vassiliades a false explanation as to the reason for the transfers, the modus operandi then being carried through by the Shareholders themselves. As to the former Mr Worsley stated in an email on 7 December to Vassiliades:-

> "...The UBOs of the following companies have decided to divest themselves of the companies so that they may focus on their core businesses.
>
> The new investors, whom you are currently working with (Caple etc etc) have negotiated terms for taking over these assets, many of which are in default or are close to default.
>
> This then is a sale of distressed assets.
>
> Process: the companies will be transferred from the current ownership (DOT from the nominee up to the three UBOs), to a new structure where the nominee shareholders will sign new DOT up to TIB Holdings. This will involve instruction letters from the three UBOs but as they also own TIB Holdings, there will not in fact be a change of ownership. TIB Holdings will then sell the companies to the new investors.
>
> Ilya Korneyev will update you as to which investors are buying which company. We are preparing the SPAs that TIB and the new cos will sign. You will need to prepare the instruction letters for the transfer to TIB and then the TIB sale. I will have the UBOs of TIB then sign those letters…

Please also note that Baymore will also be sold, but that has different ownership."

572. There was, of course, no actual sale of distressed assets (nor were the assets distressed). Mr Worsley then listed the following companies as being the subject of this fictitious "sale of distressed assets": Yeleran (owner of StroyEcologiya); SiberianKD (owner of Business Group and Priangarskiy); Agalid; Mefrito; Oldehove (owner of Eurogroup/the Otradnoye or Degunino development and of the Pokrovka development); Crylani (owner of Morledge/the Perevednovskiy development; and Royston/the Veshnyaki development); Mourija; GFI Global Factoring; and Baymore.

573. It appears that initially the plan was to transfer the companies to TIBH first, and then to companies owned by the nominee UBOs. However, TIBH was substituted for Tactio. In December 2012, the Shareholders personally signed documents transferring the beneficial ownership of the above companies to Tactio. In these documents, the Shareholders declared that they were the beneficial owners of the share capital in each company, agreeing to *"irrevocably, unequivocally and unconditionally transfer the beneficial ownership, title and interest (...) [over the shares held on trust on their behalf] to TACTIO DEVELOPERS LIMITED*" and instructed Vassiliades to issue a *"new declaration of trust and/or share certificate as per the instructions of TACTIO DEVELOPERS LIMITED".* The Shareholders also signed a further set of documents declaring that they were the beneficial owners of Tactio (which in turn was the beneficial owner of the relevant companies) and agreeing to transfer beneficial ownership of the companies to BVI companies owned by nominee UBOs. These BVI companies were in turn held on trust for Arlingham, Brora, Serrinson and Gingerson, which were owned by the Shareholders.

574. For example, in relation to Crylani (now said by the Shareholders to be a "Bank Company") the relevant document was signed by the Shareholders personally in their capacity as the beneficial owners of Crylani and instructed Vassiliades and the relevant directors and nominee shareholders to transfer the beneficial ownership of Crylani to Tactio. They signed a similar document for Mourija (also now said to have been a "Bank Company"), as well as for Oldehove. SiberianKD (an admitted "Personal Company") was transferred at exactly the same time and in the same way. The separate set of signed documents contain instructions from the Shareholders to Tactio to transfer the companies to holding companies in the Boston Arlingham/Brora structure, including Oldehove to Cape Bay House, SiberianKD to Lismore Trading, Mourija to Venn Investment Holdings, Yeleran to Tranaro Holdings and Crylani to Cedar Line Investments.

575. There were no new investors – these were simply the nominee UBOs – namely David Morris, Kenneth Caple, David Gadsby, Mr Laing and Mr Malko who were the supposed owners of (respectively) Cape Bay House, Lismore Trading, Venn Investment, Tranaro Holdings and Cedar Line Investments – which were BVI companies in the Boston structures which I am satisfied were ultimately beneficially owned by the Shareholders personally via Arlingham and Brora.

576. The Shareholders personally signed these documents on 17 and/or 20 December 2012. An email from Mr Iskandyrov addressed to two of the Shareholders' secretaries on 20 December provides:

"Sveta, Tanya,

Please sign these documents with Sergey Leonidovich [Mr Belyaev], Ilya Sergeyevich [Mr Yurov] and Nikolay Viktorovich [Mr Fetisov] (where possible) today.

They know what this is all about.

Marat,

The attached are the instruction letters for the 2 steps of restructuring:
1. Transfer from 3 Bos to Tactio;
2. Transfer from Tactio to the companies of the new investors.

Please note that no date should be indicated on the transfer to the new investor set as of now."

(emphasis added)

577. I am satisfied that this contemporary email does indeed reflect reality as to the state of the Shareholders' knowledge. Mr Worsley could hardly say *"they know all about it"* to the Shareholders' secretaries unless the Shareholders did indeed know all about it. There was no reaction from any of the Shareholders along the lines of "what is this all about?" – rather the documents were signed.

578. The reality is that there was no real transfer of the beneficial ownership of these companies taking place as the Shareholders must also have known. By way of example, SiberianKD was transferred yet its beneficial ownership indisputably remained with the Shareholders at all times – something which Mr Yurov accepted when he gave evidence.

579. It is in relation to the signing of the requisite documents at this time that Mr Belyaev was sent the email from Mr Worsley on 19 December 2012 that I have already referred to, when commenting on Mr Belyaev's evidence and also in the context of his knowledge of the offshore network and use of nominee UBOs, which appears to have followed a discussion with Mr Worsley and which belies Mr Belyaev's alleged lack of knowledge. It provides:-

"FYI – the 5 copies of the paperwork in storage for **the new people** are of course already in place. We did not discuss this, but it is of course in hand, and was indeed handled several days ago – IE well before the transfer of assets as per the papers to sign today."

580. Whilst unintelligible in the abstract to anyone who was not aware of what was going on, Mr Worsley was clearly writing in these terms to Mr Belyaev because he did know what was going on (as I find), and in that context, this is a clear reference to the Declaration of Trusts showing that the nominee UBOs held the assets for the Shareholders via Arlingham and Brora (the 5 copies of the paperwork in storage is a reference to 5 copies being secure in a safe).

581. Set against the backdrop of the meeting in London, and the documents they were signing and their content, the suggestion that the Shareholders were not aware of how the

restructuring was taking place, and simply signed the documents upon the instruction of Mr Worsley, without fully understanding or appreciating the details, is incredible, if not surreal, and I reject it. I also reject Mr Fetisov's evidence that he was not aware of the function of the BVI companies to which beneficial ownership was transferred, and that he did not know such companies would hold their interests in the companies on trust for Arlingham and Brora. In accepting that with hindsight maybe he should have asked more questions of Mr Worsley I consider he was seeking to distance himself from what he actually knew. It is to be inferred from the matters I have already identified that by this time (if not before) each of the Shareholders knew very well how the offshore network was structured and that it culminated in each of them being the beneficial owner of the companies concerned in their respective shares.

582. Further companies continued to be transferred in this way in 2013 including Nikilin, Zosimal and LB Collection Services (that company having in June 2013 borrowed RUB 1.1 billion from the Bank apparently for "balance sheet management" purposes).

F.2.7 PROTECTION OF ASSETS IN THE OFFSHORE NETWORK AND THE MOVE TO CYPRUS

583. In 2013 there appears to have been discussion with the Shareholders about the control of companies and assets held in the offshore network which I consider again belies the protested lack of knowledge on the Shareholders' part.

584. Thus, on 25 March 2013, Mr Worsley emailed Mr Yurov on his personal email account giving a summary of the situation regarding nominees:

> "Background as to what protection we have now (with foreign nominees):
>
> Deeds of trust: These give you guys the ownership at the top of the structure. As needed, these can be shown to courts and tax people etc. There is nothing discretionary about them. You guys own the assets.
>
> If some guys in Cyprus said one day "Why didn't you tell us about the deeds??" the bottom line is that they might tell us to move companies, but that's it... The deeds are the deeds and you own it all. I did a lot of research to check all this.
>
> So, we are fine.
>
> However, I have also put in place mechanisms so that if a nominee dies, or goes weird, we can remove the assets without the need for disclosing the deeds to anyone. This protects you guys even further and avoids the need for courts to recognise the deeds, and for disclosures."
>
> (emphasis added)

585. None of this is wild ranting on the part of Mr Worsley or Mr Worsley off on a frolic of his own – this is, indeed, the structure that had been put in place, from which the involvement of nominees, and the Shareholders owning all the companies, is perfectly clear to the Shareholders. This did not provoke a response from Mr Yurov along the lines of "what on earth are you talking about?" It is notable that this email is not addressed in any of the Shareholders' Written Closing Submissions.

586. Mr Worsley created a briefing paper on 16 May 2013, which covered in greater depth the mechanism he had put in place. In the memo Mr Worsley wrote *"You asked me about the legal position in relation to Nominees in Cyprus",* indicating *"Your concern is as to what might happen if for any reason at all, there is contention as to ownership of a company."* In the memo Mr Worsley explained that despite a lack of case law in the Cypriot courts, he had found a solution which worked under Cypriot law. He explained he had all of the nominees pre-sign instruments of transfer and letters to the trustees (which were safely stored in the UK), so as to transfer ownership to Dramcon, a company owned by Mr Worsley. He explained that if a nominee died, the company could be taken under Dramcon and re-assigned to a new nominee. He also explained that he had set up a company which Mr Grechishnikov owned, and had signed similar instruments of transfer and letters for Dramcon up to this company. Further, Mr Grechishnikov held a power of attorney over Dramcon. As Mr Worsley put it: *"If a nominee dies or goes rogue, we take the company under Dramcon. If I die in the day/week when Dramcon owns the company, Andrey can control Dramcon, and move the company."* Mr Worsley concluded by stating:

> "We need to take as much corporate administration as possible in house. There is a limit as we need to show lots of different Directors for the CBR re companies that have loans from NBT. However, we will do all that we can. This will level our existing staff base into a more useful and cost effective unit, by saving third party costs."

587. Mr Worsley also created a second briefing paper on 6 June 2013 (adding to the text of the first) and noted that "*[w]e have to hide in plain sight"* in a climate of increased scrutiny of tax evasion; and that *"[o]ur Cypriot bankers are successful in dealing with Russia because they take at face value, the paperwork that is delivered in support of a transfer of money. In other words they accept, without question, loans between BVI companies etc..."*. This paper ends with a section beginning: *"Ilya, [Mr Yurov] When we met to discuss that overview paper…."*, before setting out further thoughts on the various alternative offshore jurisdictions.

588. It appears that Mr Yurov had been discussing with Mr Worsley at least one matter touched on in the second briefing paper (as quoted above). Questions were put to both Mr Yurov and Mr Fetisov about the references to payments to "X" in the context of the CBR in the second briefing paper which I have already referred to, leading Mr Fetisov to say he had not seen the document. In circumstances where there is no documentation that proves whether or not these briefing papers were seen by the Shareholders, I cannot be sure whether the Shareholders were provided with copies of these briefing papers, but given the language of the briefing papers (which is clearly directed at the Shareholders) and their content it seems likely that the Shareholders were provided with copies of these briefing papers. If they were this can only have added to their knowledge about the nominee structure.

589. In any event what is clear is that there was then a decision to move the administration of the offshore network to Cyprus. Thus, in November 2013, Mr Worsley established his own CSP company in Cyprus called Iona Holdings Limited ("Iona"), and a number of Columba employees, including Mr Grechishnikov, transferred to Cyprus. From that point, Vassiliades ceased to deal with Columba and received their instructions from Iona.

590. In August 2014, Mr Worsley obtained a licence from the Cyprus Securities and Exchange Commission to offer fiduciary services through another company, Teos Corporate Services Ltd ("Teos"); and the management and administration of the majority of the Cypriot companies in the offshore network was transferred from Vassiliades to Teos in September 2014. The reason for leaving some Cypriot companies under the administration of Vassiliades was explained by Mr Worsley to Mr Yurov in an email on 5 December 2014:

> "Companies: We need to use external suppliers for the companies that borrow from NBT. This is because we need to show differing addressees and Directors due to requirements of the CBRF. Vassiliades' infrastructure is very useful in this respect, and we will leave the NBT borrowers with him for this reason. We plan to take in-house most/all of the other companies. This will be possible as we now have a fully regulated trust company in Cyprus."

591. It is also clear that the Shareholders were aware of the decision to move the administration of the offshore network to Cyprus. Mr Belyaev's evidence was that, although he recalled discussions at the Bank about opening a Cyprus office, he had no specific recollection of what was going on and did not discuss this with Mr Worsley. As such he claimed that he did not fully understand the details of what was being set out in the emails. Mr Fetisov claimed he was not closely involved in the process but generally aware it was going on and updated at a high-level.

592. The Shareholders were certainly updated on progress as shown by the emails of Mr Worsley to the Shareholders and I am satisfied that they would have been aware that a decision had been made and was being implemented. By way of example as to the correspondence between Mr Worsley and the Shareholders:-

(1) *"I will continue to interview people in Cyprus, and I will look for an office there"* (24 September 2013)

(2) *"I am now in Cyprus. I have been interviewing people, and I will be doing so again later today and on Monday. I have made a job offer to our key new person here. I met Manko and told him about the changes (he is all OK). I have found three potential new offices to rent, and I will select and revert. I am as normal also seeing our lawyers and bankers and accountants here. Lots to do... In short, the roll out is in progress as planned and is in line with projected time lines*" (4 October 2013)

(3) *"What do we need:*

1) We need someone we trust in Cyprus, to make payments." (10 October 2013)

(4) *"In Cyprus I found an office, hired an MD, and made offers to three staff other key members. I also bought office furniture and set in place all next steps, as well as seeing lawyers etc as normal"*
(email to Mr Yurov 10 October 2013).

(5) *"I am writing from the new Cypriot office. As I write, the office furniture is being delivered and installed Last week I purchased the computers for this office. They will be here later this week, along with new internet lines.*

The new Cypriot guy will start December the 2nd. On the same day, two junior lawyers will also start.
T am aiming to have Manko start in Nicosia then as well. All hard copy docs that are now in the Lirnssol office will be in a safe deposit room in a business centre in Nicosia." (11 November 2013).

593. The reason for the move appears to have been two-fold. First, it was intended to save money, and second, it was part of a strategy to move all management and control of companies out of Russia.

594. As to the former, it was intended to save money by bringing much of the administrative work previously done by Vassiliades "in-house" at a lower cost. As Mr Fetisov noted in his witness statement, Vassiliades were charging in the region of €3-4 million per year and the new structure would *"eliminate the need for Vassiliades".* It is apparent from the documentation that in late May 2013, Mr Worsley had a detailed meeting with Mr Fetisov in relation to the budget for the Cypriot operations and costs savings, which he summarised in an email to Mr Yurov. By June 2014, Mr Worsley was informing Mr Yurov and Mr Fetisov that by closing down the Moscow office *and "firing all other Moscow employees"* he had reduced the projected costs for 2015 down to €2.2 million.

595. As to the latter, it was envisaged that documents in relation to the offshore network (and the passkeys for online access to the companies' bank accounts) would be moved outside of Russia. This had potential tax advantages (as the companies would ostensibly not be controlled from Russia) but it also meant that the documentation was not readily available to the Russian authorities should enquiries be made. In this regard the documentary archives of the various companies were transferred from Moscow to Cyprus in late 2014. It is clear that Mr Worsley, at least, was of the view that it was necessary to move all management and control of companies outside Russia, stating in an email to Mr Yurov on 15 September 2013: *"We have to move Management and Control out of Russia"*. He expressed similar sentiments to a Columba employee (offering a transfer to Cyprus) in an email dated 19 September 2013, *"This initiative is part of wider strategy to move all management and control of our companies out of Russia"*.

F.2.8 THE SETTING UP OF THE SHAREHOLDERS' DISCRETIONARY TRUSTS

596. In spring 2013, all Mr Fetisov's interests in the offshore network (including the Borrowers), as well as his interests in the Bank, were settled into separate discretionary trusts in the Isle of Man. This included his interests in all the companies which he and the other Shareholders now deny ever owning and/or even knowing about. Later in 2013, the other Shareholders began to consider doing the same, and this was implemented in spring 2014. Again, this included their interest in all the companies which they deny ever owning and/or knowing about. The beneficiaries of all three sets of discretionary trusts were the Shareholders alone, as well as any other persons as might be nominated. None were. The Shareholders also appointed further companies controlled by Mr Worsley as the "protectors" of the trusts, with power to change the trustees.

597. If there had indeed been any distinction between Shareholder Companies and Bank Companies so far as the Shareholders were concerned (which the preponderance of the documentation addressed above to date clearly shows there was not), and had some of the

companies in the offshore network been beneficially owned not by the Shareholders but rather by the Bank, it cannot be seriously argued that to place them in discretionary trusts in favour of the Shareholders was anything other than wholly improper, amounting as it would, to the misappropriation of Bank assets for the benefit of the Shareholders.

598. Ultimately each of Mr Yurov and Mr Fetisov acknowledged this (as they had to). Thus Mr Yurov said during the course of his cross-examination:

> "Q. Well, you could not honestly allow the Bank's property or companies run for the benefit of the Bank to be placed inside a discretionary trust of which Mr Fetisov was the sole beneficiary, could you?
> A. Well, to say, you know, like straight, I think that's correct description."

and

> "Q…. if they had been owned by or for the benefit of the Bank, as you claim you believed, you were thereby moving them out of the Bank's control and giving a third party, a trustee in the Isle of Man, complete control over what you now claim were the Bank's assets. And that would be dishonest, wouldn't it?
> A. If that was the purpose of my activities, to transfer nominally the beneficial rights of the companies which were controlled, owned and beneficially owned by the Bank, to third parties, yes, that would be dishonest."

599. Equally, Mr Fetisov acknowledge the same during the course of his cross-examination:-

> "MR PILLOW: Mr Fetisov, if you knew that an asset was owned by the Bank or for the benefit of the Bank, it would have been improper for you to cause it to be transferred to yourself personally unless you'd paid a proper price for it, wouldn't it?
> A. Generally, yes, I agree.
> Q. Indeed that would be dishonest, wouldn't it?
> A. I guess so, yes.
> Q. And it would be improper for you to take the income or profit from a Bank asset personally instead of the Bank getting that money, wouldn't it?
> A. Generally, yes.
> Q. And it would be dishonest, wouldn't it?
> A. Yes, I agree.
> Q. If you knowingly transferred an asset that was the Bank's into a discretionary trust of which you were the sole beneficiary, that would also be improper and dishonest, wouldn't it?

A. Generally, yes."

600. Yet I am satisfied that this is precisely what happened – companies that the Shareholders allege were Bank Companies were transferred into their own personal discretionary trusts. Of course, the reality is that there was never any distinction between Bank Companies and Shareholder Companies and the Shareholders treated all the companies as their own. The effect of what occurred can be tested by considering what would happen to any dividends produced by the underlying asset once the trusts were in place. Self-evidently (and indisputably) such dividends would be in the hands of the trustees who could only then distribute them, in accordance with the terms of the trust, to the Shareholders personally.

601. What was done about the transfer of all the companies into the Shareholders' personal discretionary trusts also tells the lie to way the Shareholders were forced to argue their case in closing namely that *"the far more important line of enquiry is whether the Borrowers were intended to be under the control of and used for the benefit of the Bank. That might fairly be described as beneficial ownership in substance – even if the formal ownership structure is something different"* (paragraph 54 of Mr Fetisov's Closing) and *"asking about 'beneficial ownership' (and, a fortiori) 'ultimate beneficial ownership' was largely pointless so long as the shareholders were ultimate beneficial owners of the Bank and the companies had no profits to distribute. What really mattered, and matters, was the question of how (and in whose interests) particular transactions were carried out"* (paragraph 122 of Mr Yurov's Closing Submissions).

602. Putting companies in your own personal discretionary trust is simply inconsistent with the companies being under the control, or for the benefit, of the Bank or the Bank retaining ultimate (or indeed any) beneficial ownership. Once in the trust, any ownership (as well as control) has been lost – that is, after all, one of the very purposes of a discretionary trust - quite apart from the additional point that the Shareholders were not the only shareholders of the Bank and it was not for them to do as they wished with the Bank's assets. Additionally, putting companies into your own discretionary trusts is, and can only be, in your own interests – and to put assets owned by the Bank into such discretionary trusts is (self-evidently) dishonest.

603. In consequence, the Shareholders had no choice but to distance themselves from what occurred claiming that each of them separately *"left it all to Mr Worsley"*, that Mr Worsley himself despite having run the offshore network for years mistakenly failed to observe and implement the distinction between "Bank Companies" and "Personal Companies" and (crucially) that each Shareholder separately failed to pick up this error when personally signing documentation transferring numerous alleged "Bank Companies" into their own personal trusts. Such evidence defies belief. In the circumstances I identify in Section F.2.8 below, I am satisfied and find, that the Shareholders knew perfectly well that they were transferring all the companies into their personal trusts, and that they did so intending that such assets would be dealt with in accordance with the terms of the trust (i.e. for their personal benefit and that of their families not that of the Bank).

F.2.8.1 MR FETISOV'S TRUST STRUCTURE

604. Mr Fetisov was the first of the Shareholders to set up a discretionary trust, in April 2013. Mr Fetisov's own evidence is that in or about early 2013 he instructed Mr Worsley, *"to place certain of [his] interest into discretionary trusts for the benefit of [him] and [his family]* so as to avoid UK inheritance tax as he was spending a substantial amount of time in the UK. Self-evidently, therefore, the purpose was to shelter his personal assets (and not hold assets for the Bank as the assets ultimate (ultimate) beneficial owner – which would have been a contrived concept in any event).

605. It appears that the decision to set up such a trust was in fact made in December 2012. In this regard on 11 December 2012 Mr Worsley received an email from Simcocks (the solicitors in the Isle of Man), which he forwarded to Mr Fetisov then next day. The email provided:

> "Further to our telephone conversation I understand the position to be as follows:
> 1. One of the Beneficial Owners of the present IOM structures operated by Boston wishes to set up his own Private Trust structures separate from Boston. He lives in the UK and wants to transfer his assets to offshore trusts whilst he is not deemed UK domiciled.
> 2. There would be a Purpose Trust ("PT") which owns a Private Trust Company ("PTC") which would be an Isle of Man 2006 Act Company.
> 3. The client would settle 2 discretionary trusts ("DT") and the PTC would be trustee of both.
> 4. One DT would own shares of investment companies and the other DT would own the clients properties (apartment and house in Russia) and I assume property in UK, through BVI companies (we can establish these too if you wish through our BVI office)…"

(emphasis

606. I consider that the timing of this email is significant. Just a few days later each of the Shareholders, including Mr Fetisov, signed the documentation by which various of the Borrowers were transferred into the Boston structures including Oldehove, Crylani, Mourija, SiberianKD, and StroyEcologiya (through Yeleran) – and Mr Fetisov knew (from the above email) that his share of that structure was going to go into his own discretionary trust. It defies belief that he was not aware, and did not intend, his share of those companies to go into his discretionary trust.

607. In January 2013 Chale Holdings Limited ("Chale Holdings"), a BVI Company, was set up. On 20 February 2013 Boston Nominees signed a declaration of trust declaring that they held two-sevenths of the shares in Arlingham and Brora on trust for Chale Holdings – thereby moving Mr Fetisov's share of the Boston Isle of Man structure into Chale Holdings. The trustees undertook and agreed:

> "to account to [Chale Holdings] for all dividends and profits which may be paid to us from time to time upon the said shares and for all other monies or profit which may be payable to us in respect thereof"

608. On 28 March 2013 Mr Worsley emailed Mr Drozdov, Mr Fetisov and Mr Yurov about the establishment of Chale referring to the intended transfer of Mr Fetisov's interest in the Bank into the trusts and stating, amongst other matters:

"4) We should continue with the work to move Nikolay's %% of Tactio, TIB Holdings, and Winsala into Chale ASAP."

Could you have the executed (by Boston) Chale docs countersigned please?

5) FYI, I have moved Nikolay's other assets into other BVIs, also owned by Chale..."

609. On 4 April 2013 Mr Fetisov settled two Isle of Man trusts (The Chale trust and the Polden trust) and signed letters of wishes in relation to these trusts. The letters of wishes executed by Mr Fetisov provided that his overriding wish was that the trust fund be available to him during his lifetime and to his family after his death.

610. The following day, Mr Fetisov settled half of the shares in Chale Holdings into the Chale trust and half into the Polden trust. The trustees' signature on the deeds effecting this was witnessed by Nicola Offord, the assistant manager of Boston who later in November 2013 sent Mr Worsley charts showing the companies in each of the Shareholders' Boston Isle of Man structures including Arlingham and Brora and a list of companies, including Disputed Companies, held underneath Arlingham and Brora.

611. It is important to appreciate that it is not simply that the structure charts show such a structure. This is the structure that had already been implemented when the Chale and Polden Trusts were established. Thus, by way of example, in relation to Erinskay (alleged to be a "Bank Company" in which Mr Fetisov says he had no interest), the documentation shows that by April 2013 when the Chale and Polden Trusts were established, Erinskay was ultimately owned, through intermediary companies called Serendale and Lupin and a "nominee UBO" (a Mr McBean) by Brora (and so ultimately by the Shareholders personally) in the usual 3:2:2 proportions.

612. Mr Fetisov claims that he only gave instructions for his interest in the Bank and interests in personal investments to be settled into the trust. He maintains that at the time he understood this is what Mr Worsley had done. For example, he suggests that he understood the "*other assets*" referred to in the 28 March 2013 email to be assets such as RCP, Willow River and SiberianKD. Mr Fetisov claims that he did not know when signing the instructions to transfer Chale Holdings into the trusts that he was transferring any interest in "Bank Companies". He also suggests that it is far from clear what assets were actually transferred into the trusts.

613. I do not consider Mr Fetisov's evidence to be credible in this regard for a number of reasons. First, and as already identified, there was, I am satisfied, at this time, no distinction between Bank Companies and Shareholder Companies (this was a later invention) – so the intention was to transfer his share of <u>all</u> companies into the discretionary trusts. Second, I consider it is no coincidence that discussions about the move into a trust took place around the same time that alleged "Bank Companies" were being transferred to Tactio and then ostensibly to BVI companies owned by nominee UBOs. Third, there are no written instructions supporting Mr Fetisov's alleged distinction in terms of his instructions, and again no distinction drawn in the documentation between Bank Companies and Shareholder Companies in the documents at the time. Fourth, there must have been a discussion between Mr Worsley and Mr Fetisov as to the setting up of a discretionary trust and that discussion must have included a conversation about what companies were to be placed in that trust. Fifth, and as already noted, Mr Worsley would

himself, despite running the offshore network for years have had to fail to observe the distinction (or pick it up at the time of the later structure charts). Sixth, the likelihood is (as addressed below together with the position in respect of Mr Yurov and Mr Belyaev) that Mr Fetisov (and the other Shareholders) received and/or discussed the later structure charts making the position absolutely clear as to what was in the trusts.

614. The transferring of interests into discretionary trusts was also taking place against the backdrop of the avoidance of any paper-trail within the Bank that would reveal the Shareholders' ownership of the offshore network. Thus, on 9 April 2013 (i.e. whilst the setting up of Mr Fetisov's trusts was under way), Mr Worsley emailed all three Shareholders (at their private email addresses), as well as Mr Vartsibasov and Mr Iskandyrov, stating:

> "Please also take into account the fact that the audited reports (EG Feb to July 2013 reports) will show settlement of the deals that will make the 'profits' as being in April....
> We can back date the signed docs to Feb/March (if new companies), and maybe a bit further back if we have to use old companies, but in each case, the actual deal settlement will be in April of this year. IE these profits will have appeared just before the purchase, in all 5 cases.... There is little that can be done about that fact. Please bear it in mind when talking to the CBR.
> …
> This email was sent to non NBT email addresses on purpose (I do not have an address for Fedor). Pls print if needed internally at NBT."

615. Mr Yurov sought to ridicule this email on the basis that Mr Worsley was acting like "James Bond" but what it actually shows is Mr Worsley communicating privately to the Shareholders (out-with the Bank's servers and associated documentary record) about the importance of not leaving a paper trail within the Bank that would reveal the ownership of the offshore network by the Shareholders.

F.2.8.2 MR YUROV'S AND MR BELYAEV'S TRUST STRUCTURES

616. From October 2013, the idea of setting up personal discretionary trusts for Mr Yurov and Mr Belyaev was discussed by Mr Worsley with Boston, and must have been discussed by Mr Worsley with both Mr Yurov and Mr Belyaev (given that they each decided to set up discretionary trusts). On 31 October 2013 Mr Worsley had another meeting with Boston at Claridge's. The same day Boston wrote to Mr Worsley summarising the meeting and indicating that they looked forward to hearing from Mr Worsley should the settlors (that is, Mr Yurov and Mr Belyaev) wish to proceed with Isle of Man trusts. In this regard Boston stated amongst other matters:

> "3) Structure Diagrams - we will provide an all encompassing structure diagram detailing the current position of the entities under our management.
>
> …
> We look forward to hearing from you with regards to the Trust Deed wording and Letters of Wishes for the unsettled Trusts should the settlors decided to proceed with IOM Trusts."

617. On 11 November 2013, Ms Offord sent Mr Worsley a diagram showing the Arlingham, Brora, Gingerson and Serrinson structures (which were held under Mr Fetisov's discretionary trusts and held directly on bare trust at that stage for Mr Yurov and Mr Belyaev). The diagram contained a list of companies underneath Arlingham, Brora, Gingerson and Serrinson, including a number of Disputed Companies and BVI companies with nominee UBOs (which in turn held Disputed Companies).

618. It follows, therefore, that Mr Worsley would have seen precisely what was in the structure and would have understood what was in Mr Fetisov's discretionary trust and what was proposed would be within Mr Yurov's and Mr Belyaev's discretionary trusts. It is inconceivable, in my view, that Mr Worsley would not have spoken out at this point if there had been some distinction between "Bank Companies" and "Shareholder Companies" as it was clear that no such distinction was being observed. This is a yet further contemporary document showing that in fact there was no such distinction.

619. On 26 November 2013 Mr Worsley informed Boston that Mr Yurov and Mr Belyaev did want to move into trusts on the Isle of Man. The email provided "*This will apply to their Bank holdings, and also to their holdings in the companies (via Arlingham/Brora etc)".* Again I consider it inconceivable that Mr Worsley would have said this unless he had discussed the transfer into trusts with Mr Yurov and Mr Belyaev. The question therefore arises as to what was discussed. The Bank submits that it is very likely, given that Mr Worsley had very recently received associated structure charts from Boston and must have been discussing matters with Mr Yurov and Mr Belyaev, that he would have shared the charts with them and/or showed them and/or discussed them with Mr Yurov and Mr Belyaev. Mr Stanley, on behalf of Mr Yurov, asks whether this necessarily follows – would Mr Worsley necessarily have gone through the structure diagrams and associated companies with them?

620. I consider that it is more likely than not that he did so. Firstly, there is the language of what he says to Boston contemporaneously as his email to Boston specifically addresses what they want transferred namely their interest in the Bank and *"also… their holdings in the companies (via Arlingham/Brora etc)".* This is a specific and clear instruction that refers to the companies via Arlingham/Brora. It is difficult to see why he would say this unless he had discussed this with Mr Yurov and Mr Belyaev – that is the obvious inference from him giving such instruction. Secondly, Mr Worsley had put his mind to what was included and he knew perfectly well what companies were in the structure via Arlingham and Brora. Thirdly, he could hardly have given such a specific instruction unless he had discussed matters in that level of detail with Mr Yurov and Mr Belyaev. Fourthly, it was the obvious thing to do – the obvious question to Mr Yurov and Mr Belyaev would have been – what do you want transferred into the discretionary trusts - which would have led to a discussion and ultimately a decision/instruction which must have included *"their holdings in the companies (via Arlingham/Brora)".*

621. When questioned about this Mr Yurov said as follows:-

> "Q…Mr Worsley, he reports to Boston, through
> Andrew Ash and Greg Ellison:
> "Ilya and Sergey wish to move into Trusts."
> So do you accept that you had clearly discussed with
> Mr Worsley and Mr Belyaev, but certainly Mr Worsley that

you planned to move your assets into discretionary trusts at around this time?

A. I admit that I was discussing with Mr Worsley this thing on his advice, yes.

Q. If you turn over the page, Mr Worsley goes on. {D4/100/3} He says in terms:

"This will apply to their Bank holdings, and also to their holdings in the companies (via Arlingham/Brora etc)."

Do you see that?

A. Yes, I can see that.

Q. It could not be clearer, could it, Mr Yurov, that you had instructed Mr Worsley to place the companies we have seen in the Arlingham and Brora structures into a discretionary trust for your personal benefit?

…

A. Well, I can read it but I disagree that that was clear to Mr Worsley or anybody else.

…

[Q.] Is it your evidence to the judge, Mr Yurov, that Mr Worsley was making an elementary but almighty mistake by transferring these companies into your personal discretionary trust?

A. No, I think, you know, it's not elementary or almighty mistake. My only theory on that, that this period of time Arlingham/Brora really were not holding any banking assets, because, you know, otherwise Mr Worsley -- there are two options, or this Arlingham/Brora was just the companies without exact holding of all these, you know, other companies -- majority of the name I never saw in my life by the way -- or he was just decided to totally default on my direct instructions. There are only two options for that.

Q. No, the real truth, Mr Yurov, which you knew at the time, was that you had decided to protect what you regarded as your personal assets, including companies you are now saying were the Bank's, by putting them in a discretionary trust of which you were the sole nominated beneficiary. That's the truth, isn't it?

A. No, this is wrong, no, this is not the truth.

622. I do not consider Mr Yurov's answers bear analysis. His first option (that Arlingham/Brora did not hold any alleged "Bank" assets) is simply wrong, as Mr Yurov must have known given that he was involved in the transfer of Oldehove, Crylani, LB Collection Services and other companies in December 2012 and July 2013. His second, that Mr Worsley *"just decided to totally default on my direct instructions"* makes no sense. First, there would not appear to be any reason why Mr Worsley would default on whatever instructions he was given (and none is suggested) – far more likely (as one would expect) is that a person in Mr Worsley's position would carry out Mr Yurov's instructions – and that those instructions would be reflected in the email. Second, it follows from Mr

Yurov's evidence that he did indeed give instructions – the best evidence of those instructions is what Mr Worsley contemporaneously passed on. Third, if there was a distinction between "Bank Companies" and "Personal Companies" (which I am satisfied there was not) it would have been readily apparent that precision was needed as to what was and was not being transferred and this would have been reflected not only in the discussions between Mr Worsley and Mr Yurov, but also in Mr Worsley's email to Boston, and both Mr Worsley and the Shareholders would no doubt have checked to ensure that no "Bank Companies" were transferred.

623. On 3 March 2014, Boston re-sent Mr Worsley the diagrams showing all the companies within the structures administered by them. This is just two days before Mr Worsley met with the three Shareholders so that they could sign various documents. It appears that the documents included the trust documents for Mr Yurov and Mr Belyaev. Given the purpose of the meeting I consider that there is every likelihood that the structure charts were either provided to the Shareholders or discussed with them at this meeting. Once again this would have shown what companies were within the structures and would be within the trusts.

624. Mr Yurov settled two trusts called the Mead Drove Trust and the Watling Trust; and signed two letters of wishes confirming that his overriding wish was that the trust fund be available for himself (alone) during his lifetime, then for his family after his death. Mr Yurov personally signed a transfer document specifically effecting the transfer of his shares in Arlingham and Brora (three-sevenths in each case) into the Watling Trust. By Declarations of Trust dated 5 March 2014, Boston Nominees confirmed that they held 4,285.714 shares in both Arlingham and Brora on trust for Watling Limited as trustees of the Watling Trust. I reject Mr Yurov's evidence that he did not know what assets were owned by or through Arlingham and Brora as well as the suggestion (for which no reason was provided) that he thought that they only held Willow River/RCP and other "Personal Companies". Such evidence is not credible. The same was apparent from the structure charts addressed above, and from prior correspondence that has already been addressed above.

625. Mr Belyaev's trusts were called the Laurel Bay Trust and the Eagle Hill Trust. Mr Belyaev signed similar instruments of transfer of his shares in Arlingham and Brora to the Eagle Hill Trust, which were thereafter held by Boston as trustee.

626. Mr Belyaev says that the trusts were created to avoid Russian taxes on CFCs; but claims that he simply *"signed the documents prepared by, if I recall correctly, Boston Trust"*; and that only his interests in the Bank itself should have been settled into the Eagle Hill Trust. He says that the *"only explanation I have as to how other assets ended up in this trust is that they were placed there at a later date and that documents were backdated in an attempt by someone to legitimates the transfer without my knowledge or consent".* The former suggestion is a further example of Mr Belyaev claiming not to read documents provided to him or even signed by him, which I do not find credible, particularly given that what is being considered is what is to be done with Mr Belyaev's personal assets- a subject which one would expect to be close to his heart, and to which he would have paid attention. The latter (somewhat fanciful) suggestion is without any evidential foundation and has something of an air of desperation about it. I have no hesitation in rejecting it. As with Mr Yurov, I am satisfied that Mr Belyaev must have understood the significance of

transferring Arlingham and Brora, not least given his personal involvement in moving companies into that structure in December 2012 and July 2013 (as already addressed).

627. In the circumstances I have identified, I am satisfied, and find, that there would have been conversations between each of the Shareholders and Mr Worsley in all likelihood accompanied by structure charts, as a result of which (and/or coupled with their existing knowledge of the composition of the offshore network), each of the Shareholders will have understood that their interests in the Borrowers and other personally owned companies were being settled into their respective trusts, which reflected their intention.

628. The position therefore was that by March 2014, much of the offshore network, including the Borrowers themselves, had been transferred by the Shareholders into discretionary trusts of which they were the sole beneficiaries. It is also notable that not only did the Shareholders set up these discretionary trusts with the assistance of Mr Worsley, they also appointed him as the "Protector" of the trusts (through further companies owned by him, such as Herne Consulting). Not only is this a reason why Mr Worsley would surely have ensured that the right assets were transferred into the trusts, it also suggests (contrary to certain suggestions made by the Shareholders in evidence) that they still trusted Mr Worsley and most certainly did not regard him as a "loose cannon" or someone off on a frolic of his own.

F.3 PLUMS AND DUFF – "BANK" and "PERSONAL" / "SHAREHOLDER" COMPANIES

F.3.1 THE ORIGIN OF THE ALLEGED DISTINCTION

629. The contemporary correspondence I have identified above does not reveal any contemporary distinction between "Bank Companies" and "Personal Companies" and much of it is actually inconsistent with any such notion as I have identified. If there had been any distinction it is at this time period that one would expect it to be reflected in the documentation, and the Bank submits (rightly in my view) that documentation from this period is the best guide as to whether there was any such distinction. The preponderance of the documentation supports the conclusion that there was no such distinction.

630. The Bank submits that the origin of the alleged distinction can be traced to the period from May 2014 onwards when it is said the Shareholders were contemplating losing control of the Bank, either in the context of a possible sale to BIN or in the event of the collapse of the Bank. The Bank also urges caution as to the relevance, and significance, of what was said at the time of, or following the collapse of the Bank. That context is different to the contemporary position prior to the collapse of the Bank and there may be various reasons for what was then (or subsequently) said.

631. What the Bank says occurred is that the Shareholders decided that they wished to keep only the companies that were actually or potentially valuable (like WR/RCP and SiberianKD/Business Group/Priangarskiy) for themselves, whilst contriving an argument that the worthless shell companies (like Erinskay, Baymore, Mourija, LB Collection Services et al.) and loss-making project companies (like Stivilon and StroyEcologiya) were, all along, owned by and for the benefit of the Bank such that they bore no responsibility for their ongoing maintenance or financing. What was characterised in the Bank's Written Closing as "cherry-picking of profitable companies" though perhaps more accurately characterised as reverse cherry-picking, or rather there was a duff with some

plums in it and when the collapse of the Bank was on the cards the Shareholders chose to take the plums and leave the duff.

632. The Bank says that the idea for this argument can be seen to have surfaced in May 2014. In particular, there were discussions between the Shareholders and Mr Worsley at that stage as to what would happen in the case of the Bank's collapse or a change or control (referred to in euphemistic terms as a "corporate event", but the point being a scenario where the Shareholders would no longer own the Bank). The obvious matter that would arise is that any change of ownership would result in the Bank itself having new shareholders but the Shareholders would personally own and control all of the Bank's largest corporate borrowers – and this depended on large amounts of money being made available to them to service their loans and avoid defaults.

633. The possible occurrence of a "corporate event" and its consequences was mentioned in Mr Worsley's budget update on 12 May 2014 which included the following passage under the heading "Companies":

> "We need to use external suppliers for the companies that borrow from NBT. This is because we need to show differing addressees and Directors due to requirements of the CBRF. Vassiliades' infrastructure is very useful in this respect, and we will leave the NBT borrowers with him for this reason. We plan to take in-house most/all of the other companies.
>
> …We now have just over 200 companies. This sounds like a huge number, but it is not unreasonable. Bear in mind that we have to separate structures in layers, when we make financing schemes, so that when the CBRF looks as incoming/outgoing financial flows, they do not see connections between layers. We always minimize the numbers of companies in layers, using companies that are in neutral visual positions in multiple structures.
>
> We also have to take into account N6 issues, which mean that we need multiple silos. I am going through the list of companies to see what dead wood we can cut out. <u>If there is a corporate event at the bank, we can review the whole company and cost structure at that time. Any new partner will need to finance the existing loan and interest re-payments, via the silos, and will need the existing structures. Aside from that, at the time of a corporate event, we can hive off the assets that have any actual real value, so as to minimize personal costs payable at such a point. I am making a plan to that effect, so that it is ready as and when needed.</u>"
>
> (emphasis added)

634. On 27 May 2014, Mr Worsley texted Mr Yurov saying:-

> "Main problem is that we have loans of 1.2 billion USD, 90% of which are under water… And we have to finance them… And service all [these] companies that get loans" and "I will also make a corporate event budget. <u>Basically if you guys keep only the two cash flow positive companies for BiIla, plus the trusts, the costs are super minimal... Like almost zero. The weight is in the bad debt stuff.</u>.. PS I went through all of the companies. I am closing about 5% of them. The rest are really needed. For the financing schemes. There was really not much fat on the bone…"
>
> (emphasis added)

635. In an email to Mr Yurov and Mr Fetisov the same day Mr Worsley stated:-

"Various budget points. These are high level overview principals of the situation.
1) Outstanding loans to the companies that borrow from NBT are at approx USD1.3

2) Of those, only Billa is a cashflow positive asset, with approx 130M is loans.
3) Thus, 90% are under-water.
4) If there is a corporate event, and the under-water loans are left with NBT, the costs of the Billa asset structure is minimal. Billa: Accounting of the local entities. Cypriot accounting and audit. Nominee fees (if needed). South of USD100K, against the revenues.
5) In the case of a corporate event, leaving you with only Billa to pay for, the vast vast majority of the rest of the costs fall away. 100% of the Moscow office, 100% of the Cypriot and Maltese offices. Just some trust lawyers left to pay, with less to manage, So another 50-100K max. So, if the above happens, the costs are OK compared to Billa income.
As to the rest of the cost:
6) We have to think of N6 issues. Hence the need for a structure that shows multiple 'owners' and also shows multiple separate structures. We cannot respect N6 and have it all owned by one person in one company.
7) Financing: We have to have a number of separate structures that borrow from NBT in order to pay interest costs. Again, we cannot lend to one company, and pass it straight on. We need 'screens'. We really minimise them, but they are needed.
8) I have been through the list of companies. I have been able to strip out about 5%. There was not a lot of fat on the bone. For MICEX, we had to open about 20 new companies. They should stay open this year, in case MICEX#2 is needed. After that we can close them. It was a huge deal. The structure was needed.
9) The chain of logic as shown above, does imply an unavoidable structure that is connected to the ownership and financing of the bad portfolio. We cannot escape that for the moment…
…
Summary:

The problem is the bad portfolio. If we can stop owning it and financing it, the problem is solved

If there is a corporate event, and interest payments come from another source (not NBT - but say from another bank), but someone has to keep the bad assets (rather than letting them go bankrupt, thereby saving the balance sheet), then all of the 'schemes' would not be needed.... All that would then be needed would be an N6 friendly ownership structure. That is relatively inexpensive. In such a scenario, we would cut the structure to the bone, and then assess whether it would be cheaper to service it in-house or externally.

Aside from all of that, we can simply cut to the bone. That I am doing.

We can also generate revenues to service all of this, and to make money.

I have various plans that can make us millions. Let's discuss."

636. It appears that there is then a meeting involving all three Shareholders after this email, as in a further email (sent on 17 June 2014) and addressed to all three Shareholders it is provided at the start, *"A brief note about Ilya's [Mr Yurov's] final point in our meeting…"*. That email provides, amongst other matters as follows:-

> "How to carry the assets?"
>
> We need to see the difference between carrying the assets, and carrying the assets AND the liabilities.
>
> To carry the liabilities (IE the companies that are cashflow negative) implies that the interest payments will be paid. Beyond that money must be procured to make those payments - thus implying circular paths with multiple companies etc etc IE the current situation...
>
> I assume that you will not want to pay the interest payments from these underwater companies from your own pockets
>
> I thereby assume that all of the structure associated with all of that, falls away - all of the circular related companies and audit and staff costs
>
> That leaves us with the ASSETS.
> Take Billa as an example:
> What are the costs:
> Interest payments
> Alliance Development
> Audit and accounting of two Cypriot companies
> Annual charges for two Cypriot companies
> Annual charges for two offshore companies
> Minor admin
>
> If you find other cashflow positive assets, the same sort of thing will apply.
>
> If, on one or two assets, you choose to pay the interest payments from your own pockets (because you believe in the future opportunity of the company), then the circular structure falls away, and the same cost structure applies as per Billa.
>
> So, things get a lot simpler once we factor out the dead assets."

637. Accordingly, what is being proposed by Mr Worsley is that if there is change of control at the Bank, the Shareholders would take Willow River/RCP, and any other "cashflow positive assets" that are worth saving, and abandon the rest of the companies such that they would inevitably default on their loans and go bankrupt, thereby saving the costs of running them. This is what did indeed happen. The distinguishing feature that Mr Worsley is identifying is not that there are "Shareholder Companies" in contra-distinction to "Bank Companies" but rather that particular companies were profitable and worth saving whereas other companies were not. This, therefore, appears to be the genesis of the idea to create a distinction between two categories: one owned by the Shareholders (the cash

positive assets) and everything else to be cast adrift (and much later in time to be characterised as "Bank Companies"). Such an approach, of course, has regard only to the interests of the Shareholders and does not have regard to the interests of the Bank itself or for that matter its depositors or employees (or indeed the wider interest of the Russian taxpayer).

638. It appears that Mr Worsley followed through his idea of seeking to find "other cashflow positive assets" as on 17 June 2014, Mr Worsley sent an email to Mr Butylkov at Columba attaching a spreadsheet, saying: *"I need a new version of this please, where the companies that are cashflow positive, are shown as zero in the final column. IE RCP/WR. Yaposha. Others? Thanks"*. The version of the spreadsheet sent back to Mr Worsley confirmed that most of the various borrowers had large cash-flow deficits. Those that had not included Willow River, RCP and Priangarskiy but also Yaposha (City and Investments) and Filenta. However, NRT, which owned Yaposha City, was in deficit, and the evidence is that by the time of the collapse of the Bank in December 2014, Yaposha Investments could not service the interest on its debts, whilst by that time Filenta had exchanged the building at 5 Spartakovskaya Street for shares in the Bank (at that time of no value) with the result these would not be worth keeping – they were to be labelled "Bank Companies".

639. The rationale for the distinction is therefore discernible from May 2014 but in fact it was not until much later that the alleged distinction blossomed into two categories of companies in Mr Yurov's second affidavit in the context of his application to discharge the freezing injunction against him in May 2016.

640. However before turning to that it is necessary to consider events in the intervening period, and documentation generated in this period to see whether that sheds any light as to whether there was (contemporaneously) any such distinction.

641. Mr Yurov's evidence is that in November 2014 he started negotiating a possible sale of the Bank with the major shareholders of Otkritie - Mr Aganbegyan and Mr Vadim Belyaev (no relation to the Second Defendant). Mr Yurov says he was told by them that they were in a position to buy the Bank and that, due to their close connections to the Russian financial authorities, they could structure this through the CBR's financial rehabilitation programme (known as "sanation"). Mr Yurov claims that an agreement was reached between him (acting on behalf of all the Shareholders) and Mr Aganbegyan and Mr Vadim Belyaev at a meeting in early December 2014 ("the Oral Agreement"). The agreement was that Otkritie would purchase the Bank, paying US$10 million upon the formal appointment of Otkritie to the Bank's administration, and a further US$40 within 12 months.

642. It was Mr Yurov's evidence that he made clear at the meeting that there was an offshore network of companies held off balance sheet that were held for the benefit of the Bank, and which could be transferred either to the Bank or any entity proposed by Otkritie as part of the acquisition process. He claims that in the days after the meeting, the Bank opened its books to Otkritie, including the off-balance sheet structure. Following this, text messages were exchanged about recording the agreement. It was agreed that the Oral Agreement would not be put in writing. In this regard there was a text message he sent to Mr Aganbegyan on 29 December 2014 which provided:

> "Sorry to bother you ...
>
> But nobody calls, therefore I am speaking to you as a friend ...
>
> We need to decide a number of issues as quickly as possible:
>
> - transfer of all off-balance sheet assets either to Trust's balance sheet or somewhere else ...
>
> - decide on further actions on a gentleman's agreement ...
>
> - start to make payments in Trust (to prevent negative legal consequences) ...
>
> - set up a mechanism to take decisions on various important issues for Trust (for example, Trust Ukraine) ..."
>
> (emphasis)

643. I do not consider this evidence of Mr Yurov sheds any light on whether there was a distinction between "Personal Companies" and "Bank Companies" – clearly if a deal was in the offing it would be necessary to transfer all or part of the offshore network and that was in the Shareholders' gift (or at least that of the trustees of their discretionary trusts) regardless of any alleged distinction – given that all the companies were sitting in the trust structure.

644. On 21 December 2014, the Bank's management wrote an application letter to the CBR formally requested a bailout, and proposing that Otkritie be appointed to assist the financial rehabilitation process. On 22 December 2014, the Bank was placed in temporary administration under the DIA. Following a tender process, Otkritie was declared the investor in the Bank's sanation. Otkritie assisted the temporary administration of the Bank and worked on the Bank's rehabilitation plan. Work was carried out by Ms Dolenko and Mr Popkov, who were Otkritie employees. On 13 January 2015 Ms Dolenko resigned from Otkritie and was appointed as the temporary administrator of the Bank as has already been noted. The Bank remained under temporary administration until 22 June 2015 when Otkritie became the owner.

645. Mr Yurov's evidence was that he also attended a meeting with Mr Vadim Belyaev on 13 January 2015 in New York. He says the meeting covered the Oral Agreement (as to which Mr Vadim Belyaev indicated there were technical issues with the payment of the first tranche) and Otkritie's plans (including how they planned to proceed in relation to the offshore companies said to be controlled by the Bank). Mr Yurov claimed that Mr Vadim Belyaev indicated their exact plans were not set, but that they were planning to default on the companies' loans and take the assets directly onto the Bank's balance sheet.

646. On the same day, following the meeting Mr Yurov sent a text message to Mr Worsley indicating:

> "Just out from meeting… They will think what to do… But most probably will default companies ant [sic] take assets… They are not ready to finance Columba… So, let's cut everything…"

647. On 13 January 2015, Mr Drozdov emailed Mr Yurov from a private unnamed email account (2332537@gmail.com). The context of that email was his discussions with the Bank's temporary administration and whether/how he would cooperate with them. The email provided:

> "On January 30 I was on vacation and dropped in at the bank on business. Trofimov and Dolenko immediately wanted to see me. The meeting was quick – they told me out of hand that my services are no longer needed and suggested that I leave quietly effective 1 January, or things would be bad for me. They sort of hinted that they didn't want to spoil my employment record.
>
> To which I answered that their alternatives don't worry me much – let them proceed according to employment law and the terms of my employment contract. In general, I advised that, before taking some rash decision on the basis of some list, they find out about my functionality, specifically what I do, and then take reasoned decisions. And I'm on vacation, so I shouldn't even be there, so I got up and left.
>
> I barely managed to leave the bank for the New Year's holidays, and they were already phoning me every 10 minutes, calling me back for a meeting. Some good person at the top gave out my cell phone number, and the chief called me, apologized, and invited me to discuss everything calmly on January 12.
>
> The meeting was yesterday. They invited me to cooperate on returning all the assets financed out of bank funds to the bank's books.
>
> I have several options for my next steps:
>
> 1. The shareholders need me and can offer me some terms for cooperation. I part ways with Otkrytie.
>
> 2. The shareholders don't need me and I act at my own discretion depending on my own interests, protection against various hostile actions against me (and a number of managers, Dikusar, Iskandyrov, et al.), and analysis of the overall defence plan, since they will 100% be bothering me and calling me in.
>
> 3. If the shareholders don't need me, then I can be helpful to Otkrytie. I have a conflict of interest here and I have my own principles.
>
> 4. I part ways with everyone, sue everyone for everything due me, and pursue my own personal projects.
>
> 5. Both shareholders and Otkrytie need me to carry out the plan that you set out in your recent messages, that we transfer everything to the Bank's or Otkrytie's books.
>
> I remain mutually acceptable for both shareholders and for Otkrytie – option 5.
>
> I don't want to argue with anyone and am ready to structure all asset transfer deals to repay the debt by transferring assets to the Bank's or Otkrytie's books.
>
> Attached is a list of assets for transfer. It's not complete, since I put it together quickly for lack of time. It will be expanded.

> If my suggestion is accepted, I'd put together a letter acceptable to me, that I'm carrying out the will of the shareholders with respect to the asset transfer and I'd sign the appropriate addenda to my employment contract with Otkrytie on work with the assets.
>
> And I'll get to work. This needs to be done quickly, since financing was suspended, and the assets might simply be lost for reasons beyond our control.
>
> Please review and take a decision. They are awaiting my decisions."
>
> (emphasis added)

648. Attached to the email was a list of companies which he proposed to transfer. The list included a large number of Disputed Companies as well as admitted Shareholder Companies (such as Willow River/RCP and Priangarskiy) – the list does not distinguish between Bank Companies and Shareholder Companies. If such a distinction existed Mr Drozdov (who was described by Mr Fetisov as *"like a computer"* and "*very accurate")* would have been aware of the distinction and would surely have made that distinction. I consider that the fact that he does not further tells against there being any such distinction. Indeed putting all these companies in one list shows that he knows they are all "Shareholder Companies" – otherwise there would be no need to transfer them "to the Bank", and they would not be all in one list including companies admitted to be the Shareholders. The email also sheds light on the fact that the new people were regarding these as "assets financed out of bank funds" which they considered were to be returned to the "bank's books" (a similar attitude is revealed in the subsequent settlement agreement between the Bank and Mr Worsley as discussed below).

649. On 13 February 2015, all three Shareholders attended a meeting with Mr Popkov, Mr Vadim Belyaev and Mr Aganbegyan at Otkritie's London office. There is a dispute as to exactly what was said at the meeting.

650. According to Mr Popkov, the meeting was to discuss a number of issues, including settlement with companies in the offshore network. During the meeting the Shareholders acknowledged that there were many offshore companies administered on their behalf. They proposed to transfer such companies to the Bank, which was agreed in principle for any companies with assets. The Shareholders made clear that there were certain companies that they wished to maintain control of and which were servicing their loans from the Bank. These included: Willow River, RCP, Priangarskiy and Business Group (i.e. what the Shareholders now call "Personal Companies"). Per Mr Popkov, there was no suggestion that some of the offshore companies were owned by the Bank. Both sides were negotiating on the basis that they were all owned and controlled by the Shareholders. Otkritie agreed to take over a number of companies, subject to due diligence, and agreed to allow the Shareholders to keep the companies they desired provided that the Shareholders settled claims by Phosagro against TIBI and T&IB Equities Ltd.

651. The Shareholders claim that the main purpose of the meeting was to discuss why the first US$10 million tranche in relation to the Oral Agreement had not been paid. According to Mr Yurov, Mr Aganbegyan assured the Shareholders that the deal would progress, but they wanted assurances that neither the Bank nor Otkritie would be liable for any of the Shareholders' personal liabilities to the Bank. The Shareholders gave such

assurances and agreed to have this recorded in writing. When asked how the transfer of the offshore companies was to be effected, Mr Vadim Belyaev indicated this was not yet decided. According to Mr Yurov, none of the Shareholders acknowledged that the Bank's offshore companies were administered on their own behalf, but he had already made clear in the discussions in December 2014 that a small number of the offshore companies were owned personally by the Shareholders.

652. I do not consider it is necessary for me to attempt to resolve the differences in evidence as to what was discussed at the meeting. There is nothing to suggest that there was, or was said to be, any particular distinction between "Personal Companies" and "Bank Companies" referred to or acknowledged in the meeting – what the Shareholders were proposing was to transfer some companies but retain those still servicing their loans to the Bank (including WR, RCP, Priangarskiy and Business Group).

653. On 20 February 2015 Mr Popkov sent an email to Mr Yurov which attached a draft letter providing: "*We discussed it during our meeting in London*". The letter was never signed by any of the Shareholders. Paragraph 1 of the draft letter provided:

> "We, the undersigned, being the ultimate beneficial owners (hereinafter the "Shareholders") directly and / or indirectly controlling National Bank Trust (Russia) (hereinafter, "Trust"), hereby transfer to Trust and / or to the persons or entities designated by them, all assets or companies that are under our control, whether directly or indirectly, individually or collectively or otherwise, that may hereafter be identified, specified and requested by Trust and which have, directly or indirectly through a subsidiary entity, any financial obligation to Trust. The foregoing obligation of the Shareholders include the Shareholders' obligation to transfer all liens and entities owning any collateral (pledges, mortgages or other security interest) under loans given by Trust and / or entities and shareholders of entities owning such collateral. We undertake to execute any documents in order to effect the transfer of assets as described above to Trust and / or to the persons or entities designated by them.
>
> Transfer of companies which are listed in Appendix 2 shall not be effected, provided that TIB Investments Ltd and T&IB Equities Ltd have repaid all outstanding indebtedness to OJSC PhosAgro and the last has given statement that it has no claims against Shareholders, Trust, Otkritie arising from these obligations."

654. The draft letter contains three appendices:-

(1) Appendix 1 to the letter was entitled "List of companies for transfer (not inclusive) as at 18.02.2015". It listed 15 companies, including Belenfield, Oldehove, Crylani, Eurogroup, Royston, Morledge, StoyEcologiya, Yeleran, Stivilon, Black Coast, and TIBI.

(2) Appendix 2 to the letter listed a number of companies, making clear they were for conditional transfer. These included RCP, Willow River, Wave, Business Group, SiberianKD and Priangarskiy.

(3) Appendix 3 to the letter listed two companies which were not to be transferred. These were Nikilin and Metcalfe.

655. The Bank says that this letter reflects Mr Popkov's account of the 13 February 2015 meeting as set out above. For their part the Shareholders contend that the distinction drawn between Appendix 1 and Appendix 2 reflects a distinction between Bank Companies (which would be transferred to the Bank/Otkritie) and Shareholder Companies (which would not be transferred). In particular, Mr Belyaev's evidence was that the appendices refer to different types of company: (1) Bank Companies (i.e. companies owned and controlled by the Bank and holding the Bank's assets) which were to be transferred to Otkritie; (2) companies in which the Shareholders had a personal interest which were not to be transferred to Otkritie, subject to the proper servicing of any debt; and (3) companies owned personally by Mr Belyaev, which were not related to the Bank and had not received any loans from it.

656. I consider that (on their face) the Appendices simply reflect those assets being transferred and those assets being retained – that does not address ether the question of existing beneficial ownership or whether there had ever been a distinction between Bank Companies and Personal Companies.

657. Perhaps more interestingly, on 23 February 2015 Mr Yurov replied to Mr Popkov's email in these terms:-

> "1. The proposed document should be split into at least two, namely:
>
> A) a letter confirming the position on our part (repeatedly stated earlier in face-to-face meetings with the shareholders of Otkritie) about the readiness to ensure at any time, but as soon as possible, the transfer to the persons or companies disclosed by the shareholders of Otkritie **of all our beneficiary rights** related to the assets, owned by companies from Appendix 1, with the simultaneous legitimate transfer of obligations under loans provided by the National Bank Trust (hereinafter the "NBT") to companies from Appendix 1.
>
> Such transfer must be carried out within requirements of the legal contracts that provide for the absence of liability of the parties (that is, Otkritie and the persons disclosed by them, and exclusively us (but not third parties who have committed criminal acts)) for any demands or actions related to assets held by the companies from Appendix 1.
>
> B) at the moment, we are holding negotiations with Phosagro, and we will be able to formulate a position only after they are finished, in a separate document."
>
> (emphasis added)

658. The Bank points out (rightly in my view) that Mr Yurov is here recognising that the Shareholders have "beneficiary rights" in respect of the companies in Appendix 1 – that is not consistent with these having been "Bank Companies" but is consistent with all the companies being beneficially owned by the Shareholders. In contrast, the Shareholders submit that this is a pedantic point and it is simply envisaging that the Shareholders will give up such rights (if any) that they have in the companies in Appendix 1. That, however, is not what is said and I consider this email does, indeed, provide further support that the Shareholders considered they had beneficial rights over all the companies, some of which they were willing to give up (the Companies in Appendix 1).

659. Thereafter Mr Popkov communicated with an internal lawyer, working for both the Bank and Otkritie, who produced an amended draft. This draft expressed the willingness of the Shareholders to procure the transfer of all the assets or companies listed in Appendix 1 to persons or entities designated by Otkritie.

660. On 20 May 2015, Mr Yurov and Mr Fetisov met Mr Popkov in London. Mr Popkov's evidence was that at the meeting he provided a list of debtor companies controlled by the Shareholders which he asked to be transferred to the Bank. These companies were: Agalid, Belenfield, Black Coast, Crylani, Morledge, NRT, Oldehove, Royston, SNPM, Yaposha and Yeleran. The meeting took place just after Mr Dikusar had been arrested in Russian criminal proceedings.

661. On 26 or 27 May 2015 there was a further meeting in Cyprus, attended by Mr Popkov and two members of his team, as well as Mr Yurov, Mr Worsley and two Teos employees. Mr Popkov made a secret recording of the meeting. I have already referred to the initial (truncated) transcript of that meeting when addressing Mr Popkov as a witness. The court has now been supplied with an additional transcript of the recording. Various issues were discussed at the meeting. For present purposes, it is sufficient to note that in the meeting Mr Yurov stressed that he had offered and been prepared to transfer the companies in the offshore network from the "very first day".

662. Later, on 3 July 2015, Mr Yurov sent an email to Mr Popkov stating:

> "Dmitriy,
>
> 1. Regarding the letter on transferring the companies
>
> As you know, under the oral agreement between me, Fetisov, and Sergei Belyaev (NBT beneficiaries) and Vadim Belyaev and Ruben Aganbegyan (primary shareholders of Otkrytie) in December 2014 in Moscow, which was confirmed at my meeting with Vadim Belyaev in New York in January 2015 and at the meeting attended by me, Fetisov, and Sergey Belyaev and Vadim Belyaev, Ruben Aganbegyan and you in London in February 2015, we (Yurov, Fetisov and Belyaev) committed to arrange **the transfer of beneficiary rights,** and Vadim Belyaev and Ruben Aganbegyan committed (along with other commitments) to arrange to receive these rights in respect of all, without exception, foreign (including Erinskay, Baymore, and Black Coast) and Russian companies managed and controlled by employees of NBT and Columba Management as soon as possible after Otkrytie appoints the NBT turnaround specialist. Despite my regular and repeated requests to Otkrytie shareholders and executives (for example, among others, in SMS and WhatsApp messages to Ruben Aganbegyan and Vadim Belyaev on 20 December 2015 and 20 May 2015, and numerous emails between you and me) to date (3 July 2015) not one company has been transferred.
>
> This demonstrates breach of the terms of the oral agreement to date (since, as you know, Otkrytie appointed the NBT turnaround specialist back on 26 December 2014).
>
> We once again confirm **our readiness to transfer beneficiary rights in the companies** (including, but not limited to, Erinskay, Baymore, Black Coast and the other 11 on your list)."

(emphasis added)

663. Mr Popkov did not reply to the email. His evidence was that he did not respond because he sensed it was emotionally charged and saw no benefit in challenging Mr Yurov's account of the facts. The Bank suggests this email was a self-serving account of the discussions, written as the relationship between the Shareholders and Otkritie was deteriorating.

664. Overall, the Shareholders' case is that from the first moment that the question of Otkritie's takeover was raised, they were consistently open about the existence of the offshore companies, their purpose and the Bank's entitlement to take control of them. They say this supports the idea that the Bank ultimately controlled the companies, which were used for its own benefit. The Bank contends that the discussions relating to the transfer of the offshore companies were premised on the idea that the companies needed to be transferred in the first place. In other words, if the companies were Bank Companies all along, there was no need for them to be transferred. By way of riposte the Shareholders say that this analysis is pedantic. The notion of "transfer" does not imply any admission that the Shareholders had a personal interest in those companies, but simply that Otkritie or the Bank needed practical assistance to acquire operational control of them.

665. I do not consider that the documentation concerning transfer of the offshore companies to Otkritie ultimately sheds much light as to whether there was ever any contemporary distinction between Bank Companies and Shareholder Companies. If anything, the contemplated transfer of "beneficial rights" supports the Bank's case that beneficial ownership did indeed rest with the Shareholders and that there was never any distinction contemporaneously, with all the companies in the offshore network being treated as beneficially owned by the Shareholders (hence why they were transferred into the Shareholder's discretionary trust).

666. The Shareholders also refer to the terms of the settlement agreement reached between Otkritie and Mr Worsley in late 2015. Clause 2 of this agreement talks about the recovery of assets *"belonging to NBT",* and Annex 1 lists a number of the Disputed Companies, describing them as being *"beneficially or legally owned or controlled (directly, indirectly or otherwise) by [the Bank]*". Mr Popkov's evidence is that this was clearly a mistake. It was also the product of a negotiation with Mr Worsley and his lawyers. The Shareholders submit that this agreement is an accurate record of the true nature of the arrangements.

667. The agreement is drafted long after the contemporary events. It appears to reflect the viewpoint of the Bank at the time the settlement was drafted i.e. that it financed these assets and that it is entitled to them (echoing Mr Drozdov's email of 13 January 2015). It is notable that it was drafted with the assistance of the Bank's English solicitors, as is apparent from the footer which bears the reference of Mr Neil Dooley, then as now the solicitor with conduct of the matter. It would certainly reflect an English law viewpoint of the matter i.e. directors of a company dishonestly diverting the Bank's assets into companies they controlled with the result that the assets would be owned by the Bank however matters were structured. It does not focus on what the position would be under Russian law.

668. I do not consider the settlement agreement assists in relation to whether there was ever any distinction between "Bank Companies" and "Shareholder Companies" – there is no such distinction in the contemporary correspondence and the Shareholders repeatedly confirmed their beneficial ownership in all the companies without distinction, and indeed

ultimately agreed to them being put in their own personal discretionary trusts. I consider the settlement agreement contains no more than a statement of the Bank's then viewpoint, a viewpoint that Mr Worsley was content to endorse as part of the settlement.

669. In fact the alleged distinction did not even emerge until Mr Yurov swore his second affidavit on 25 May 2016 in the context of his assertion, in support of his application to discharge the worldwide freezing order against him, that the Bank had failed to disclose that the Shareholders had, in 2015, explained that most of the offshore companies were beneficially owned by the Bank itself. The conclusion of Males J is equally apposite at trial, after a detailed consideration of the contemporary documentation, as addressed above. Males J found at [54]:

> "There was nothing in any contemporary document or in Mr Worsley's evidence to indicate any clear division between bank companies and personal companies…. Moreover, it is notable that during 2015 the defendant discussed on several occasions the possibility of transferring to the bank the companies in the offshore network which he now says were already the bank's companies. As such discussions took place after the defendant's relationship with the bank had been terminated, it is difficult to see how he could have offered to do this unless he had control of the companies in question."

F.4 THE SHAREHOLDERS' EVIDENCE AS TO THE ALLEGED DISTINCTION

670. It is relevant to note that the Shareholders' evidence is that there was always a clear distinction between "Shareholder Companies" and "Bank Companies" that was widely known. Logically, and obviously, any distinction would have to be widely known not least so that there was no doubt as to who could direct and receive benefits. One would also expect that this distinction would manifest itself in clear terms in the contemporary correspondence between those with any involvement in the management of the offshore network, and that everyone (including Mr Worsley and the Shareholders) would act consistently with such distinction. Yet, as already addressed in detail, no such distinction manifests itself in the contemporary documentation and Mr Worsley and the Shareholders act inconsistently with such distinction (not least in placing all such companies into their personal discretionary trusts as already addressed).

671. Both Mr Yurov and Mr Fetisov maintained in their evidence that there was a clear distinction between "Shareholder" Companies and "Bank" Companies. Indeed Mr Fetisov pretty much used these very words on more than one occasion in his evidence, *"…there was always a clear distinction between Shareholder Companies and Bank companies"* (paragraph 88 of Mr Fetisov's first statement), and "*…This is not correct, as there was always a clear distinction between Bank companies and Shareholder Companies"* (paragraph 10 of Mr Fetisov's second statement). Mr Yurov's evidence was to the same effect and he sought to emphasise how widely known the (alleged) distinction was. Thus at paragraph 46 of his first statement he said he said *"…because I am sure that Mr Drozdov and Mr Worsley always understood the distinction, I would have expected that they would have kept the structures distinct. If they failed to do so, that is a disappointment to me"* whilst at paragraph 47 he claimed that *"… It was always clear which companies were shareholder companies (some of which, such as Priangarskiy, have proved unprofitable) and which were not; the difference was widely known with the Bank."*

672. The problem with all of this evidence is that it does not find any support in the contemporary documentation over many years both in relation to the management of the companies and the need for those managing the operations of the companies to know who could direct and receive benefits, nor in the contemporary structure charts as to how the offshore network was composed, nor in documentation relating to the Shareholders (including, most fundamentally their acknowledgement of beneficial ownership and transfer into their respective discretionary trusts). It would be truly incredible, and defies belief, that documentation evidencing such distinction would not exist, and indeed be legion, had there been any such distinction. The answer is that there clearly was no distinction. I address below the absence of such documentation, as well as the ignorance of those running the offshore network. But it is not just the absence of such documentation it is the inconsistent documentation as well – including the numerous structure charts, the confirmations of beneficial ownership and the actions of the Shareholders.

673. Much of that correspondence has already been addressed. I focus below on the absence of documentation involving those managing the companies, who do not draw such a distinction, which tells the lie to any distinction being "widely known in the Bank", though the explanation for this is, I am satisfied, that there was no such distinction (rather than it not being widely known).

674. Before doing so I note that there would appear to have been some "creep" in terms of what companies are said to be Shareholder Companies. If there was such a distinction then the relevant companies should always have been capable of precise articulation, and should not change over time. In his Second Affidavit Mr Yurov swore that, *"…I have never considered myself to be and do not consider myself to be, entitled to the benefit of the companies that are part of this offshore network, which I always understood were – however they were held – for the Bank…. The only exception to this is in respect of a small number of companies (Willow River, RCP, SiberianKD and associated companies)…"* (paragraph 38) and *"The shares in Willow River, RCP and SiberianKD (and associated companies) are, as far as I am aware, the only assets of my own which are held in this complex offshore structure"* (paragraph 164). No mention is made of Moscow River or Taransay. These are companies through which the Shareholders received personal benefits. That is no doubt why they are now admitted by Mr Yurov and Mr Fetisov to be owned by and for the benefit of Shareholders. No explanation has been proffered, however, as to why, if there was this clear distinction, they were not initially identified as such.

F.5 NO REFERENCE TO THE DISTINCTION BY EMPLOYEES OR THIRD PARTIES

675. The admitted Shareholder Companies (Priangarskiy/Willow River/RCP) were being run or overseen by the very same Bank employees as the disputed Bank Companies (e.g. Stivilon, Yaposha), including Mr Buyanovsky (a Bank employee responsible for the structuring/projects group) and Mr Nicolay Nazarov (a Bank employee responsible for the management of distressed assets). It would have been essential for there to be clarity as to who exactly owned and controlled, and was entitled to direct and receive the benefits from, each of the Projects and for any such distinction to be spelt out clearly in writing. In this regard, for example, it was Mr Nazarov who arranged for cash to be taken from WR and RCP (via the management company Alians Development) which ended up in the Shareholders' own Swiss bank accounts. However, there is no such documentation.

676. It is clear that Messrs Buyanovsky and Mr Nazarov were unaware of such alleged distinction, and at the time they were dealing with WR/RCP (for example Mr Nazarov was dealing with the leaseholders of the supermarkets owned by WR/RCP and Mr Buyanovsky was liaising with both Mr Fetisov and Mr Worsley in relation to WR/RCP, as evidenced in the contemporary documentation) and at the same time were dealing with other projects now alleged to be Bank Companies, yet they, and other employees, referred in correspondence to numerous companies both Shareholder Companies and alleged Bank Companies in one and the same breath, as did the recipients of that correspondence.

677. Thus, by way of example, Mr Nazarov, on 28 January 2014 wrote directly to Mr Fetisov about *"annual performance bonuses"* asking: *"Is there news about bonuses for Billa and Degunino, employees are worried and asking questions"* and indeed Mr Fetisov himself also corresponded with Bank employees without making any such distinction. Thus, by way of example on 5 February 2014, Mr Fetisov wrote to Mr Buyanovsky about *"Presentation of the projects"* in these terms, "*I will need from you in the next 2-3 days the presentations and detailed description (current statuses, plans for the future, financial models etc.) for the following assets/projects: Kodinsk, Billa, Stroyecologya, Stivilon, Tahashe, Vorsha…"* which Mr Buyanovsky replied: "*Realistically I'll provide it by the end of the day."*

678. Other individuals were also clearly equally unaware of any distinction, and referred to numerous companies both Shareholder Companies and alleged Bank Companies in one and the same breath. By way of example, on 10 November 2011, Ms Dadikina of Columba sent Mr Worsley a "*Summary of Nazarov Projects*" stating:

> "1. Billa project (investments $136 mln.), leasing of real estate (18 units) for grocery retailers shops BiIla and for other small lessees (Retail Chain Properties Limited & Willow River Russian Housing Developments Ltd, represented by LLC Managing company "Aliance Development")
>
> 2. property on Prechistinskaya nab. (investments $ 30 mln.), searching for customers (Moscow River Estate and Property Management Limited)
>
> 3. garage and office center in Degunino district, Moscow (investments $ 86 mln.), not completed yet (LLC "Eurogroup Development")
>
> 4. Building in Veshnyaki (investments $ 60 mln.) is leased to the bank and other lessees (Royston Holdings Limited)
>
> 5. Building in Perevedenovsky per. (investments $ 62 mln.) is leased (Morledge Holding Limited)
>
> 6. Building in Spartakovskaya str. (investments $ 94 mln.) is leased to the bank (LLC "Filenta")
>
> 7. Building in Kolpachny per. (LLC "64" represented by JSC Managing company "TRUST")

8. noncore assets received in repayment of obligations to the companies and the bank, including:

8.1. apartments in Omsk (investments 5,8 mln. rub.) — searching for customers (JSC "MFK "TRUST")
8.2. non-residential property in Omsk (investments 6,1 mln. rub.) is leased, searching for customers (JSC "MFK "TRUST")
8.3. land in Perm region (investments $ 7,8 mln.) — searching for customers (NBT)
8.4. property in Ulyanovsk (investments 28,6 mln. rub.) — searching for customers (related Berkut, LLC Collector agency "Right and business")
8.5. land in Ulyanovsk region (bought by the bank related Elegant (JSC "MFK "TRUST")
8.6. land in Krasnodar region (investments 14 mln. rub.), searching for customers (JSC "MFK "TRUST")
8.7. others"

679. Whilst one would not necessarily expect all items of correspondence to refer to the distinction, one would expect all correspondence to remain true to the distinction and not inter-mingle the companies, and when relevant draw a distinction between the companies. This is most obvious in terms of dealings with, and the dealings of, third parties, when structure charts are drawn up, and when placing assets into trusts. However as already addressed no such distinction was observed including on various occasions where such distinction would have had to be articulated and actioned.

680. Thus, it is plain that various parties involved in the structure of the offshore network were not aware of such distinction, most obviously Vassiliades and the other corporate service providers as the documentation they produce does not refer to the distinction and in many instances is quite inconsistent with it. I have already referred not only to the very first Chrysanthou & Chrysanthou document (on 29 July 2010 when Mr Fetisov (and the other Shareholders) signed letters to Chrysanthou & Chrysanthou, in respect of Willow River, Moscow River (admitted Shareholder Companies) and Black Coast (allegedly a "Bank Company")) declaring themselves as beneficiary) but also to the numerous Vassiliades documents signed in March 2011 and September 2011. There are also the numerous Deeds and Declarations of Trust executed by the Cypriot nominee shareholders and the "nominee UBOs".

681. The contemporary documentation is also inconsistent with the distinction – most obviously the structure charts prepared and circulated by Mr Drozdov and also by Mr Iskandyrov in late 2008, late 2009 and early 2010. There are also the structure charts, lists and spreadsheets prepared by Mr Worsley and his staff and by Vassiliades in the period 2010-2014. Representative examples, as identified by the Bank in its Written Closing Submissions (at paragraph 232) include the following:-

(1) Vassiliades' lists of companies and their UBOs (according to Vassiliades' understanding) as set out in Chrysanthou's email to Mr Worsley of 17 January 2012 the sixth page of which identifies the Shareholders personally as the UBOs of many companies, including (9) Oldehove, (10) RCP, (11) LBCS, (12) SiberianKD, (26) Mourija, (30) Crylani, and (36) Yeleran.

(2) Documents prepared by or for Columba or Bank personnel internally, such as that under cover of Mr Iskandyrov's email to Mr Worsley dated 23 July 2012 listing (1) Stivilon; (2) RCP; (3) Crylani; (4) Filenta; (5) Oldehove; (6) Eurogroup; (9) TIB Investments; (10) NRT; (11) Yaposha CITY; (12) StroyEcologiya; (13) Baymore; (15) LBCS; (16) Business Group; (17) Priangarskiy; (18) Willow River; (19) Wave; (22) Mourija; and (24) Erinskay; in most cases showing "YBF" as the "current beneficiary" and the Worsley "nominee UBOs" in the final column.

(3) Columba spreadsheets listing the offshore companies and their UBOs and registered shareholders and some of which, for example that sent by Mr Butylkov to Mr Izkandyrov on 2 December 2013, grouped the Borrowers in various ways (for example by apparent UBO), for N6 purposes.

682. There are also the various documents where such a distinction would have to have been articulated but it was not, some of which have already been referred to, including Mr Butylkov's email to Mr Worsley (of list of Borrowers that were *"cashflow positive"* dated 18 June 2014) and Mr Drozdov's email of 13 January 2015 (concerning his contact with the Bank's administration and his options on how to proceed, with the "*list of assets for transfer" "financed out of bank funds"*) which show no distinction between "Bank Companies" and "Shareholder Companies".

683. Another example is the email of Ms Petrova of Columba to Mr Nicolaou of Iona (Mr Worsley's own Cypriot CSP) dated 26 November 2014 in which she stated, amongst other matters:-

> "Please find below the list of companies which files should be reviewed and which accounts should be activated as soon as possible.
>
> The companies in the list are indicated by the priority. There are our main operational companies, NBT's borrowers, TIB Group, other companies actively used, used more rare but for important deals (like dividends payments), other companies through which the main companies are financed."

684. The list of "first priority" companies includes NRT, Yaposha, LB Collection, Erinskay, Edenbury and TIB Investments, whilst these are followed by the "companies that are to be reviewed next", which includes SiberianKD, Black Coast, Crylani, Ginza, Gofra, Jermanta, Willow River, Wave, RCP, Yeleran, Mourija, Morledge, and Moscow River. Once again there is no distinction made in terms of ownership or benefit.

685. The correspondence immediately after the collapse of the Bank also shows that senior employees within the Bank did not see or identify any such distinction. In this regard Mr Iskandyrov, Mr Postnov and Mr Vartsibasov provided descriptions of various borrowers, which were referred to in Mr Popkov's email to Ms Dolenko of 18 January 2015:

> "I reconciled as best I could the distressed assets of the shareholders or generated by the shareholders…
> …

There are descriptions written by Marat Iskandyrov, Dmitry Postnov and Grigory Vartsibasov on: Crylani, Oldehove…, RCP and Willow River,… Trust Ukraine, Law and Business and Business Asset [presumably LBCS or Pravo], … Stivilon…
…

There is no description about Priangarskiy Wood Processing Complex….
For the time being there is no description about Stroyecologiya,… Yaposhka."

686. The attachment to the email (which is a schedule derived from the descriptions given by those senior employees), includes:

(1) A first category of borrower entitled "*REAL ESTATE TRANSACTIONS (Projects of the SHAREHOLDERS: own or collected distressed assets in the past*)", which includes: RCP, Willow River, Crylani, Morledge, Royston, Oldehove, Eurogroup, StroyEcologiya, and Stivilon.
(2) A second category entitled: "YAPOSHKA (restaurant business of the SHAREHOLDERS)", including Yaposha CITY, NRT and Yaposha Holdings.
(3) A third category entitled: "PRIANGARSKIY WOOD PROCESSING COMPLEX (business of the SHAREHOLDERS)", including Priangarskiy itself, along with Business Group.
(4) A further category entitled: "Other bad debts of the SHAREHOLDERS", including Erinskay, Baymore, SiberianKD, and LBCS.

F.6 CONCLUSION ON COMPANIES IN THE OFFSHORE NETWORK

687. In the circumstances identified in Section F.1-F.5 above, I am satisfied, and find, that during the lifetime of the offshore network:-

(1) There was no distinction between "Shareholder Companies" and "Bank Companies".

(2) All of the Borrowers were beneficially owned and controlled by the Shareholders throughout (which is no doubt why the Shareholders' interests in such companies, together with all of the companies, ended up in their personal discretionary trusts in the circumstances addressed above).

688. Accordingly Issue 6 (*"were the following companies beneficially owned and/or controlled by the Shareholders (as contended by the Bank) or by the Bank itself (as contended by Mr Yurov and Mr Fetisov): Erinskay, Baymore, LBCS, Mourija, LLC5, Gofra, Stivilon, Stroyecologiya, Belenfield, Wave, Edenbury, Black Coast, Oldehove, Crylani and NRT/Yaposha? (the "Disputed Companies"*), is to be answered that all the Disputed Companies were beneficially owned and controlled by the Shareholders.

689. The first sentence of Issue 7 *("Did the Shareholders believe, contemporaneously, that the Disputed Companies were beneficially owned and/or controlled by the Bank?")* is to be answered in the negative. Mr Yurov and Mr Fetisov did not believe contemporaneously that the Disputed Companies were beneficially owned or controlled by the Bank. On the contrary they knew that they were all beneficially owned and controlled by the Shareholders.

690. As for Mr Belyaev's contemporaneous knowledge and belief of the beneficial ownership of the Disputed Companies (the second sentence of Issue 7), I address this in

Section F.7, but as I there conclude, I am satisfied that Mr Belyaev too knew that all the Disputed Companies were beneficially owned and controlled by the Shareholders. As also addressed in Section F.7, he also knew and believed contemporaneously what is set out under Issues 4 and 5, and is admitted by Mr Yurov and Mr Fetisov (namely that the companies in the network were originally managed by Mr Drozdov, that in or about December 2009 Mr Worsley was engaged for this purpose, that in 2011 Columba took over the administration of the network and that Willow River, RCP, SiberianKD, Business Group, Priangarskiy, Taransay and Moscow River were beneficially owned by the Shareholders).

691. Issue 8 is *"Were the Disputed Companies held and/or used for the benefit of the Bank and, if so, what if any relevance does this have for the pleaded claims"?* I understand this to be directed at the Shareholders' case (developed during the course of trial and in closing) that even if (as I have found) the Borrowers and other companies in the offshore network were beneficially owned by the Shareholders then nonetheless they (or some of them) were used "*for the benefit of the Bank*". I address "balance sheet management" in Section G.3 below. However the short answer is that "balance sheet management" is neither "*for the benefit of the Bank*" nor in its best interests. Issue 8 is to be answered in the negative. The Disputed Companies were not held or used for the benefit of the Bank.

692. Mr Yurov's and Mr Fetisov's account as to their relationship with, and knowledge of the offshore companies, including the Disputed Companies, was a knowingly false and untrue account based on an (invented) *ex post facto* distinction between "Shareholder Companies" and "Bank Companies" which was maintained throughout the trial notwithstanding the weight of evidence to the contrary (as addressed above). I address Mr Belyaev's position in the next section. I am satisfied that Mr Belyaev's account as to his relationship with, and knowledge of the offshore companies, including the Disputed Companies, was also a knowingly false and untrue account based, as it was, on a false denial of knowledge of the companies and their ownership.

693. It is to be inferred that each of the Shareholders lied to hide the truth, which is in any event amply corroborated by the contemporary documents identified above, namely that the Shareholders were the ultimate beneficial owners of all of the Borrowers and that they controlled and used all the companies for their own personal benefit.

F.7 MR BELYAEV'S INVOLVEMENT AND KNOWLEDGE

694. Mr Belyaev has throughout sought to distinguish his position and the state of his knowledge from that of Mr Yurov and Mr Fetisov. In this regard he has denied any knowledge or involvement in relation to the structure, ownership, and use of the companies in the offshore network including for "balance sheet management" and denies being party to any dishonest scheme.

695. I am in no doubt whatsoever, however, that Mr Belyaev's account including as to his relationship with, and knowledge of the offshore network, including the Disputed Companies, was a knowingly false and untrue account based, as it was, on a false denial of knowledge of the companies and their ownership.

696. I have already addressed, when considering Mr Belyaev as a witness (in Section C.3.2) why I considered Mr Belyaev to be neither a satisfactory witness nor a witness of truth, and why I do not consider that any real weight can be given to his evidence save to the extent that it is corroborated by documentation or other evidence. In fact, and as already addressed when considering the chronology of events, I consider that the contemporary documentation, including documentation received by Mr Belyaev, and signed by Mr Belyaev, sheds by far the greater light on the truth, including as to Mr Belyaev's knowledge which is no doubt why he was forced to deny (variously) reading emails, recalling receiving emails, reading documents, and denying that he read that which he signed. This evidence was neither credible nor, I am satisfied, true.

697. The evidence of Mr Belyaev that he did not read all emails sent to him or could not recall receiving a number of emails in this case or did not read documents he signed, or did not read documentation relating to matters in respect of which he was voting in favour of in the context of CC meetings, is not credible and I am satisfied that Mr Belyaev did not give a truthful account as to his reading of emails and documentation and signing of documents. Contrary to paragraph 21.2 of Mr Belyaev's Closing Submissions, there is every reason to doubt Mr Belyaev's version of events as to not reading emails and not reading documents he was signing not least because I am satisfied that he is not a witness of truth, and his evidence is simply not credible and is contrary to common sense. It is inherently improbable that he did not read emails sent to him or documents he was asked to sign.

698. As already noted Mr Belyaev even went so far as to plead (at paragraph 3 of his Defence) that "*3. Save as expressly set out below, Mr. Belyaev was entirely unaware that he had any interest, whether direct or indirect, in any of the Borrowers until after the commencement of these proceedings. Even now, he does not admit that he has an interest and the Bank is required to prove the accuracy of the structure charts in the Schedules to the Particulars of Claim. Mr.Belyaev does not recognise the names of and details relating to the Borrowers and Connected Companies (as defined) identified in Schedules A to Q, being the transactions which are the subject of the claim. This is not surprising, given the very limited role Mr. Belyaev played in the management and governance of the Bank post 2008.*"

(emphasis added)

699. I have already addressed in Section C.3.2 the reasons why I am satisfied that what was stated (supported by a Statement of Truth) was demonstrably untrue (as was what he stated at paragraph 94.1 of his Defence (again supported by a Statement of Truth)). There are numerous contemporary documents either sent to, or copied to, Mr Belyaev which referred to the Borrowers, and as addressed above I do not accept his evidence that he did not read emails sent to him – that evidence was not credible and was itself a lie. The Schedules to the Particulars of Claim included Schedule F (Stivilon) and Schedules H, I and J (Priangarskiy, Business Group and SiberianKD). Mr Belyaev accepted when cross-examined that when he saw the Particulars of Claim (to which his Defence was responding) he recognised the name Stivilon, knew that Stivilon was one of the Bank's biggest customers and that it was a company where the Bank had a direct investment. Accordingly, in relation to Stivilon, it was simply untrue for him to say that he did not recognise the names of the Borrowers when he pleaded his Defence, as he recognised the name of Stivilon when he saw the Particulars of Claim (to which the Defence was responding). The reality, I have no doubt, is that Mr Belyaev was well aware of the name

Stivilon at all material times. In any event what he said in the Defence (supported by a statement of truth) about being *"entirely unaware"* that he had *"any interest whether ultimate or otherwise*" in Priangarskiy, Business Group and SiberianKD is demonstrably untrue as there is contemporary documentation referring to these entities provided to Mr Belyaev from which he clearly knew the names of these entities and was aware of an interest in them, as has already been addressed in Section C.3.2.

700. As for evidence in relation to signing of documents his evidence was even less credible. Mr Belyaev signed various documents declaring him to be one of the beneficial owners of companies in the offshore network. His signature upon such documents is, self-evidently, unhelpful to his denial of knowledge of the offshore network, his denial as to the use of that network in "balance sheet management" and his denial of a personal interest in the offshore companies, as such signatures (at least at first blush) fix him with knowledge of the contents of those documents. When asked about this he claimed not to have read what he was signing in particular cases. Indeed, in the context of "*regulatory*" documents and "*anything to do with indemnifying*", he went as far as to suggest that it was his practice not to read documents of such types. This evidence was not credible and if true (which I am satisfied it was not) would be a serious dereliction of duty of a director of a Russian company under Russian law.

701. As already noted, the impression I formed was that Mr Belyaev was not willing to admit anything unless he had no choice but to do so – and that he resorted to denying he had read documents or read what he was signing, if the admission he had done so would have been adverse to his interests. Still further, if he did not like the content of a document he would attempt to belittle the content or its relevance. The most egregious example of this related to the document sent by Mr Yurov to Mr Belyaev and Mr Fetisov on 28 June 2015 in which a decision being made in 2008 to start submitting false (or as Mr Belyaev would have the translation "unreliable") accounts to the CBR. This is, on any view, an admission of obvious impropriety. If such a decision was not made, or Mr Belyaev was not party to it, the obvious response would be for him to reply either saying it was not true, or (if he had not been aware of it) expressing shock and surprise at such impropriety. He did neither, and when cross-examined about this he had no answer, resorting to describing a communication from his fellow Shareholder, in the form of Mr Yurov, as "garbage". The obvious inference (which I draw) is that Mr Belyaev did not respond to Mr Yurov's memo because he knew perfectly well that the memo contained the truth, and that he was (contrary to his denial) party to that decision. Yet further, if he genuinely regarded it as "garbage" one would have expected him to engage with his fellow shareholder upon it. His evidence in this regard, as already addressed in Section C.3.2, was not credible.

702. In addition when questioned, and rather than answering questions as to his knowledge of the offshore network he obfuscated asking for a definition of the "offshore network" when he knew perfectly well what that meant, was particularly coy about even referring to companies in the "offshore network" choosing instead to use the term "SPV" for such a company which was neither apposite (given that SPVs are neither necessarily offshore nor necessarily off-balance sheet) nor a term that features heavily in the contemporary correspondence and denying knowledge of "balance sheet management", whilst being equally evasive in relation to his knowledge of the Bank lending to companies set up or controlled by Mr Worsley. His very keenness in, and evasiveness in, not admitting any knowledge of balance sheet management, or Bank lending to companies set up or

controlled by Mr Worsley begs the question why this was the case, being similarly evasive about the various documents he signed declaring him to be one of the beneficial owners of companies in the offshore network. I am satisfied that the reason he was lying as to not reading documents he signed and not reading emails he was being sent which revealed the use of the offshore network and balance sheet management was precisely because he knew about balance sheet management and the use of the offshore network but was prepared to lie rather than admit he had such knowledge, given that it was adverse to his interest to do so.

703. It would, in fact, have been incredible if Mr Belyaev did not know about the use of balance sheet management given that he was (on his own evidence) still participating in the Bank's business following the events of 2008 as noted in Section C.3.2 above. "Balance sheet management" was conceived and implemented at a time when Mr Belyaev was, on any view, still participating in the Bank's business and I am satisfied that he must have been aware of it. I have already referred, more than once, to the very telling email from Mr Worsley to Mr Belyaev alone (to his private email address) dated 19 December 2012, when balance sheet management was in full swing with a network of offshore companies set up or controlled by Mr Worsley, which shows that Mr Belyaev knew very well what was being done by Mr Worsley in relation to an offshore network for balance sheet management with fake nominee UBOs and the like, it providing:

> "Sergey,
>
> Hi. FYI - the 5 copies of the paperwork in storage for the new people are of course already in place.
>
> We did not discuss this, but it is of course in hand, and was indeed handled several days ago - IE well before the transfer of assets as per the papers to sign today. "

704. The reference to the "new" people (i.e. fake UBOs) would only make sense to Mr Belyaev if he had discussed such matters with Mr Worsley, and knew what he was talking about (otherwise it would be gibberish) – and equally Mr Worsley would only write to him in such Delphic terms in circumstances where Mr Belyaev would know what he was talking about. Mr Belyaev did not respond asking what Mr Worsley was talking about. I am satisfied that Mr Belyaev (contrary to his evidence) knew perfectly well about the offshore network, and its use for balance sheet management (as well as the ultimate beneficial ownership in the Shareholders – as reflected in the numerous documents signed by Mr Belyaev declaring him to be one of the beneficial owners of companies in the offshore network). Mr Belyaev was simply unwilling to tell the truth given that it would implicate him in balance sheet management.

705. Mr Belyaev also features in the correspondence sent by Mr Worsley to the Shareholders that has already been referred to, and I have already addressed why his evidence that he did not read such correspondence is incredible and stands to be rejected. Equally, as addressed in Section F.2.8.2, Mr Belyaev's position in relation to his setting up of discretionary family trusts is not distinguishable from the position in relation to Mr Fetisov and Mr Yurov. I reject his evidence that he only intended to settle his interests in the Bank into the Eagle Hill Trust. The explanation he gave as to how other assets ended up in his trust that, "*they were placed there at a later date and that documents were backdated in an attempt by someone to legitimates the transfer without my knowledge or*

consent" has no evidential foundation, and as I have already noted has something of an air of desperation about it (and I reject it). It is equally incredible that he would not have read documents provided to him or signed by him, particularly given that what is being considered is what is to be done with his personal assets a subject which one would expect to be close to his heart, and to which he would have paid attention. I have already addressed why I am satisfied that Mr Belyaev must have understood the significance of transferring Arlingham and Brora, not least given his personal involvement in moving companies into that structure in December 2012 and July 2013.

706. My conclusions as to Mr Belyaev's knowledge of the existence and use of the offshore network is also supported by the mass of contemporary documentation which evidences Mr Belyaev's involvement in events, and knowledge of the offshore network, its structure and purpose, as addressed in detail in Sections F.1 to F.5 above, as well as in the extended chronology of documents referred to at paragraphs 246 to 394 of the Bank's Closing Submissions to which I have had regard, and which also evidences Mr Belyaev's contemporary involvement and knowledge.

707. In addition to Mr Belyaev's involvement in contemporary documents and events, as there evidenced, there are also numerous general matters which further support the conclusions I have reached as to Mr Belyaev's knowledge. Many of these are (in my view rightly) highlighted by the Bank in paragraph 245 of the Bank's Closing Submissions. First, and perhaps foremost, is the fact that Mr Belyaev was one of the three major shareholders in the Bank, and one of the three directing minds and controllers of the Bank (as specifically recorded in each of the Bank's audited IFRS accounts). Much of the relevant documentation was sent to all three Shareholders without discrimination or distinction. It defies belief that he was not aware of the "balance sheet management" and use of the offshore companies as a result (as evidenced by the admitted knowledge of the other two main shareholders Mr Yurov and Mr Fetisov). Second, throughout the relevant period, Mr Belyaev was a member, with Mr Yurov and Mr Fetisov, of both the Bank's Supervisory Board and its Credit Committee (on the latter of which also sat Mr Postnov and Mr Vartsibasov who, as the Bank rightly points out, had detailed knowledge of the offshore network and "balance sheet management" activity). Third, and even to the extent that he did step back from day-to-day management of the Bank after the financial crisis of 2008 he remained one of the Bank's three major shareholders and the business of the Bank, the state of its finances, the way it was run, and the prospects of its future success (and his financial returns from it) self-evidently would have remained of major importance to him, and the "balance sheet management" was integral to the continuance of the Bank and the associated benefit to the Shareholders. Fourth, in any event he was a recipient of Mr Drozdov's structure charts in 2008 (as already addressed) from which he would have been aware of the companies in the offshore network including Yaposha. Fifth, it defies belief that he was not aware of the decision to falsify the Bank's accounts (to avoid intervention by the CBR) – and his lack of response to Mr Yurov's June 2015 email evidences that he had such knowledge. Sixth, any significant shareholder, a fortiori a Supervisory Board Director and CC member would have known (and would have made sure that they knew) about major projects financed by the Bank including Gelendzhik, Glukhovo and the Yaposha group which were consuming huge amounts of money. Seventh, and a fortiori, Mr Belyaev would have taken a particular interest in how projects that he admits to having an interest in were structured and controlled, and how any profit they made was or would be paid to him. The relevant companies, namely Willow River and RCP, Moscow River, Taransay and Priangarskiy/Business Group/SiberianKD were

all set up, held and controlled in essentially the same manner as the other offshore companies, and he could not have known about the ownership structure of the former without also knowing about the ownership structure of the latter. Finally, I agree that the recruitment of Mr Worsley, and virtually every communication Mr Belyaev had with him, and with the other Shareholders about him and what he was doing, from December 2009 onwards is inexplicable unless Mr Belyaev knew what Mr Worsley was doing in relation to the offshore structure and for what purpose (given the contemporary correspondence identified above in which Mr Worsley kept Mr Belyaev (as well as the other Shareholders) fully informed about the offshore network of companies).

708. In the above circumstances I am satisfied that Mr Belyaev's account as to his relationship with, and knowledge of the offshore companies, including the Disputed Companies, was a knowingly false and untrue account based, as it was, on a false denial of knowledge of the companies and their ownership. I infer that he, like Mr Yurov and Mr Fetisov, lied to hide the truth, which is in any event amply corroborated by the contemporary documents identified above, namely that the Shareholders were the ultimate beneficial owners of all of the Borrowers and that they controlled and used all the companies for their own personal benefit, Mr Belyaev not being distinguishable, in this regard, from Mr Yurov and Mr Fetisov.

G. THE NATURE OF THE LOANS AND TRANSACTIONS AND THE SHAREHOLDERS' INVOLVEMENT (ISSUES 14-18A)

709. Issues 14 to 18A are concerned with the nature and purpose of the Loans and Transactions and the Shareholders' involvement in the same.

G.1 Were assets "taken over" after the financial crisis? (Issue 14)

14. Did companies in the network take over certain assets using financing from the Bank following the 2008 financial crisis and defaults on previous loans/investments secured on them and, if so, what were those assets? If and to the extent that this happened, for what purpose and for whose benefit was it done? What was Mr Belyaev knowledge of these facts and matters at the relevant time, and what is the consequence of such knowledge or the absence of such knowledge?

710. Mr Yurov and Mr Fetisov submit that in the aftermath of 2008 financial crisis the Bank suffered a series of losses on its genuine commercial loan portfolio and that "balance sheet management" lending with the use of off balance sheet companies was done to enable the Bank to take control of collateral in respect of defaulted loans, such as real estate developments, which enabled the Bank not to crystallise losses immediately during the financial crisis but (so it is alleged) let it indirectly hold and develop assets so that they could be realised at a profit for the Bank or at least at a reduced loss, and that this was all done for the benefit of the Bank. This lies uneasily with (in fact is contradicted by) what was stated in the Bank's own audited accounts for 2009 (signed by Mr Fetisov), *"During the year ended 31 December 2009 the Group did not obtain any assets by taking control of collateral accepted as security for loans to legal entities (31 December 2008:nil)".*

711. The flavour of the case of Mr Fetisov and Mr Yurov can be seen from paragraphs 70 and 77 of Mr Fetisov's witness statement:

> "These steps were taken in order to salvage as much value as possible from the failed loans and investments. It was hoped they would enable the Bank to retain the underlying assets until economic conditions improved and/or the relevant project could be completed. They also avoided the Bank's funders, such as prime brokers, enforcing against failed investments such as CLN s, which would have led to very poor realisations for all concerned. Finally, they prevented the Bank from having to immediately crystallise substantial losses. The alternative was that the Bank exited the loans and disposed of the security at the bottom of the market, in circumstances where there was every chance the situation would improve in future…
>
> At the time I believed, and still believe, that it was in the best interests of the Bank to take over the projects which Mr Eggleton funded and which it defaulted with the 2008 crisis, and to continue funding them. Had the losses crystallised at that point then the Bank would have had to conduct distressed sales of the incomplete development projects, in a property market which had collapsed. There was also a significant risk that various rights (such as land/ development rights) would have been forfeit if the Bank had enforced against

the original borrowers and put them into bankruptcy, destroying the value of those borrowers. In such circumstances, its recoveries would have been negligible. Using the offshore structure created the possibility of trading through - in the expectation that the projects would be completed and the market would recover".

712. Quite apart from the legitimacy or otherwise of "balance sheet management" (addressed under Issue 16 in Section G.3 below), it would be necessary to demonstrate that the loans in issue represented the refinancing of losses incurred on genuine loans during the 2008 financial crisis. The short answer is that the evidence before me does not demonstrate that.

713. The starting point, however, is that there are only a very limited number of projects that can even begin to fit the bill of Borrowers being lent money by the Bank to finance or refinance debts that had defaulted during the financial crisis. Indeed the only potential examples are Stivilon, StroyEcologiya and Willow River/RCP (the Shareholders accepting that they are the ultimate beneficial owners of Willow River/RCP). Yet further in the case of Stivilon and StroyEcologiya: (1) It is not clear on the evidence before me what assets were so acquired or how, or what the amount of the lending from the Bank was, and (2) I am satisfied that Stivilon and StroyEcologiya were Shareholder projects in any event. The position in this regard, and more generally, in respect of Stivilon and StroyEcologiya is addressed in Section R.6 below.

714. In this regard Mr Fetisov accepted in cross-examination as follows:-

"Q….these were mainly assets seized by the Bank during the crisis. That's wrong, isn't it, as far as RCP and Willow River are concerned? Do you agree?
A. Yes, I agree.
Q. And --
A. It's also wrong with regards to timber company Siberia.
Q. Well, I'm going to go through the list. It's wrong in relation to Yaposha, isn't it, because that had nothing to do with the crisis, even on your case?
A. Correct, yes. It was investment, yes.
Q. It's also wrong, isn't it, in relation to the buildings, the commercial real estate in Moscow?
A. Yes.
Q. And it's also wrong, as you say, in relation to Priangarskiy and Business Group and SiberianKD?
A. Correct.
Q. Which leaves only, I think, from the ones we're concerned with on that list, Stivilon and Stroyecologiya?
A. And the leasing company.
Q. Yes, but I'm not asking you about the leasing company."

715. That, in fact, the only two potential candidates in issue in the case were Stivilon and StroyEcologia can also be seen from Mr Fetisov's Closing Submissions where these are the only two entities named in paragraph 68 thereof.

716. Indeed, I am satisfied that none of the other projects even fits the pattern of "troubled projects" taken over in the aftermath of the financial crisis. As the Shareholders themselves accept, they were, prior to the financial crisis, the beneficial owners of the Siberian timber project (which was or came to be held through Priangarskiy, Business Group and SiberianKD). Their interests in Yaposha also pre-dated the financial crisis and there is no evidence that there was any "taking over" of any assets of Yaposha due to prior lending being in default or the loans distressed. Similarly, the various other Moscow real estate projects, such as the Bank's own building, were not previously held as collateral for lending that was taken over in the financial crisis. Equally (and self-evidently) those companies which were what have been referred to as "pure balance sheet management" companies such as Erinskay and Baymore are not examples either not least because they were not linked to any underlying business venture at all (whether pre or post the 2008 financial crisis).

717. Furthermore (and subject to the Bank's 19% interest in Stivilon and Yaposha) the Bank was itself only ever a lender to the projects (so it could only ever look to interest and repayment if projects went well) – any potential profits would be for the Shareholders based on the corporate structure put in place and associated ultimate beneficial ownership - as illustrated by Willow River and RCP (which were, as already noted, managed in exactly the same was as "Bank Companies", there being, as I have found, no relevant distinction between the two). In this regard the evidence is that between 2006 and 2014 (when the Bank collapsed) the Shareholders received more than US$140 million via payments of salaries and bonuses from the Bank and dividends from Bank-funded companies (on the basis of the lack of distinction between Bank Companies and Shareholder Companies). The reality, as perceptively identified by Ernst & Young when they undertake their own audit of the Bank's books in 2009, was that the Bank was in fact bankrolling the Shareholders own projects on a massive scale (noting, for, example, that "*about 50% of the Bank's assets are loans granted to companies of the Bank's shareholders for implementation of their projects"*).

718. The evidence before me does not establish the basic premise of the Shareholders' argument that the loans at issue in fact represented the refinancing of losses incurred on genuine loans during the 2008 financial crisis. Nor indeed does it establish that the Bank did in fact suffer losses on its loan portfolio in the amount of hundreds of millions of dollars in the 2008 financial crisis. General assertions along such lines by Mr Yurov (for example in cross-examination that the Bank embarked on a strategy of restructuring and recovery of non-performing loans that had defaulted as a result of the financial crisis) are not proof of the same, and when drilled down to detail produced only Stivilon and StroyEcologiya as potential candidates in relation to companies in issue that were "taken over" following the 2008 financial crisis,.

719. Equally, the evidence that the Bank in fact suffered losses on its loan portfolio in the amount of hundreds of millions of dollars is also totally lacking. Bare assertions to such effect were made by Mr Fetisov (as quoted above), and also by Mr Yurov (in his witness evidence and when cross-examined) but there is no proof in relation to particular losses incurred and their refinancing and neither Mr Yurov nor Mr Fetisov stands to be treated

as a witness of truth for the reasons that I have given. When questioned, Mr Yurov referred (in the most general of terms) to technical defaults on certain loans (such as missed interest payments), but, as the Bank points out, this does not mean that such loans were worthless – rather that greater provision would have been required by the Russian banking regulations, which is, no doubt, the very reason why the Shareholders hit upon "balance sheet management" to avoid recognition of liabilities - as most graphically recognised in Mr Yurov's June 2015 memo but also admitted and maintained in Mr Yurov's oral evidence (see in particular Day 16/103:15 to Day 16/104:1 as quoted in due course below in relation to Issue 16 in Section G.3). Indeed the Shareholders' whole argument in this area is intrinsically linked with Issue 16 and indeed is the purported justification for the same.

720. Accordingly, I answer Issue 14 as follows. The only potential examples of companies in the network taking over assets using financing from the Bank following the 2008 financial crisis that have been demonstrated are Stivilon and StroyEcologiya, as addressed in Section R, and the associated lending was done for the benefit of the Shareholders including Mr Belyaev (the projects financed or re-financed using the Bank's money were absorbing huge amounts of money and I am satisfied that the associated loans cannot have been made without Mr Belyaev's knowledge, involvement and agreement as a major shareholder, Supervisory Board director and CC member *a fortiori* given the beneficial ownership by the Shareholders including Mr Belyaev, of Stivilon and StroyEcologiya (as to 60%)). In any event, and as addressed under Issue 16 below, "balance sheet management" (as that phrase is used by Mr Yurov and Mr Belyaev) is not legitimate and is not reasonable or in the Bank's best interests.

G.2 The Characteristics of the Loans and Transactions (Issue 15)

Did each of the Loans and Transactions have one or more of the characteristics identified in paragraph 18 of the Re-Amended Particulars of Claim ("RAPOC") and, if so, did each of the Shareholders know that?

721. This is most conveniently addressed in Section R below in relation to each of the Loans and Transactions.

G.3 The nature of "balance sheet management" (Issue 16)

Was the "balance sheet management" exercise:

dishonest and not *bona fide*, reasonable or in the best interests of the Bank, because *inter alia* each "balance sheet management" loan increased the overall indebtedness to the Bank and thereby caused the Bank immediate loss in circumstances where, on the Bank's case, the borrowers provided little or no security for the loans and had no genuine or legitimate commercial business to generate funds to make repayment; and/or (insofar as it occurred) substituted secured loans with unsecured loans to entities with no means to repay? or

undertaken in good faith, in the Bank's best interests and reasonably *inter alia* (a) as part of an effort to restructure non-performing loans on the Bank's books with arm's length borrowers, as a result of which the Bank had taken over underlying assets/collateral for its own benefit through off-balance sheet structures so as to salvage the maximum value from those failed loans/investments and with the aim of avoiding or reducing the risk of greater losses to the Bank; (b) to conduct treasury activities, such

as investing in securities and to generate liquidity; (c) holding and developing interests in real estate investments; (d) to avoid the immediate crystallisation of substantial losses; (e) to avoid the Bank's funders enforcing against the failed investments, which would have led to poor realisation for such assets; and/or (f) holding and collecting in underperforming retail loans?

G.3.1 Balance Sheet Management

722. This is intrinsically linked to Issue 14 above. Given that (as I have found) the reality is that very little of the lending can actually be demonstrated to have been used to enable the Bank to take control of collateral in respect of defaulted loans during the 2008 financial crisis, to the extent this fact is relied on by the Shareholders, it cannot be a justification for the same. However, the issue's real importance and significance lies in the fact that it remains the central justification of the Shareholders in relation to the Loans and Transactions of which complaint is made by the Bank.

723. The overarching issue that arises therefore is as to whether the "balance sheet management exercise" (as that phrase is used by Mr Yurov and Mr Fetisov) was undertaken in the Bank's best interests and reasonably and in good faith (as Mr Yurov and Mr Fetisov submit) or whether what occurred was not reasonable or in the Bank's best interests and/or was in bad faith (as the Bank submits). In this regard it is important to appreciate that Mr Yurov and Mr Fetisov seek to suggest that "balance sheet management" is not only legitimate but is a legitimate justification for the entirety of the Loans and Transactions the subject matter of the Bank's claim and claimed loss (and not just, for example, the loans to Stivilon and StroyEcologiya).

724. The backdrop to such issues is that it is common ground amongst the Russian law experts set out in paragraphs 14 to 16 of the Joint Memo on Russian Law including:-

> "14. It is agreed that under the Initial Article 53(3), the New Article 53(3), and under Article 71(1) of the JSC Law, members of the board of directors were obliged to act in the interests of the company when performing their rights and obligations of members of the board of directors and to perform their rights and obligations in relation to the company in good faith and reasonably.
>
> 15 It is agreed that with respect to liability under the Initial Article 53(3), the New Article 53(3), and under Article 71(1) of the JSC Law:
>
> (1) the claimant must prove the bad faith and/or unreasonable actions (or omissions) of the director which caused damages to the company, existence of damages, as well as the causal link between the behaviour of the director and the damages suffered by the company.
> …
>
> 16. It is agreed that paragraphs 2 and 3 of Resolution No. 62 list situations establishing rebuttable presumptions of bad faith and/or unreasonable actions of the director."
>
> (emphasis added)

725. It will be seen therefore, that:-

(1) Although bad faith will trigger liability under Article 53(3) and Article 71(1), liability also arises thereunder in the context of unreasonable actions or omissions and they need not be in bad faith (although the Bank submits that they were), and

(2) Equally directors are required to act in good faith and reasonably as well as in the interests of the Bank. In this regard something that might be perceived as in the interests of the Bank, for example bringing money into the Bank at a time of great need, will still be in breach of duty if it was not in good faith or reasonable e.g. a course of conduct which was illegal even if it brought money into the bank, or allowed its survival when it ought to have gone into liquidation and/or have had its licence revoked.

726. The Bank's case, in short, is that the "balance sheet management" (in the sense used by Mr Yurov and Mr Fetisov) is in fact fundamentally dishonest and is in any event neither reasonable nor in the Bank's best interests (as addressed in Section M.3.1), which suffices; and accordingly, the Shareholders were in serious breach of duty in procuring, facilitating, approving or acquiescing in it, and are liable to the Bank in respect of it.

727. The question of loss is addressed in Section N (Causation and Quantum), but the Bank's case is that the effect of "balance sheet management" (in the sense used by Mr Yurov and Mr Fetisov) led to a very large increase in the size (or apparent size) of the Bank's corporate loan portfolio and therefore the (apparent) asset base between 2008 and 2014. I have already identified that the unchallenged evidence of the Bank's expert Mr Allen was that the corporate loan portfolio more than doubled from about RUB 24.8 million in 2008 to about RUB 58 billion in the first half of 2014 (Table 3.1 to Allen 1), and that it was "balance sheet management" involving the Borrowers that led to the large apparent increase in the Bank's corporate loan portfolio as is apparent from the fact that as at 30 June 2014, RUB 45.3 billion of the Bank's loan portfolio consisted of loans to just the Borrowers at issue in these proceedings (Table 3.2 to Allen 1). As the Bank points out, that was, in itself, a significantly greater sum than the size of the Bank's entire corporate loan portfolio in 2008 (c. RUB 24.8 billion). As at 31 December 2013, the Bank's total reported capital was just RUB 17.5 billion. Hence, as the Bank rightly says, this was not a "closed loop" in which a fixed amount of money was recycled round and round in a series of loans, with the hole in the balance sheet at the end of the process being the same as an original "loss" at the start.

728. The source of the funding was, as I have already noted, mainly small-scale retail depositors, i.e. ordinary Russian savers, who deposited money with the Bank. The Bank's principal business in the relevant period was retail banking; and by 2014 it had over 400 branches across Russia holding the deposits of some 1.5 million individual customers, totalling around US$1.9 billion. In this regard, the size of retail deposits was not matched by the size of the retail loan book. Mr Allen's Appendix 5a shows that the customer deposits were consistently larger than the (growing) retail loan portfolio: *e.g.*, customer deposits in 2012 were RUB 142.5 billion, whereas the retail loan portfolio was only RUB 98.1 billion. The evidence before me is that customer deposits constituted the only real money coming into the system from the outside world. Again as already noted, Mr Allen's evidence (at Allen 3.17-3.20), which was not challenged in cross-examination, was that:

> "3.17 The large increase in the asset portfolio was not financed through equity: the total capital of NBT reported in its IFRS financial statements increased by only RUB 4.5 billion in the period between 2005 and 1H 2014, compared to an increase in the total asset portfolio of RUB 145.4 billion.

> 3.18. Instead, the increase in total assets appears to have been largely funded by an increase in liabilities, primarily the "amounts due to customers" (including mainly customer deposits and current accounts) which increased by RUB 114.2 billion (or some 4 times) between 2005 and H1 2014.
>
> 3.19. When the Bank entered administration, and a shortfall between assets and liabilities of some USD 1.9 billion was exposed, these and other external liabilities had to be covered, inter alia, by the DIA financing of USD 2.3 billion referred to in paragraph 2.2 above."

729. It is the Bank's case that had the CBR known about the true nature of the Bank's lending and the Bank's true financial position it would have stepped in to protect depositors by revoking the Bank's licence. This aspect is dealt with in Section I below, but the points are inter-linked, as this is part of the very reason why "balance sheet management" was undertaken in the first place (i.e. the Bank and the Shareholders intended to deceive the CBR, whether or not they succeeded), as is readily apparent from the contemporary documentation, Mr Yurov's June 2015 memorandum, and indeed the justifications of the Shareholders in Mr Yurov's oral evidence (in particular on Day 16/103:15 to Day 16/104:1) as also relied upon in Mr Yurov's Closing Submissions.

730. The true reason for all of this (says the Bank) is so that not only could the Bank be kept alive (whereas the Shareholders believed the CBR would have stepped in had the true position been known) ensuring that the Shareholders continued to be (handsomely) paid and continued to derive personal benefits for themselves (including as shareholders through the continuance of the Bank), but more fundamentally so that assets could be transferred offshore, through an opaque web of companies into the Shareholders' own beneficial ownership and for the Shareholders' personal benefit (the Shareholders' interest being neither recorded in the Bank's documents or revealed to the Bank's auditors or the CBR).

731. Issue 16, and the answers to be given in relation to particular Loans and Transactions, is also inter-linked with Section R, in relation to the Loans and Transaction themselves (where the nature and circumstances of those Loans and Transactions are addressed and associated findings made) because the "balance sheet management" involved vast amounts of lending to the Shareholders' own projects which the Bank says was done without appropriate scrutiny, due diligence or disclosure, being (says the Bank) waved through the Credit Committee (often by absentee ballot which the Bank says was itself inappropriate) without any appropriate, scrutiny, due diligence or disclosure of personal interest, coupled with the inappropriate extension of loans as repayment deadlines approached without any disclosure of the Shareholders' personal interests or benefit to them. Again this is addressed in Section R in relation to the particular Loans and Transactions – but none of this, says the Bank was done in good faith, reasonably and in the best interests of the Bank. These are (says the Bank) independent breaches of duty quite apart from the propriety (or otherwise) of "balance sheet management".

732. It has never been clear how "balance sheet management" (as defined and allegedly deployed by the Shareholders or for that matter deployed by senior management within the Bank) could possibly be reasonable or in the best interest of the Bank, and I consider

that remains the position at the conclusion of the evidence despite all the attempts that have been made by Mr Yurov and Mr Fetisov to justify it. In this regard there is a fundamental difficulty with the Shareholders' position which is revealed whenever they have attempted to grapple with why they did what they did, which was (even on their own evidence) designed to avoid the revocation of (or risk of revocation of) the Bank's banking licence, and involved (as Mr Yurov has acknowledged) the commission of an offence (whether it be an "administrative violation", an "administrative offence" or something (even more) serious). It cannot realistically be suggested that such conduct was reasonable, or in good faith or (ultimately) in the Bank's best interests, despite the best efforts of the Shareholders so to submit, and I am satisfied it was not.

733. This is even before considering the individuals Loans and Transactions (and associated pattern of behaviour) each of which I am satisfied also involved multiple and repeated breaches of the Shareholders' duties, such Loans and Transactions not being reasonable, or in the best interest of the Bank or in good faith for the reasons addressed in detail in due course, including in Section R below. Suffice it to note at this point that I am satisfied that such lending was done without appropriate scrutiny, due diligence or disclosure, being (as the Bank notes) waved through the Credit Committee (often by absentee ballot in circumstances where the contemplated requirements for such a ballot do not appear to have been met) without any appropriate scrutiny, due diligence or disclosure of personal interests, coupled with the inappropriate extension of loans as repayment deadlines approached without any disclosure of the Shareholders' personal interests or benefit to them.

734. The inappropriateness of "balance sheet management" generally is highlighted by Mr Yurov's own evidence, albeit his stance has been refined, and obviously increasingly sanitised, over time:-

(1) In Mr Yurov's June 2015 memo (as addressed in Section C.3.1 above) it was stated:-

> "**If such losses had been recorded in the bank's books back in 2008, the CB would have had to revoke NBT's banking licence as the reduction in capital would have been over 20%.** As a rule, as soon as a bank's licence is revoked, it becomes bankrupt because the depositors have the right to withdraw their deposits. Since no share capital could be attracted after NBT's shares were unlawfully attached in 2008 on the grounds that they allegedly belonged to Khodorkovsky (the attachment is still in force regardless of 12 complaints and petitions), **a decision was made to start submitting false accounts to the CB (which, in my understanding, was only an administrative offence punishable at most by a fine and licence revocation (in any case, the risk of licence revocation already existed)) and focus on providing loans to individuals instead (as the most profitable transactions) in order to offset the previous years' losses by the received profits, recover the bank's capital over time, and stop submitting false accounts to the CB.** This business logic had failed as NBT incurred new losses, this time on loans to individuals, and had to file for rehabilitation proceedings to avoid bankruptcy."
>
> and
>
> "the forced decision of 2008 **to submit false accounts** to the CB **in order to avoid the revocation of licence and bankruptcy**".
>
> (emphasis added)

The inappropriateness of such conduct is, I am satisfied, in no way diminished if (as those who represent Mr Yurov submit), "*false accounts*" is too strong a translation and that the reference should be to submitting "*inaccurate returns*" as an "*administrative violation*". Either way it is an admission that what had been done was (at the very least) something that was an offence that could result in a fine and the revocation of the Bank's licence. Despite the clear attempt to minimise and justify what had been done this is (rightly in my view) a recognition of wrongdoing (which is no doubt why Mr Yurov has since been keen to distance himself from the memo, as I have addressed at Section C.3.1). It is notable in this regard that Mr Yurov (rightly) acknowledges that he "*must accept that if 'balance sheet management' involves known illegality then it would not be something that a reasonable director would have pursued*".

(2) What Mr Yurov told Mr Popkov in a meeting in Cyprus in May 2015, *"here it is a kind of* ***the total amount of losses****. I can't say for sure now, but, in any case,* ***it was such that if the bank reflected it ... on ... created provisions, well, proceeding as it were, well, from its scale, directly, yes, there it would be revoked the license in 2008*****"** (emphasis added)

(3) Mr Yurov's Second Affidavit in which he swore:

> "28. Then the global financial crisis hit in late 2008. This caused the Bank (now merged into one) considerable difficulties (as it did for all other banks in Russia and elsewhere). In particular (i) there were large numbers of defaults from 2008 onwards on corporate and personal loans that had previously been made; and (ii) the Bank suffered heavy losses from the fall in the value of Russian securities in 2008, and again in 2014. The Bank also suffered as result of the fall in the Russian Rouble, in particular in 2014. In addition, in 2009 the Russian courts found the Bank liable to Rosneft for US$75 million (the claim arose out of a previous transaction entered into by the Bank on behalf of Yukos), which further reduced the Bank's capital. I estimate that between 2008 and 2012, the Bank lost around US$70 million in total, which was around a quarter of the share capital.
>
> 29. All of these problems placed the Bank in a very precarious financial position. The impact of the diminution in capital was magnified, because the Bank was restricted in its ability to lend funds by reference to a multiple of its capitalisation. Accordingly, the Bank's ability to lend was greatly reduced by any fall in capital. This was compounded by the fact that the Bank was unable to raise additional capital by issuing further shares, because its shares were frozen.
>
> 30. **As a result, there was considerable concern that if those losses had all been recorded on the Bank's balance sheet, it would have had its licence revoked by the Central Bank of Russia and consequently been declared bankrupt.. For obvious reasons, the Bank's management wished to do everything possible to prevent this from happening, and took steps to manage its balance sheet using its pre-existing offshore structure** (as I will describe in more detail below)"
>
> (emphasis added)

(4) Mr Yurov's oral evidence (Day16/103:15 to Day16/104:1):

> "My understanding is that if that Bank had to, like, literally two options: first to realise losses which were not actual losses at the time and to **reflect this on its books and in that case there was a risk that capital of the Bank will decrease for more than 20 percent, which might lead to the withdrawing of the licence as one of the possible options for Central Bank**. Or the other option was not to -- not realise this mark to market losses but to take over the assets and to recover them and to proceed accordingly with the reporting. I mean, to reflect in the reporting this course of action."
>
> (emphasis added)

735. Even were Mr Yurov's and Mr Fetisov's evidence to be taken at face value (which it clearly cannot be as it is readily apparent that this "balance sheet management" was not about the Bank in the aftermath of 2008 financial crisis using off balance sheet companies to enable the Bank to take control of collateral in respect of defaulted loans, such as real estate developments – for as addressed in relation to Issue 14 above this description did not apply to the vast majority of the lending), it is a clear (and inevitable) admission that inaccurate or false accounts/returns (however one characterises what was being done) were generated with the purpose of creating something other than an accurate position of the Bank's financial position without which the Bank would have had (or would have been at a risk of having) its banking licence revoked by the CBR. It is simply not tenable to suggest that such conduct is reasonable, or in good faith, or (ultimately) in the best interests of the Bank (which must be what is in the best interests of the Bank acting lawfully), and I find that it is not.

736. Euphemisms used by or on behalf of the Shareholders are further attempts to sanitise wrongdoing which in fact contain implied admissions of wrongdoing. Thus, as already noted, Mr Stanley urges upon me that Mr Yurov should not be seen as a "*venally unscrupulous"* person and that a fairer assessment would be that "*Mr Yurov may rather have been a person who took a somewhat cavalier view of the finer points of corporate governance"*. Whilst I consider that this is more than an understatement (given my findings in this judgment) a "*cavalier view of the finer points of corporate governance*" rightly acknowledges that what Mr Yurov did was not in accordance with proper corporate governance (nor, I am satisfied, with Mr Yurov's obligation to perform his duties with respect to the Bank in a reasonable manner).

737. However such sanitised admissions of Mr Yurov (as adopted by Mr Fetisov), neither (1) reflect the true seriousness and wrongdoing of such conduct in relation to accounts and the misrepresentations to the CBR and what they believed the CBR's reaction would have been had it known the truth (as addressed in Section I), or (2) reflect what was actually going on in terms of "balance sheet management" which in itself involved multiple breaches of the Shareholders' duties, both generally, and in the context of the Loans and Transactions (as further addressed in Section R).

738. The former is addressed in detail in Section I below. However suffice it to note at this point that I am satisfied that the "balance sheet management exercise" was a dishonest exercise (and which the Shareholders knew was dishonest) which was intended to mislead and did (contrary to the Shareholders' submissions) mislead the CBR, with various matters being concealed from and/or misrepresented to the CBR including (1) the concealment of the Shareholders' personal ownership of companies (including but not

limited to the admitted Shareholder Companies) coupled with positive representations that the various nominee shareholders and fake "nominee UBOs" were the real beneficial owners of the admitted Shareholder Companies and other Borrowers when they were not, (2) Borrowers were presented as being owned by separate "investors" so as to mislead the CBR into believing that there was no undue concentration of risk with a single borrower (so as to falsely claim compliance with the CBR N6 requirements) when the Bank was in substantial breach of the same in circumstances where all the Borrowers were owned and controlled by the Shareholders, (3) various companies including Erinskay and Baymore were falsely presented to the CBR as arm's length commercial lending to genuine independent businesses based in Cyprus with their own employees and offices, and (4) the Bank repeatedly represented to the CBR that the development and other real estate projects to which the Bank was heavily exposed (Gelendzhik, Kodinsk, Glukhovo and Yaposha) had good prospects and would lead to substantial future revenues, when the reality was that they were consuming a steady stream of very substantial loans from the Bank without ever being in a position to service them still less repay them (memorably being described by Mr Yurov as "garbage").

739. In fact it matters not (for liability purposes) whether the "balance sheet management" was not only unreasonable and not in the best interests of the Bank but also a dishonest exercise intended to mislead the CBR and the world generally as to the financial condition of the Bank, but it self-evidently was, and equally self-evidently the Shareholders knew it was. This is apparent from what is stated in Mr Yurov's June 2015 memo (to which neither Mr Fetisov or Mr Belyaev demurred upon receipt) and Mr Yurov's subsequent evidence as identified above. It is a self-evidently dishonest state of mind consciously not to record losses on the Bank's books, make a conscious decision to falsify accounts/render inaccurate returns on the basis that they knew that this was an administrative offence punishable by a fine and licence revocation (i.e. they knew what they were doing was wrong and punishable) but that "*at most*" they would be so punished in circumstances where they (rightly) were of the belief that the risk of licence revocation already existed.

740. That the balance sheet management undertaken was not only unreasonable and not in the best interest of the Bank but also a dishonest exercise, is also entirely consistent with (but not dependent upon) the evidence of Ms Podstrekha, the Deputy Head of Banking Supervision at the CBR, that I accept, who regarded "balance sheet management" as *"fraudulent and dishonest".* In this regard (and contrary to paragraph 214 of Mr Yurov's Closing Submissions) balance sheet management (as practised by the Bank) is neither permissible nor legal, as it prevents proper reserves being placed on the lending as Ms Podstrekha explained in her evidence:-

> "Q. It's obvious why it was happening. It was happening to avoid taking reserves on the Bank's balance sheet, wasn't it?
>
> A. Yes, **it was happening to deceive the regulator. So the regulator would not be to assess − wouldn't be able to assess properly the quality of the assets of the Bank**." (emphasis added)

741. In the circumstances identified above I am satisfied and find that the Shareholders acted dishonestly, as well as unreasonably and not in the best interests of the Bank, in relation to "balance sheet management", the accounts and misleading the CBR.

742. As already noted this is even before considering the individuals Loans and Transactions (and associated pattern of behaviour) each of which I am satisfied also involved multiple and repeated breaches of the Shareholders' duties, such Loans not being reasonable, or in the best interest of the Bank or in good faith for the reasons addressed in detail in due course, including in Section R below, such lending being done without appropriate scrutiny, due diligence or disclosure, being (as the Bank notes) waved through the Credit Committee (often by absentee ballot in circumstances where the contemplated requirements for such a ballot do not appear to have been met) without any appropriate scrutiny, due diligence or disclosure of personal interest, coupled with the inappropriate extension of loans as repayment deadlines approached without any disclosure of the Shareholders' personal interests or benefit to them.

743. Again it matters not (for liability purposes) whether the Shareholders were acting dishonestly and in bad faith in this regard, but again they self-evidently were. They used the Bank's money, and channelled it through an opaque web of offshore companies and nominees, to transfer the Bank's assets and monies into companies ultimately beneficially owned by them, and ultimately into their own family trusts. In other words they appropriated property belonging to another (the Bank) with the intention of permanently depriving the other of it, in circumstances which cannot be other than dishonest. In this regard they disguised loans to related parties with no general commercial business and independent means to service or repay loans to transfer the Bank's assets into their own ultimate beneficial ownership and their own family trusts. To seek to distance themselves from Mr Worsley and the web of companies he set up, and the numerous UBOs he recruited to achieve this, does not bear analysis. As is apparent from the chronology of events in Section F above, the Shareholders knew perfectly well what was going on, receiving structure charts, signing numerous documents in relation to the UBOs, and ultimately facilitating the transfer of assets into their own family trusts. The suggestion that they were ultimately holding the assets for the benefit of the Bank is an obvious falsehood.

744. An obvious question is why were all these loans being undertaken in the way they were? The obvious, and I am satisfied the correct, answer is to conceal, through an opaque web of companies and nominee UBOs, not only what was being done – but also for whose benefit it was being done – namely the Shareholders'. The attempts of the Shareholders to distance themselves from the actions of Mr Worsley and his nominees are, I am satisfied, attempts to distance themselves from obvious wrongdoing – but it is apparent from the chronology of events, the correspondence the Shareholders received, and the documentation that they each signed, as identified in Section F above, that they knew very well what was going on, and they cannot but have been aware, and known, that it was dishonest, unreasonable, and not at all in the best interests of the Bank, what was being done - rather that it was entirely for their own benefit.

745. Even Mr Yurov accepts (at paragraph 145 of his Closing Submissions) that, *"the implementation of the balance sheet management involved deception, as when third parties who had no connection to the Bank and no involvement in the companies were presented as active investors, which they were not".* Whilst Mr Yurov submits that he was not personally complicit in that, he and the other Shareholders obviously were, as is readily apparent from the chronology of events and associated contemporary correspondence. An example (of many), that shows such knowledge and complicity has

already been referred to in Section F.2.6, namely Mr Worsley's email of 20 April 2012 to the Shareholders (the email that indicated that there was an error in relation to four of the offshore companies (RCP, Tiesto, Arooj and Sapkont)) which shows both the awareness on the Shareholders' part of the use of nominees (such as Mr Worsley himself and Mr Webb), and that what was contemplated was the production of false back-dated documents (which the Shareholders were prepared to sign, and did sign, which is, in of itself, an additional dishonest and deceptive practice on their part).

746. It will be recalled that this email provided:-

> "Back in 2009 and 2010, when Drozdov was running the processes, 4 companies were transferred from TIB Holdings to two Nominees (myself and Morgan Webb). The properties are Retail Chain (Billa) [i.e. RCP], Tiesto… (a service company), Arooj and Sapkont.
>
> At the time Deeds were signed between the nominees (Worsley/Webb) and TIB. However at the time of the transactions the combination of Drozdov/Buyanovskiy/Maximov etc did not bother to follow up with SPAs to document the 'Sale' between TIB and the nominees. This has waterfalled down and now Vassiliades still has [you] three registered as the UBOs of these companies.
>
> This is not what is needed for the Billa sale. We need to re-register (on Cyprus) the UBOs as myself and Webb. Bear in mind that the Deeds between myself and Webb were signed in 09/10 already. SPAs have today been prepared and executed (back-dated) to document the transactions of 2009 and 2010. I will bring the letters in on Monday, plus copies of the Deeds that Webb and myself executed back in 09/10.
>
> FYI – a new full audit of all documentation has recently been started."
>
> (emphasis added)

747. It will be recalled that this is precisely what was prepared and thereafter signed by the Shareholders. I address in Section F.2.6 why this was not about correcting a mistake (as claimed by the Shareholders) but about the production of false back-dated documentation purporting to show that such a sale had taken place when it had not, and why it is not credible to suggest that the Shareholders did not read the email and were not aware of what was contemplated. Once again the position of Mr Belyaev is no different either in terms of his signing of documentation in relation to the offshore network including the use of individuals as false UBOs who had no involvement with the companies and most certainly were not active investors, as evidenced by Mr Worsley's email to Mr Belyaev dated 19 December 2012 (addressed in Section C.3.2 above).

748. Whilst Mr Yurov claimed that there was some distinction to be drawn between being the beneficial owners and the *ultimate* beneficial owners, I am satisfied that that was no more than an attempt to distance himself from what was clearly dishonest conduct. Equally, in the context of the transfer of companies from Totalserve to Vassiliades as addressed in Section F.2.5.5 above, the Shareholders personally signed instruction letters for all of the companies to be transferred, representing themselves as the beneficial owners of these companies (and most certainly not on behalf of the Bank, as there addressed), many of those companies being avowedly admitted to be Shareholder Companies (and

Declarations of Trust over the shares in the companies in favour of the Shareholders personally were signed). In any event, what was done was not "*a reasonable reflection of reality*" (another submission made on behalf of Mr Yurov) as the Shareholders are not the only shareholders of the Bank, and so it would be neither appropriate, nor rational, for them to sign personally on behalf of the Bank, as if they were.

749. Nor is it credible, as Mr Yurov also suggests, that he thought that the people who were dealing with the off balance sheet network were professionals who were able to find legitimate ways to achieve its purposes and that skilled technicians could find ways of getting around problems created by what he characterises as a *"a complex, often formalistic, regulatory regime [where] that the regime sometimes stood in the way of making sensible commercial decisions in the Bank's best interests"*, and I reject that evidence. It is readily apparent, as it would have been readily apparent to Mr Yurov and the other Shareholders, that what was being done was deceptive with a web of offshore companies and false UBOs concealing the Shareholders' ultimate beneficial ownership. I am satisfied that Mr Yurov knew perfectly well that legitimate ways were not being used to achieve the purposes of the off balance sheet network – as evidenced by his June 2015 memo with its acknowledgment of false accounts and commission of offences (on any view wrongdoing whatever the precise translation) quite apart from the deceptions inherent in the creation and maintenance of the offshore network leading through to the Shareholders' ultimate beneficial ownership.

750. As already noted, Mr Yurov (rightly) acknowledges that *"the implementation of the balance sheet management involved deception"*, and he also (rightly) acknowledges that *"it is apparent now that some of those involved, notably Mr Worsley, sometimes overstepped the mark"* albeit that I am satisfied and find that it was also apparent to the Shareholders contemporaneously (albeit it is a considerable under-statement). If nothing else, the use of false UBOs and the backdating of documents by the Shareholders very much more than oversteps the mark and is self-evidently deceptive and dishonest, and these matters were, as I have found, known to the Shareholders. What was being done was not "sailing close to the wind" it was deceptive (both in terms of the accounts and relations with the CBR) and more generally in relation to the operation, and whole purpose, of the offshore network (to conceal the transfer of all companies to the Shareholders' ultimate beneficial ownership).

751. The Shareholders' attempts to justify both the fact of, and nature of, "balance sheet management" are addressed in Mr Yurov's Closing Submissions (and adopted by Mr Fetisov and Mr Belyaev, albeit he denies any knowledge of the same (a denial that I have rejected)).

752. Mr Yurov, to a very large extent, places all his eggs in one basket, namely that the Bank used "balance sheet management" as *"a strategy of restructuring and recovery of non-commercial loans that had defaulted as a result of the financial crisis…achieved by the Bank lending funds to an off balance sheet company, which would 'buy out' the assets (such as the real estate development projects, rather than taking formal enforcement action, and repay the Bank's previous non-performing loans using the new loan to the off balance sheet company…It was hoped that such loans would then be repaid if market conditions improved"* (Yurov Closing Submissions para 131). Mr Fetisov says something

similar as the first of the uses of "balance sheet management" as *"structures used to rescue the Bank's distressed assets"* (Fetisov Closing Submissions para 60).

753. However, as will already be apparent, that will just not do as an explanation, still less justification, for the "balance sheet management". As has already been identified under Issue 14, the only potential examples of companies in the network taking over assets using financing from the Bank following the 2008 financial crisis that have been demonstrated are Stivilon and StroyEcologiya, and that associated lending was in any event done for the benefit of the Shareholders and not the Bank.

754. Nor was this all about an *"alternative…for the Bank to engage in forced sales of sub-prime assets at the height of the financial crisis"* (Yurov Closing Submissions para 132) – again the "balance sheet management" was not an alternative to a forced sale of sub-prime assets – it was not linked to existing sub-prime assets, but rather was a way of both misleading the CBR and obtaining substantial loans (without proper disclosure) for the ultimate benefit of the Shareholders. Furthermore, the language of "*It was hoped that such loans would then be repaid if market conditions improved"* (emphasis added) has a degree of aspiration (if not desperation) about it - resonating more in terms of the last roll of a die, or turn of the roulette wheel, than a director acting reasonably and in the best interests of a bank.

755. Mr Yurov says his characterisation of the background to the Loans and Transactions (which I have rejected) is supported by four sources of evidence. First, Mr Yurov's and Mr Fetisov's evidence. I have already addressed why their evidence in this regard does not accurately reflect the factual position – the only potential pre-existing distressed assets that could fit Mr Yurov's description related to Stivilon and StroyEcologiya. Second, the establishment of the Distressed Asset Group within the Bank. Whilst there were no doubt (at a level of generality) distressed assets following the financial crisis in 2008, neither the very existence of the Distressed Asset Group, nor anything it did, provides any justification for the use of "balance sheet management" as it was in fact carried out. Once again it is to be noted that it was stated in the Bank's own audited accounts for 2009 (signed by Mr Fetisov), that *"During the year ended 31 December 2009 the Group did not obtain any assets by taking control of collateral accepted as security for loans to legal entities (31 December 2008:nil)".* Third, reliance is placed on Mr Iskandyrov's evidence about discussion concerning distressed assets, and his evidence that, *"These [balance sheet management] schemes were required after the financial crisis of 2008 in order to ensure that the balance sheet ratios submitted by the Bank to the CBRF continued to comply to the…[CBRF] ratios and metrics…"* However, this is again an assertion with a high level of generality, and it is also indisputable that Mr Iskandyrov was implicated in "balance sheet management" himself. As I have already noted in Section C.2.3, I consider that Mr Iskandyrov under-played his involvement in relation to the offshore network, and was very much involved in what forms the subject matter of the Bank's criticism of the conduct of the Shareholders (and so is himself subject to that same criticism). In any event there is nothing here that grapples with the propriety or appropriateness of balance sheet management and what was being done in relation to the accounts and contact with the CBR. Fourth, reliance is placed on explanations of Mr Yurov in correspondence in December 2014 and May 2015 to the effect that the Bank was issuing loans with the aim of salvaging the value of pre-crisis loans and investments, but such correspondence (essentially at the end of events) is again at a high level of generality, and as already noted,

in relation to Loans and Transactions in issue, only Stivilon and StroyEcologiya are potential examples that would fit such a bill.

756. The position of Mr Yurov as to "balance sheet management" (as adopted by the other Shareholders) is addressed at paragraphs 144 to 147 of his Closing Submissions. There is nothing there that provides a justification for such "balance sheet management" or which would lead to the conclusion that it was reasonable, in the best interests of the Bank, or indeed undertaken honestly or in good faith.

757. First it is suggested that, *"It was obviously in the Bank's best interests for it to continue to operate so long as there were reasonable prospects for its long-term survival and recovery".* This suggestion at a banal level is unobjectionable. But it is not a justification for keeping the Bank alive through inappropriate "balance sheet management", through deceiving the CBR or for inappropriate and non-commercial lending through an opaque network of offshore companies through to the ultimate beneficial ownership of the Shareholders. Nor is it a matter of whether the Bank was or was not insolvent in the context of Issue 16. What is in issue is whether the Shareholders acted in good faith, reasonably and in the best interests of the Bank in performing their duties in the context of "balance sheet management". It is worth recognising, once again, that it is not in the best interest of the Bank to act in a way that is either illegal or which gives rise to a risk of it having its banking licence withdrawn. Indeed (as also already noted) Mr Yurov rightly acknowledges that he "*must accept that if 'balance sheet management' involves known illegality then it would not be something that a reasonable director would have pursued"*. To do that which would result in an administrative offence is not to exploit loopholes for a company, nor does it justify falsifying accounts, rather it is to do something which is not in the best interests of a company and should not have been done. This assertion in any event goes to an aspect of the case in relation to the accounts and the CBR, it is no answer in relation to the lending through the myriad of offshore companies for the ultimate benefit of the Shareholders. In the present case the end was no more legitimate than the means. Nor can it be said that there was no real risk of loss – monies were being lent to companies without any proper due diligence or disclosure of interest, and in many cases without any or any sufficient security, as addressed in Section R in relation to the Loans and Transactions.

758. Mr Yurov submits that it is critically important for the Court to analyse not simply whether the balance sheet management was honest, but if it was not then precisely what the nature and intended objective of the impropriety was, focussing in such submission, in particular, upon any breach of the Russian regulatory rules. In this regard Mr Yurov identifies that the fundamental premise of Mr Yurov's case is (a) the Bank was always its intended beneficiary, and never its intended victim, and (b) the Bank itself was always an active and knowing and willing participant in it, and was not deceived, and relies on nine sources of evidence which he says supports Mr Yurov's fundamental premise.

759. There are a number of preliminary points to make about this submission. First, so far as "balance sheet management" is concerned, the central issue is whether, in relation to balance sheet management the Shareholders breached their duties to act in the Bank's best interests and exercised their rights and performed their duties with respect to the Bank in a bona fide and reasonable manner. This does not just depend on "impropriety" or "dishonesty" – as already stressed these duties can be breached without impropriety or dishonesty (though on the facts, and for the reasons I give in this judgment) I am satisfied

that "balance sheet management" (as carried out), was (to the knowledge of the Shareholders) both improper and dishonest. Second, and accordingly, whilst the nature of any impropriety may be relevant to breach of duty and the seriousness of any breach it does not follow that the intended objective of any impropriety determines whether there was any breach of duty – conceptually one or more of the Shareholders could even have believed what they were doing was in the best interests of the Bank, but it does not follow that what was done was in the best interest of the Bank. Third, it does not necessarily follow that (if it be the case) the Bank was an active, knowing and willing participant in what was being done that what was done was in the Bank's best interest or that this would prevent the Shareholders being in breach of duty. Fourth, I am satisfied that what was done by way of balance sheet management was not reasonable and was not in the Bank's best interests. That does not depend on impropriety or dishonesty. However, as I have found it did involve impropriety and dishonesty on the facts of this case. Accordingly even if the fundamental premise of Mr Yurov's case had been made out, Mr Yurov and the other Shareholders would still be in breach of duty and liable for loss caused by their breach of duty. Fifth if (as I am satisfied is the case) the CBR, auditors, and ultimately, the depositors were deceived then that does go to impropriety and dishonesty as it is improper and dishonest to deceive such bodies - it is also not in the best interests of the Bank to do so.

760. Such preliminary points cut across the "fundamental premise of Mr Yurov's case". However, and in any event, the fundamental premise of Mr Yurov's case has not been made out. I am satisfied that the intended (and actual) beneficiary of the balance sheet management was the Shareholders, first by reason of the web of offshore companies leading to them as the ultimate beneficial owners of companies that should have been the Bank's assets or which should not have benefitted from the massive loans made to them with the Bank's money (in breach of duty), and secondly in terms of the other benefits the Shareholders obtained (including as to salary and personal payments/benefits received by them). The Bank was not the intended beneficiary, nor was it the actual beneficiary (which was the Shareholders).

761. As for the suggestion that the Bank was always an active and knowing and willing participant in the balance sheet management it is important to have regard to the Bank's separate legal personality. The Bank is not its senior management, nor does it follow that a Shareholder's knowledge is the Bank's knowledge. In any event, and once again, even if the Bank was an active and knowing and willing participant in the balance sheet management (and I do not consider that the Shareholders have made that out on the facts) I do not consider that was done was in the best interest of the Bank as it involved deceptive and illegal conduct (as recognised in Mr Yurov's June 2015 memo).

762. Accordingly, I do not consider that the fundamental premise of Mr Yurov's case has been made out on the evidence, nor do I consider that such premise is supported by the nine matters relied on by Mr Yurov. The first is based on the (false) premise that the balance sheet management exercise was to recover the value of defaulted loans and repaying loans – but the vast majority of the lending does not fit that bill. The second is that the various schemes were run with the active involvement of senior managers in the Bank which is true, but it does not follow that they participated because it was generally understood at the time that such arrangements were lawful and acceptable – the premise is itself false – such arrangements were clearly not lawful (as again recognised by Mr Yurov in his June 2015 memo), and it is not a premise in any event – senior managers no

doubt did what they did as that is what the directors, who were also the major shareholders, wished.

763. The third point is Mr Yurov's alleged reliance on, and trust of, relevant managers and specialists in the Bank. He may well have relied on others for advice – but his own state of mind is again revealed by the likes of his June 2015 memo – he knew what was being done was wrong in terms of the production of false accounts and the deception of the CBR. However, whether that is so or not, his own conduct in relation to the (false) UBOs and in backdating documents and the like, was in breach of his duties to the Bank. He cannot hide behind the advice of others in this regard.

764. As to the fourth point that Mr Yurov's alleged understanding was that Russian law permitted the Bank to treat companies such as the Borrowers as non-affiliated and, as such, to recognise loans to such companies on its balance sheet rather than consolidating the underlying assets I do not accept that this is an accurate statement of his understanding. I am satisfied that he knew that what was being done was unlawful under Russian law (as reflected in his June 2015 memo).

765. As to the fifth point, I address the position of the CBR in Section I below. However, suffice it to say at this point that the CBR was repeatedly misled, and did not know what was actually taking place, whatever was suspected. As to the sixth point, whether or not the use of off balance sheet companies was a very common practice among Russian banks – it does not follow that it was in the best interest of a bank to do so, not least given the risk of the revocation of its banking licence. In any event the allegations of breach of duty go beyond the regulatory perspective, and extend to the massive amount of lending to companies beneficially owned by the Shareholders without any proper scrutiny or disclosure, which was not in the best interest of the Bank. The seventh point that non-Russian banks such as Bank Winter sold products such as fiduciary lending does not necessarily mean that such lending was acceptable from a regulatory perspective, and in any event, once again this point goes only to the regulatory aspect.

766. It is asserted in the eighth point that the balance sheet management schemes in issue were not intended to be used "*directly*" to enrich Mr Yurov. I do not accept that given that he and the other Shareholders were the ultimate beneficial owners of the companies in the offshore network, quite apart from the fact that he did personally benefit from payments made through the offshore network.

767. The ninth point is that it is said that Mr Yurov was candid and open about the existence of the off balance sheet network and its purpose especially to Otkritie. This is, however, after the event, and it is difficult to see what else Mr Yurov could have done at that time.

768. Another aspect of balance sheet management that was also not reasonable or in the best interest of the Bank was that such lending increased the overall indebtedness to the Bank and thereby caused the Bank immediate loss in circumstances where, as identified in Section R, the borrowers provided little or no security for the loans and had no genuine or legitimate commercial business to generate funds to make repayment. This aspect is addressed in Section R (and also Section N in terms of loss). However, under Issue 16, the Shareholders (and Mr Fetisov in particular) deny generally that "balance sheet management" caused financial loss to the Bank (and as such submit it was not wrongful), as it is said that the granting of a loan did not worsen the Bank's financial position.

However, the Shareholder's case in this regard, and the examples provided by Mr Fetisov, do not bear examination (the issues that arise as to loss are addressed in Section N below).

769. The first example given by Mr Fetisov is a situation where the Bank is owed money under defaulted CLNs and rather than enforcing in a bad market and suffering a large loss it buys out the underlying business/assets using an off-balance sheet company and makes a direct loan to its company thereby repaying the CLNs. In doing so the Bank has replaced non-performing securities on the balance sheet with what is characterised as a performing loan, it being said that the financial position is the same as it was –with the Bank remaining exposed to the performance of the business/assets and that the cash it has paid out will have returned to the Bank by way of the discharge of the previous CLNs. Quite apart from the fact that there will have been costs involved (including the costs of administering the company and/or funding its further development) it has not been proved that this is, in fact what happened (i.e. any direct link between a defaulted CLN and the new loan), whilst in relation to the new borrowers they provided little or no security for the loans and had no genuine or legitimate commercial business to generate funds to make repayment (as addressed in Section R below) – so the making of those loans did result in loss being suffered, as addressed in Section N below. In this regard each loan should have been considered on its own merits and stands to be considered on its own merits.

770. The second example given on behalf of Mr Fetisov is the Bank providing funds to companies in the off-balance sheet structure by making a loan to company X which has fallen due for repayment and the Bank lends money to company Y, which transfers the money to company X, which then repays its loan. It is said that the Bank has suffered no financial loss as the money will have returned to the Bank and the debtor has simply been changed from one off-balance sheet company to another. Quite apart from the Shareholders having been unable to prove all the links within the chain (the reality is far more complicated than this simplistic example), this example ignores all the other reasons that have already been addressed as to why "balance sheet management" is inappropriate, why each of the loans should not have been made and why it was not in the interests of the Bank to do so, the fact that more and more (larger loans) are needed to service interest and principal (in each case to companies where lending was neither justifiable nor justified), and the fact that at some point (as occurred) the music stops and the Bank faces a mass of defaulted loans. The Bank's actual loss is addressed in Section N below. I am satisfied that this is another reason why "balance sheet management" is not reasonable, or in the best interests of the Bank, and is in fact not in good faith and dishonest, as it not only exposes the Bank to the risk of financial loss, but actually results in financial loss to the Bank.

G.3.2 Conclusion on Issue 16

771. In the circumstances identified above, and for the reasons given, I am satisfied and find that the "balance sheet management" exercise was neither reasonable nor in the best interests of the Bank. In this regard (and as further addressed in Section R) each of the Loans and Transactions were not appropriate involving multiple and repeated breaches of the Shareholders' duties, such lending being done without appropriate scrutiny, due diligence or disclosure, being waved through the Credit Committee (often by absentee ballot in circumstances where the contemplated requirements for such a ballot do not appear to have been met) without any appropriate scrutiny, due diligence or disclosure of personal interest, coupled with the inappropriate extension of loans as repayment

deadlines approached without any disclosure of the Shareholders' personal interests or benefit to them.

772. Such lending increased the overall indebtedness to the Bank and thereby caused the Bank immediate loss in circumstances where, as identified in Section R, the borrowers provided little or no security for the loans and had no genuine or legitimate commercial business to generate funds to make repayment. It also involved the Bank's money being channelled through an opaque web of offshore companies and nominees, to transfer the Bank's assets and monies into companies ultimately beneficially owned by the Shareholders in a process which involved deception of the CBR and the use of false nominee UBOs. It was also not bona fide and indeed was dishonest, in the circumstances, and in the respects, I have identified above.

773. For the avoidance of doubt, I find that it was not undertaken in good faith, in the Bank's best interests and reasonably as part of the matters alleged by the Shareholders. It was not undertaken in an effort to restructure non-performing loans on the Bank's books (the same not having been shown), nor did it involve arm's length borrowers. Its purpose was not for the Bank to take over underlying assets/collateral for its own benefit through off-balance sheet structures so as to salvage the maximum value from any such failed loans/investments or with the aim of avoiding or reducing the risk of greater losses to the Bank – such lending did not fit that bill, nor were the loans properly considered and addressed, and in any event it was ultimately for the Shareholders' benefit. Nor was "balance sheet management" properly used to undertake (necessary) treasury activities or for holding and developing interests in real estate investments; or to avoid the immediate crystallisation of substantial losses or to avoid the Bank's funders enforcing against failed investments and/or for holding and collecting in underperforming retail loans (all as alleged by the Shareholders).

G.4 The role of the Shareholders in relation to the Loans and Transactions

17. Did the Shareholders cause or procure, or agree amongst themselves that one or more of them should cause or procure, each of the Loans and Transactions? Alternatively, did the Shareholders deliberately or recklessly acquiesce in and fail to question or prevent the making of each of the Loans and Transactions? In particular:

17.1 What power, influence or control did each of the Shareholders exercise at the Bank and, specifically, over the CC? Did each of the Shareholders use such power, influence or control to cause, procure or arrange the making of the Loans and Transactions; or the approval of the Loans and Transactions by the CC in circumstances where (insofar as it is relevant), they would not otherwise have been approved?

17.2 To what extent (if at all) did each of the Shareholders procure or direct the entry by the Bank into the Loans and Transactions or have knowledge of them? To what extent were those Loans and Transactions entered into on the direction of Bank executives (as opposed to the Shareholders) and/or without the Shareholders' involvement or knowledge?

17.3 To what extent (if at all) did the Shareholders cause, procure or arrange the steps necessary for the Borrowers to enter into the Loans and Transactions; the disbursement by the Borrowers of monies received from the Bank; and the purchase by the Borrowers of assets?

17.4 Were the Loans and Transactions ones which would not have been made but for the Shareholders' exercise of power, influence or control?

774. Issue 17, and the Shareholders' response to it, is intrinsically linked to the alleged distinction between Bank Companies and Shareholder Companies (which I have found did not exist) and whether the offshore network companies (and the balance sheet management undertaken through such companies) was for the ultimate benefit of the Bank or (as I have found) the Shareholders. The reason for this is that much of the Shareholders' riposte to whether they caused, procured or agreed the Loans and Transactions or deliberately or recklessly acquiesced in and failed to question or prevent the making of each of the Loans and Transactions is to the effect that the Loans and Transactions were arranged by the Bank's management, and managed by the Bank's management, for the benefit of the Bank as part of "legitimate" "balance sheet management" for the benefit of the Bank. Thus, Mr Yurov (in submissions adopted by Mr Fetisov) submits that, *"The Loans and Transactions were arranged by the Bank's management in order to enable the off balance sheet network to perform the functions which the Bank required of it in the course of the Bank's business. His role was in approving ideas others developed, not in instigating them".*

775. However, once it is appreciated, as I have found, that the Loans and Transactions were for the benefit of the Shareholders, as was the offshore network, and that there was no distinction between Bank Companies and Shareholder Companies the basic premise that this was all being done for the Bank and for its benefit, falls away. The position is that these Loans and Transactions were for the benefit of the Shareholders, with the offshore network of companies being used (ultimately) to transfer assets into the Shareholders' family trusts. It would be inherently implausible in such circumstances (and indeed defy belief) if the Shareholders did not cause, procure or agree each of the Loans and Transactions which were for their benefit.

776. Not only is it inherently implausible, but it is also contrary to the Shareholders' participation in Credit Committee meetings (and associated responsibilities) from which they should have known, and I am satisfied they did know, all about the Loans and Transactions, and approved them in circumstances where they should have known, and I am satisfied did know, that the loans were neither reasonable nor in the best interests of the Bank, nor entered into honestly and in good faith. Their knowledge was reinforced through their signing of documentation in relation to the offshore network, and the transfer of assets to their own family trusts.

777. That the Shareholders were involved, at a high level, is expressly acknowledged and admitted at paragraph 149 of Mr Yurov's Closing Submissions, *"Messrs Yurov and Fetisov* ***were involved at a high-level*** *and did not involve themselves in the detail of the transactions"* (emphasis added) and at paragraph 155 of Mr Yurov's Closing Submissions "*In the circumstances, it follows that the Defendants were involved* ***at a high level in the process by which the Loans and Transactions were made****, but always alongside the Bank's senior management"* (emphasis added) – albeit, in each case, this understates and underplays their actual involvement, not least through participation in CC meetings and signing documentation associated with the offshore network.

778. This is also illustrated by the very evidence of Mr Iskandyrov on which reliance is placed by the Shareholders:-

> "Q. I think, Mr Iskandyrov, **we agree that at a high level** the shareholders – and by that I mean at least Mr Fetisov and Mr Yurov – **would have approved the general aim of the transactions**, so, for instance, moving bonds into the offshore companies, but then they wouldn't be involved in the detail of how that was done, how much, which particular loans were made, and how that would all be structured. Is that a fair summary?
>
> A. Yes, it is."
>
> and
>
> "it's unlikely they [the Shareholders] would get involved in the **details**"
>
> (emphasis added)

779. This cuts across much of the submissions of Mr Yurov in relation to Issue 17 (as reflected in paragraph 150 of Mr Yurov's Closing Submissions). Thus whilst it is undoubtedly the case that the Bank's senior management were involved in the management of the offshore balance sheet structure and indeed the Loans and Transactions (including from within the Bank), and in this regard what transactions would be entered into to carry into effect the "balance sheet management", such involvement was in the context, and as a result, of the fact that this was all being done for the benefit of the Shareholders, who were involved not only at a high level but also at the very important level of Credit Committee approval (without which none of the Loans and Transactions could have taken place). They were also involved at the implementation stage in relation to the web of offshore companies (and the signing of documentation in relation thereto).

780. Set against such backdrop the suggestion made by Mr Yurov and Mr Fetisov that the Bank's senior managers were acting independently of the Shareholders defies belief (and I reject it) – not least because such Loans and Transactions were self-evidently in the interest of the Shareholders to whom they were clearly behoven, and to whose direction they acted. It is clear on the evidence that it was the Shareholders who were the real decision makers in relation to the Loans and Transactions and the associated Credit Committee meetings. That must be the case from the very fact that the Loans and Transactions were approved without any of the requisite supporting documentation (as addressed in Section E.1.3 above) and had no justifiable commercial rationale.

781. The fact that the real decision makers were the Shareholders is unsurprising given the size of their shareholdings and their roles within the Bank as addressed in Section E.2. The fact that they were the real decision makers who had the power to direct the transactions of the Bank at their own discretion is even expressly spelled out on the face of the IFRS accounts. For example the IFRS accounts of the Bank for the year ending 30 December 2008 expressly provided:-

> "As at 31 December 2008 the Bank was ultimately controlled by TIB Holdings Limited (the "ultimate parent company"), **which in its turn was controlled by three individuals who have the power to direct the transactions of the Bank at their**

own discretion and for their own benefit. Those individuals are Ilya S. Yurov, Sergey L. Belyaev and Nikolay V. Fetisov."

(emphasis added)

782. It can also be seen from the contemporary documentation from which it is apparent that the likes of Mr Iskandyrov and Mr Buyanovsky looked to Mr Yurov and Mr Fetisov personally for approval. Thus, on 5 July 2012 Mr Iskandyrov sent Mr Worsley an email, in the context of Erinskay and Baymore, in which he wrote: *"Did you see diagram I sent yesterday?... And* ***could you ask yurov approve question on credit committee which Postnov sent to Sidorova****."* (emphasis added).

783. Another example is the exchange in February 2014 between Mr Fetisov and Mr Buyanovsky in relation to the Kodinsk project (concerning Priangarskiy and others). In this regard on 15 February, Mr Fetisov wrote to Mr Buyanovsky, and various other Bank employees, in these terms, *"I would like to know what is the timeline to bring to the credit comm the issue of credit line up to 1-1.2bn for Kodinsk. Pls provide the timeline."* On 17 February 2014 Mr Buyanovsky replied:

> "The [N6] limit on the SiberianKD group – Business Group – PLPL was selected almost in full. We can lend for PLPK futures operations, but then we need to unload [N6]. As a solution, let's consider selling stakes in BG to a new owner. We'll prepare proposals in this regard….
>
> …Another drawback, the lack of logic in the entire transaction, is less significant…
>
> **…If you give your OK to the loan structure, then we can go to the Credit Committee next week, when/if Ilya is in Moscow."**
>
> (emphasis added)

784. It will also be recalled that when it came to back-dating CC minutes and inserting approval of loans in minutes (even if not discussed in a meeting and even without regard to what minutes a matter might be included in) it was Mr Yurov, and not the CC as a whole, who was Mr Postnov's first (if not only) port of call. As, for example with Mr Postnov writing to Mr Yurov (via his secretary) on 23 May 20912 asking him to "*coordinate and instruct the secretary of the CC*":

> "1. To include the decision regarding the provision of a loan to the company Arelwind Investments Ltd. amounting to 300 million roubles **in the minutes of one of the Committee's previously held meetings**. The loan will be used for satisfying margin call requirements by the Bank's borrowers carrying out operations in the federal loan bonds market…
>
> (emphasis added)

As I have already found, Mr Yurov went along with this dishonest charade. The next day, Ms Sidorova replied with a scanned image of the page signed by Mr Yurov and the words: "*I. S. Yurov's consent*" which I am satisfied she would not have done unless Mr Yurov had consented. For present purposes, however, what matters is that it shows that Mr Yurov was the port of call when a (purported) decision had to be taken. It matters not that this

did not relate to one of the Loans and Transactions. It shows that the ultimate decision makers were the Shareholders.

785. In terms of the approval of the Loans and Transactions, the Credit Committee reviewed and approved individual lending transactions, including all of the relevant transactions in the present case. The Shareholders were at all material times members of the Credit Committee. At least one of them was present at each of the Credit Committee meetings at which the relevant transactions were considered. Mr Yurov acted as the chair of the Credit Committee at every meeting he attended and, when Mr Fetisov was present and Mr Yurov was not present, Mr Fetisov acted as the chair.

786. I have already quoted, and addressed the provisions of the CC Regulations in Section E.1.3. Those regulations are of particular relevance as the Articles of the CC Regulations define the parameters in which the Credit Committee operated, and speak for themselves as to the Credit Committee's role, and the responsibilities of members of the Credit Committee.

787. It will be recalled that Article 6.2 provides that "*the Credit Committee is created for the purpose of implementing Bank's credit policy and making decisions concerning the credit risk management".* Each of the Shareholders (when participating in a CC meeting, in person, or in absentia) cannot but have been aware of the features of the Loans and Transactions under consideration and the (lack of) justification in the context (amongst other matters) of the absence of supporting documentation or proper security - yet they approved the same. Unless what was taking place was simply a monumental, careless, dereliction of duty on the Shareholders' part in approving loans without proper justification on a regular if not universal basis (which is not suggested by the Shareholders) the only reasonable explanation (and inference) for such approvals is that the Shareholders were personally causing and/or procuring and/or agreeing the Loans and Transactions, and for their own benefit. I am satisfied that this was the case. Accordingly, where one or more of the Shareholders voted in favour of the making of a loan on the Credit Committee, I am satisfied that he or they caused or procured or agreed it (the relevant occasions and individuals are set out at Appendix C to the Bank's Closing Submissions).

788. Further, and on any view, Mr Yurov cannot have his cake and eat it when it comes to Credit Committee meetings. He cannot in the same breath deny knowledge of the Loans and Transactions and his role in procuring them, whilst at the same time saying that his role as a member of the Credit Committee was to manage credit risk and ensure not a single kopeck of Bank money was lost due to credit risk, and that he had to be convinced by all the materials available to him that the credit risk had been properly reviewed, valued and calculated, and that making a loan would not harm the Bank due to credit risk. Whilst his evidence in this regard is hardly consistent with the conduct of someone who was prepared to back-date and falsify documents or approve a loan seemingly unaccompanied by any materials (as addressed in Section E.1.3), if there is any grain of truth in Mr Yurov's evidence he must have been aware of the Loans and Transactions and what they were for.

789. It is pointed out, as is the case, that not all Shareholders attended all CC meetings, and indeed Mr Fetisov specifically submits that whilst he admits that *"On occasions [he] may have played some role in the making of the Loans and Transactions",* he was not involved

"at all" in the making of a number of the Loans and Transactions (as particularised at paragraph 82 of his Closing Submissions), with his involvement said to be limited in relation to specified others. I address each of the Loans and Transactions, and the involvement of the Shareholders in aspects of the same, in Section R below. However, whilst attendance at a particular CC meeting, and approval of a particular Loan and Transaction (or aspect of it) at a particular CC meeting, reinforces a Shareholder's knowledge and involvement, it is not necessary that they took part in the particular CC meeting for them to have had knowledge of the Loan and Transaction or indeed for them to have caused or procured it.

790. In this regard I am satisfied that it is to be inferred that the Shareholders, and each of them, knew about the Loans and Transactions (certainly their principal terms and the purposes of the loans), including from discussions with each other, and that they agreed together that one or more of them would approve each transaction on the CC and thereby caused or procured the entry by the Bank into each Loan and Transaction.

791. Such inference arises from the contemporary documents addressed in Section R evidencing or suggesting such knowledge and discussion and the inherent probabilities given the fact that (to their knowledge) the loans were being made to companies controlled by them personally and which were (1) for their own personal benefit - in relation to which they signed large numbers of documents in their own personal capacity as beneficial owners (as identified in the chronology of events), as well as giving personal indemnities to those administering them on their behalf, (2) in the case of the "balance sheet management" companies, these were being used in relation to (and were crucial to) the Bank's (apparent) continued financial soundness and compliance with CBR ratios (and as such of undoubted importance to them as Shareholders), and (3) in the case of other Borrowers (and loans to them) in that they were to, or in respect of, the Shareholder's personal business projects (such as Kodinsk, Degunino, Gelendzhik and Yaposha) and as such no doubt close to their hearts (and which they would be expected to take a personal interest in, most notably in relation to such matters as the level of indebtedness, the ability to service loans, and their overall financial status and prospects for the future).

792. There is also the more general point that these were loans involving the lending by the Bank of many millions of dollars, post the 2008 financial crisis, which the Shareholders would inevitably have taken an interest in (in their role as directors and given that the Bank was owned by, and on the evidence before me controlled by, the Shareholders), as a result of which the Loans and Transactions would be relevant to, and impact upon, their own personal interests, such that I am satisfied that this is a further reason why they would have known of the transactions and discussed the same - despite the denials in evidence, from Mr Yurov and Mr Fetisov (which I do not accept) that they did not know about particular transactions or aspects thereof. I have already addressed at length why neither is a witness of truth whose evidence stands to be accepted, and they each gave evidence which I am satisfied was untrue, as already identified, in relation to their knowledge of the companies and transactions concerned. It is also to be borne in mind that the evidence that is before me is to the effect that the Bank's corporate loan book was otherwise wound down or largely inactive post the financial crisis of 2008 - this would have placed the Loans and Transactions in even sharper focus.

793. There is also the point that each transaction does not stand to be considered in isolation divorced from the other transactions in relation to that Loan or Transaction. Knowledge is by its nature cumulative in relation to the transactions as a whole. Equally, Mr Yurov

and Mr Fetisov regularly took part in CC meetings together and voted together, and I consider that it is overwhelmingly likely that they (and Mr Belyaev) discussed the Loans and Transactions together not least because they were ultimately for their benefit through the network of offshore companies. I do not consider that the position of Mr Belyaev is any different given his shareholding, his role within the Bank as already addressed, and his relationship with the other Shareholders. I do not consider that Mr Belyaev would have allowed the Bank to be run, or the projects undertaken, without his personal knowledge, discussion and approval of all significant transactions, and I reject his evidence to the contrary in circumstances where he too is not a witness of truth.

794. Even where a Shareholder did not sit on a particular CC meeting to consider a particular loan I am satisfied that they would have been aware, both from discussions with the other Shareholders, and with other Bank staff, including Mr Vartsibasov, Mr Postnov, Mr Iskandyrov, and from 2010 Mr Worsley, that large loans for "balance sheet management" purposes and to finance the Shareholders' personal business projects were being sought and approved by the CC, and advanced to the Borrowers in the offshore network. They would also have been aware this was done in circumstances where the Shareholder or Shareholders sitting on the CC and considering such loan would cause or procure the loan in the normal pattern by approving the loan without any proper scrutiny or declaration of interest (in the same way as the many other Loans and Transactions with which they were personally familiar). I am also satisfied that they expressly or impliedly approved and/or agreed to such a course of action whereby one or more of them would approve the transaction on the CC thereby causing or procuring such loans. On any view, and in any event, the other Shareholders did not question or prevent such loans being approved or made (as any honest director would have done), thereby acquiescing in, or failing to prevent, such loans.

795. I address each of the Transactions and Loans, and the Shareholders' involvement in relation thereto in Section R. In the circumstances set out above, and for the reasons given, I am satisfied, in relation to Issue 17, that the Shareholders did cause or procure, or agree amongst themselves that one or more of them should cause or procure, each of the Loans and Transactions. In any event, and as addressed in the preceding paragraph, I am satisfied that the other Shareholders did not question or prevent such loans being approved or made (as any honest director would have done), thereby acquiescing in, or failing to prevent, such loans.

796. The sub-issues under Issue 17 are inter-linked, and their answer centres on the conclusions I have already reached on Issue 17 and the central role of the CC decision and the role played by the Shareholder or Shareholders sitting on the CC considering the particular Loan or Transaction. In short that Shareholder or Shareholders voted in favour at the CC meeting and thereby ensured that the loan was approved. Such Loan and Transaction was not accompanied by requisite supporting documentation or justifications for it, nor were Shareholders' interests declared. If the vote of the Shareholder had not sufficed to ensure the Loan or Transaction was approved it would not have been approved (given the lack of requisite supporting documentation or justification therefore).

797. I have already addressed the impact of Article 6.4 of the CC Regulations (in Section E.1.3), which it will be recalled provides that: *"Implementation of resolutions issued by the Credit Committee is* ***mandatory*** *for all structural subdivisions and Bank's staff members participating in the credit transactions"* (emphasis added). Whilst it apparently remains part of the Shareholders' case on Russian law (as addressed in Section M below)

that decisions of the Credit Committee approving the making of loans were advisory only and that the decision actually to issue a loan or to conclude an agreement was ultimately that of the relevant executive officer (such as the CEO) there is no evidence in fact that anyone (including any executive officer such as the CEO) did consider resolutions passed by the Credit Committee and whether they were in the best interests of the Bank which is consistent with the express language of Article 6.5. Again I have already noted Mr Yurov's apparent acceptance that further approval did not take place, it being stated at paragraph 103 of his Written Closing Submissions that, "*since approval was essentially a formality because the Loans and Transactions had been arranged within the Bank and were known to be for the benefit of the off balance sheet network no further independent consideration was required after approval by the Credit Committee*". This is a recognition that there was no independent consideration by anyone after approval by the Credit Committee as to whether the loan was in the Bank's best interests. It is also common ground that the Supervisory Board did not in fact approve any of the Loans and Transactions that are in issue.

798. Issue 17.1 asks what power, influence or control did each of the Shareholders exercise at the Bank and, specifically, over the CC, and whether each of the Shareholders used such power, influence or control to cause, procure or arrange the making of the Loans and Transactions, or whether the approval of the Loans and Transactions was made by the CC in circumstances where (insofar as it is relevant), they would not otherwise have been approved.

799. I have already identified above that the Shareholders were the real decision makers within the Bank who had the power to direct the transactions of the Bank at their own discretion (as expressly spelled out in the IFRS accounts of the Bank, as quoted above) and the correspondence shows that Bank employees such as Mr Iskandyrov and Mr Buyanovsky looked to Mr Yurov and Mr Fetisov personally for approval (again see the examples I have already given above in relation to the 5 July 2012 email of Mr Iskandyrov concerning Erinskay and Baymore and the exchange in February 2014 between Mr Fetisov and Mr Buyanovsky in relation to the Kodinsk project). As such they had power, influence and control at the Bank, which they exercised in relation to the Loans and Transactions. They had a central role in relation to the approval of the Loans and Transactions including, but not limited to, through voting in favour at the CC meeting (where they attended the same) and thereby ensuring that the loan was approved.

800. As already noted, such Loan and Transaction was not accompanied by requisite supporting documentation or justifications for it, nor were Shareholders' interests declared (and were often by way of in absentia voting). If the vote of the Shareholder had not sufficed to ensure the Loan or Transaction was approved it would not have been approved (given the lack of requisite supporting documentation or justification therefore). I am satisfied therefore that they did use their power, influence and control to cause, procure and arrange the making of the Loans and Transactions in circumstances where (absent their approval) the Loans and Transactions would not otherwise have been approved (given their position of power and influence). The disclosure does not reveal any example of a transaction that any Shareholder wished to happen that an executive failed or refused to implement, or of any transaction opposed by a Shareholder that was approved. The reality was also (as Mr Yurov himself acknowledged) that "balance sheet management loans" were rubber-stamped at CC meetings.

801. I have already addressed the subject matter of Issue 17.2 in the context of Issue 17 generally, and am satisfied that the Shareholders had knowledge of the Loans and Transactions in the circumstances I have identified and that they agreed together that one or more of them would approve each transaction on the CC and thereby caused or procured the entry by the Bank into the Loans and Transactions. Whilst Bank executives were involved in the management of the businesses and the associated Loans and Transactions, there is no evidence that any of the Loans and Transactions were entered into on the direction of Bank executives (as opposed to the Shareholders) still less without the Shareholders' involvement or knowledge, and at least one Shareholder was present at each of the Credit Committee meetings at which the relevant transactions were considered - with Mr Yurov acting as the chair of the Credit Committee at every meeting he attended and when Mr Fetisov was present and Mr Yurov was not present, Mr Fetisov acting as the chair.

802. In relation to Issue 17.3, the Shareholders were the owners and controllers of all of the Borrowers as I have found. They were also, as already noted, the real decision makers within the Bank who had the power to direct the transactions of the Bank at their own discretion. In such circumstances they were able to, and did procure, that those working for them/the Bank or at their direction (including Mr Worsley, Mr Iskandyrov, Mr Postnov, Mr Vartsibasov, Mr Grechishnikov and others at Columba) took all necessary steps to cause the Borrowers to enter into the loans and disburse the proceeds (whether that be for "balance sheet management" purposes or to finance their own personal business projects). The Shareholders' involvement (as acknowledged by Mr Yurov) was at a "high-level" but all such matters were being managed on their behalf, and whenever necessary they also signed whatever documentation was required to carry matters into effect. For example, in signing letters of instruction to Vassiliades in September 2011.

803. Equally in relation to Issue 17.4, and as already addressed, I am satisfied that the Loans and Transactions ones which would not have been made but for the Shareholders' exercise of power, influence and control, and for the reasons that I have identified.

G.5 The Bank's Management and the Loans and Transactions

18. What was the extent of knowledge of the Bank's management of the true nature and purpose of the Loans and Transactions (including the ownership of the relevant companies); and what, if any, significance does any such knowledge have for the pleaded claims?

804. The Bank's management were indeed aware of the true nature and the purpose of the Loans and Transactions including ownership of the companies, the use of "balance sheet management" schemes, and the Shareholders' personal interests including in the Borrowers with or related to actual projects. This is most obviously so in relation to Mr Postnov, Mr Vartsibasov and Mr Drozdov.

805. So far as the use of "balance sheet management" I consider that a large number of individuals within the Bank will have been aware of the use of "balance sheet management" (though care is needed as to what is meant by the use of "balance sheet management"). Mr Yurov goes so far as to suggest that more than 100 people were aware of the off balance sheet network (and it is submitted the purpose for which it was set up)

and identifies the individuals he is referring to. As to the former there will no doubt be many who were aware of the off balance sheet network, and there may well be a number who were aware of the purpose of the use of "balance sheet management" (at various levels and at various levels of knowledge and understanding).

806. However, I have not heard from a large number of the individuals identified, and in circumstances where I have made findings that "balance sheet management" in the sense it was used and deployed by the Bank, as addressed herein, was not only not reasonable or in the best interests of the Bank but dishonest, I do not consider it would be either fair or appropriate to make findings in relation to particular individuals (most of whom I have not heard evidence from and none of whom have had put to them the associated allegations of dishonesty). In addition, I am also satisfied that the reason why the Shareholders rely upon the involvement of other Bank employees or directors, namely to submit that because others in the Bank were aware of the use of "balance sheet management" (whatever precise meaning may be ascribed to that by the Shareholders) that shows that such activities either were, or were "generally understood" to be lawful and proper, is a false premise, and does not follow.

807. First, the actions of other individuals has to be seen against the backdrop that the real decision makers within the Bank who had the power to direct the transactions of the Bank at their own discretion were the Shareholders, and Bank employees would no doubt follow their directions (including where such directions may involve conduct that was, on analysis, neither lawful nor proper). Second, Bank employees may well have breached their contracts and/or directors may have breached their duties, and acted dishonestly by reason of their involvement in "balance sheet management". However, their knowledge is not attributable to the Bank, and does not in way exonerate, excuse, or diminish the Shareholders' breaches of duty and/or dishonesty. Further, it would have been open to the Shareholders to have brought Part 20 proceedings against other wrongdoers (as both Mr Yurov and Mr Fetisov did against Mr Worsley, before settling the same, and as Mr Yurov did against Mr Iskandyrov before abandoning the same).

808. In the above circumstances any knowledge that the Bank's management may have had as to the true nature and purpose of the Loans and Transactions (including the ownership of the relevant companies) is not of significance to the pleaded claims, and does not in any way exonerate, excuse or diminish the Shareholders' breaches of duty and/or dishonesty.

H. PERSONAL BENEFITS (ISSUES 19-21).

19. Did the Shareholders stand to, or in fact, benefit personally from the making of each of the Loans and Transactions? If so, was it each of the Shareholders' intention to personally benefit from the proceeds of the Loans and Transactions and/or did they intend such proceeds to be used for the benefit of the Bank?

20. Did the Shareholders benefit from the "balance sheet management" exercise itself including by way of:

20.1 continuing receipt of salary and bonuses from the Bank;

20.2 the Loans and Transactions; and/or

20.3 other benefits pleaded at paragraph 14 of the Yurov Reply, paragraph 10 of the Belyaev Reply and paragraph 13 of the Fetisov Reply.

which, on the Bank's case, would not have accrued to the Shareholders had the "balance sheet management" not occurred because the Bank would have collapsed and/or entered into the DIA rehabilitation scheme if its true financial position (on the Bank's case) had been disclosed to the CBR and/or publicly known? If so, what (if any) relevance does this have for the pleaded claims?

21. Is the Bank entitled to rely on the following additional alleged personal benefits to the Shareholders that have been addressed in the accountancy reports served on behalf of the Bank and the First and Third Defendants, specifically (i) the Menatep Transaction; (ii) the Kolyada Transactions; (iii) Willow River and RCP; (iv) Yurov House Purchase; (v) Yurov and Fetisov Personal Loans; and (vi) the Merrill Lynch Transaction. If so, have such matters been established?

809. Issues 19 to 21 deal with alleged personal benefits by the Shareholders as a result of the balance sheet fraud. In a very real sense these issues are something of a diversion, as the Bank does not bring a tracing claim (no such possibility exists as a matter of Russian law), and none of the Bank's claims depends on establishing the fact of any personal benefit, still less ascertaining the routing of such benefit and its quantum.

810. In circumstances where the Bank's claims are not dependent upon whether the Shareholders received specific personal benefits I do not consider there is any utility in addressing these issues at length. Where relevant, reference is made to particular transactions in the context of the Borrower Schedules in Section R.

811. Issue 19 is a broad and general question namely "Did the Shareholders stand to, or in fact, benefit personally from the making of each of the Loans and Transactions? If so was it each of the Shareholders' intention to personally benefit from the proceeds of the Loans and Transactions and/or did they intend such proceeds to be sued for the benefit of the Bank?"

812. In this regard I have already found in Section F.6 that during the lifetime of the offshore network:-

(1) There was no distinction between "Shareholder Companies" and "Bank Companies".

(2) All of the Borrowers were beneficially owned and controlled by the Shareholders throughout (which is no doubt why the Shareholders' interests in such companies, together with all of the companies, ended up in their personal discretionary trust in the circumstances I addressed).

(3) That Issue 6 (*"were the following companies beneficially owned and/or controlled by the Shareholders (as contended by the Bank) or by the Bank itself (as contended by Mr Yurov and Mr Fetisov): Erinskay, Baymore, LBCS, Mourija, LLC5, Gofra, Stivilon, Stroyecologiya, Belenfield, Wave, Edenbury, Black Coast, Oldehove, Crylani and NRT/Yaposha? (the "Disputed Companies"*), was to be answered that all the Disputed Companies were beneficially owned and controlled by the Shareholders.

(4) That the first sentence of Issue 7 *("Did the Shareholders believe, contemporaneously, that the Disputed Companies were beneficially owned and/or controlled by the Bank?"* is to be answered in the negative. Mr Yurov, Mr Fetisov and Mr Belyaev did <u>not</u> believe contemporaneously that the Disputed Companies were beneficially owned or controlled by the Bank. On the contrary they knew that they were all beneficially owned and controlled by the Shareholders.

(5) In relation to Issue 8 – *"Were the Disputed Companies held and/or used for the benefit of the Bank and, if so, what if any relevance does this have for the pleaded claims"? –* I understand this to be directed at the Shareholders' case (developed during the course of trial and in closing) that even if (as I have found) the Borrowers and other companies in the offshore network were beneficially owned by the Shareholders then nonetheless they (or some of them) were used "for the benefit of the Bank". The short answer is that "balance sheet management" is neither "for the benefit of the Bank" nor in its best interests. Issue 8 is to be answered in the negative. The Disputed Companies were not held or used for the benefit of the Bank.

(6) Mr Yurov's and Mr Fetisov's account as to their relationship with, and knowledge of the offshore companies, including the Disputed Companies, was a knowingly false and untrue account based on an (invented) *ex post facto* distinction between "Shareholder Companies" and "Bank Companies" which was maintained throughout the trial notwithstanding the weight of evidence to the contrary. I am satisfied that Mr Belyaev's account as to his relationship with, and knowledge of the offshore companies, including the Disputed Companies, was also a knowingly false and untrue account based, as it was, on a false denial of knowledge of the companies and their ownership.

(7) It is to be inferred that each of the Shareholders lied to hide the truth, which is in any event amply corroborated by the contemporary documents identified, namely that the Shareholders were the ultimate beneficial owners of all of the Borrowers and that they controlled and used all the companies for their own personal benefit.

813. Thus, in the light of those findings and the reasons given therefore, Issue 19 is to be answered that the Shareholders did stand to and did benefit personally from the making of each of the Loans and Transactions, it was each of the Shareholders' intention to personally benefit from the proceeds of the Loans and Transactions and they did not intend such proceeds to be used for the benefit of the Bank. However, in circumstances where none of the Bank's claims depends on establishing the fact of any personal benefit I can see no utility in addressing the matter in great detail.

814. It is common ground that the following were personal benefits:

(1) US$900,000 of the funds advanced to Erinskay and Baymore were transferred to Mishcon de Reya in respect of Mr Yurov's legal fees in the Kolyada litigation.

(2) The end recipient of RUB 50 million (approximately US$1.52 million) out of a RUB 1.1 billion loan provided to LB Collection Services ("LBCS") was Merrill Lynch, for the purpose of the "purchase of 265,511 shares (8.95% of the share capital) in Management Company Trust (majority shareholder of NBT) by TIB Holdings [TIBH], Neaspal, Winsala and Zaploma for USD 7.5 m (approx. RUB 245.8m)".

815. The relevant evidence in relation to Kolyada is addressed in Section C.2 (in the context of observations on Mr Yurov) and in the Section R.1 (Erinskay and Baymore), and in relation to the purchase of the Merrill Lynch shares in Section R.2 (LBCS).

816. At paragraph 29 of the Bank's Closing Submissions the Bank identifies particular assets of each Defendant. I see no utility in setting them out in this judgment. It is not in dispute that each of the Shareholders has substantial properties and a lifestyle commensurate with the wealth they have experienced. What assets each Defendant has will be relevant at the enforcement stage, but it is not necessary to identify the relevant assets for the purposes of the issues that arise before me, save to the extent relevant to Section Q (Assets held by the Shareholders' wives) which is addressed in Section Q.

817. In relation to sources of income of the Shareholders during the period of time in question:-

(1) Between 2010 and the Bank's collapse, the Shareholders were each paid US$2.5 million per annum in salary and guaranteed bonuses by the Bank. Between 2006 and the Bank's collapse in December 2014, they received over US$73 million in total (Mr Yurov: US$26,671,862; Mr Fetisov:US$22,517,054; and Mr Belyaev: US$24,356,431).

(2) Between May 2011 and December 2014, the Shareholders received some US$68 million into their Swiss bank accounts at Bordier Bank, routed by Mr Worsley through the accounts of Kuri Hills using sham "contracts". As the Bank identifies, the funds were made up principally (but not exclusively) of distributions from the single successful business venture, WR/RCP, which the Shareholders acquired (and later funded) with loans from the Bank (the Shareholders never invested any of their money - as Mr Fetisov admitted in evidence). The amounts received and the reason for certain receipts is in issue but it is not disputed that the Shareholders did receive personal benefits from WR/RCP as companies beneficially owned by the Shareholders, and it is agreed, for example, that Mr Yurov received US$7,348,000 in August 2011 into his personal account at Bordier in connection with WR/RCP (though Mr Yurov's case is that this was a distribution of profit by dividend whilst the Bank submits (based on Mr Allen's evidence) that the profits of WR and RCP derived from the Loans and Transactions).

(3) Mr Popkov's unchallenged evidence, and Mr Allen's evidence (not disputed by Mr Davidson) also show that the Shareholders received US$20.5 million of the proceeds

of the WR/RCP loans from the Bank, which was not needed to purchase the Billa properties and which ultimately reached their bank accounts at Bordier.

(4) The Shareholders also made a further personal profit of some US$9.65 million from the transaction relating to Moscow River. Mr Popkov's unchallenged evidence is that, in November 2010, the Shareholders used US$25 million of the funds lent to Moscow River by the Bank (following approval by the CC, chaired by Mr Yurov) to invest in a residential development, Barkli Plaza, near the Kremlin. In June 2012, Moscow River sold the property at a profit. Under the loan agreement it was obliged to pay 10% of the sale proceeds to the Bank. In fact more than US$1 million was transferred to Kuri Hills (which was transmitted to the Shareholders' accounts at Bordier) and US$9 million to Serpoint, a Shareholder company, of which US$8.65 million also ended up in the Shareholders' Bordier accounts via Kuri Hills.

818. Self-evidently if the Bank had been unable to continue to trade the Shareholders would not have been in a position to receive, or to continue to receive, such benefits (or indeed any benefits).

819. I have already addressed the issues arising in relation to balance sheet management in Sections G.3.1 and G.3.2 above finding that the "balance sheet management" exercise was neither reasonable nor in the best interests of the Bank. It was also not bona fide and indeed was dishonest, in the circumstances, and in the respects, I have identified.

820. I address the issues arising in relation to the CBR at Section I.4 below. Suffice it to note at this point that I find in due course that:-

(1) The Shareholders intended to deceive the CBR in relation to what they were doing (in terms of balance sheet management).

(2) That notwithstanding the suspicions that the CBR had, the CBR did not know, and neither Mr Yurov or Mr Fetisov believed that the CBR knew, that the Bank was lending money to off-balance sheet companies in order to service or repay debts owed to the Bank by other borrowers. However, that is, itself, a false premise in that what was actually being done was lending for the benefit of the Shareholders and not for the benefit of the Bank nor was it to rescue previous projects following the 2008 financial crisis. Nor did the CBR tacitly approve or not require the Bank to cease such practices – on the contrary the CBR was always trying to bottom such matters out, but never succeeded in doing so due to the Shareholders' breaches of duty.

(3) Based on the evidence of Ms Podstrekha, which I accept, had the CBR discovered that the Bank was undertaking balance sheet management (in the senses in which it was being deployed including to evade banking standards including N6, and to facilitate connected lending to companies of which the Shareholders were the ultimate beneficial owners, all without appropriate reserving) and/or if the accounts had not been falsified and the true financial position had been revealed, the CBR would have revoked the Bank's licence, and would have done so with immediate effect. On this hypothetical, this would have occurred immediately (i.e. as soon as such balance sheet management and/or false accounting occurred).

821. Accordingly the Bank would not have been able to continue to trade (the Bank's licence having been revoked) and the Shareholders would not have been in a position to receive, or to continue to receive, such benefits (or indeed any benefits).

822. It follows that Issue 20 is to be answered as follows: the Shareholders did benefit from the "balance sheet management" exercise itself including by way of:

(1) continuing receipt of salary and bonuses from the Bank;
(2) the Loans and Transactions; and
(3) other benefits (such as those pleaded at paragraph 14 of the Yurov Reply, paragraph 10 of the Belyaev Reply and paragraph 13 of the Fetisov Reply)**.**

These would not have accrued to the Shareholders had the "balance sheet management" not occurred and the true financial position of the Bank had been revealed, as the CBR would have revoked the Bank's licence. The fact that the Shareholders did receive personally benefits in such circumstances does not give rise to any separate claim against the Shareholders. It does, however, go towards explaining why the Shareholders acted as they did.

823. Issue 21 asks whether the Bank is entitled to rely on additional alleged personal benefits to the Shareholders that have been addressed in the accountancy reports served on behalf of the Bank and Mr Yurov specifically (i) the Menatep Transaction; (ii) the Kolyada Transactions; (iii) Willow River and RCP; (iv) Yurov House Purchase; (v) Yurov and Fetisov Personal Loans; and (vi) the Merrill Lynch Transaction and if so, have such matters been established?

824. Leaving aside pleading points (and the debate is somewhat arid given that no claim depends on whether any particular personal benefit existed), the issues that arise under Issue 21 involve the evidence of the experts Mr Allen and Mr Davidson and raise complex issues as to the source of funding and benefits received, and the extent to which monies can be traced. This is made all the more difficult by the labyrinthian network of offshore companies and the impossibility of following the track of the money in many cases with the result that the experts have had to make assumptions that may or may not be correct. In circumstances where the Bank does not bring a tracing claim and none of the claims depend on establishing the fact (still less ascertaining the precise routing and quantum) of any personal benefits I do not consider that there is any utility in addressing such matters further in this section in the context of personal benefits – as appears above there were undoubtedly personal benefits and the identification of yet further personal benefits does not advance any of the pleaded issues. To the extent that such matters can properly be raised, and are relevant to other issues, they are addressed elsewhere in this judgment including in Section R in relation to particular borrowers.

I.THE CBR (ISSUES 22-23)

22. Was the CBR aware (or did Mr Yurov and/or Mr Fetisov believe that the CBR was aware) of the fact that the Bank was lending money to off-balance sheet companies in order to service or repay debts owed to the Bank by other borrowers, and, if so, did it tacitly approve and/or not require the Bank to cease such practices?

23. Is the Bank entitled to advance a case that the lending caused the Bank to be in breach of the Instructions and, if so (i) has that case been made out and (ii) to what extent did the Shareholders have knowledge of such breaches?

I.1 Overview as to the relevance of matters relating to the CBR

825. It is important to bear in mind what the relevance of matters concerning the inter-relationship between the Bank (and involvement of the Shareholders) and the CBR is, as Issue 22 essentially addresses an aspect of the Shareholders' defence to the Bank's case on "balance sheet management" to which the Bank has responded, and Issue 23 is an aspect of the Bank's case (but it not suggested that it gives rise to any separate cause of action), whereas the Bank submits (and I am satisfied that the Bank is right in such submission) that the relevance of what the CBR was and was not told (and why) is relevant at a more fundamental level in that it demonstrates that the "balance sheet management" exercise was from the outset a fundamentally dishonest exercise intended (amongst other matters) to mislead both the CBR and the outside world in relation to the financial condition of the Bank and the Shareholders knew it to be dishonest, and any transactions entered into it for this purpose could not have been in good faith, reasonable or in the best interests of the Bank. It also goes to credit, and (as I have found), sheds light on the honesty of the Shareholders. I have already made my findings in that regard in Section C.3 (and Section G.3.1 in relation to "balance sheet management).

826. This is an important distinction, as in the Shareholders' Closing Submissions much time is spent exploring whether the CBR were in fact misled rather than grappling with what the intentions of the Shareholders were, and whether what was being done was dishonest and/or in the best interests of the Bank, and what light this sheds on whether transactions entered into for this purpose were made in good faith and were reasonable and in the best interests of the Bank. It is perhaps unsurprising that the Shareholders have adopted such an approach given that, as I have already found in Section G.3.1, "balance sheet management" (as used by the Bank) was from the outset a fundamentally dishonest exercise intended to mislead both the CBR and the outside world, and was known to be such by the Shareholders. The point to bear in mind at this stage is that this is all so whether in fact the deception succeeded – to attempt to do so is inherently dishonest and not in the best interests of the Bank.

827. In fact (as addressed in due course below in Section I.4) the CBR was misled, but that is not necessary for the Bank to make its case good on such points. If anything the Shareholders' attempted riposte, as encapsulated in Issue 22 (had it been demonstrated), essentially is by way of mitigation or explanation – i.e. what we did was not so heinous as in fact the CBR was not misled – but that does not take away (1) the fundamentally dishonest state of mind that accompanied the decision to falsify the accounts and seek to mislead the CBR on the basis that this was only an administrative offence punishable by

a fine in circumstances where it was believed (whether or not true) that if the losses had been recorded in the Bank's books the CBR would have revoked/would have had to revoke the Bank's banking licence, and (2) that it cannot possibly be suggested that what was attempted (whether successful or not) was in good faith and in the best interests of the Bank (and as I have already found in Section G.3.1, it was not).

828. I have already addressed, and made my findings in respect of, Mr Yurov's 28 June 2015 memorandum at length in Section C.3.1 when considering Mr Yurov as a witness, and in Section G.3.1, where I also addressed Mr Yurov's Second Affidavit and his oral evidence, when considering "balance sheet management" as carried out by the Bank to the knowledge of the Shareholders.

829. In Section G.3.1 I concluded, for the reasons there given, that even were Mr Yurov's and Mr Fetisov's evidence to be taken at face value (which it clearly could not be as it is readily apparent that this "balance sheet management" was <u>not</u> about the Bank in the aftermath of 2008 financial crisis using off balance sheet companies to enable the Bank to take control of collateral in respect of defaulted loans), it is a clear (and inevitable) admission that inaccurate or false accounts/returns (however one characterises what was being done) were generated with the purpose of creating something other than an accurate position of the Bank's financial position without which the Bank would have had (or would have been at a risk of having) its banking licence revoked by the CBR (as addressed in Section I.5 below).

830. That this was the <u>belief</u> of Mr Yurov (which is what matters in the context of the Bank's case on dishonesty and "balance sheet management") is amply demonstrated by Mr Yurov's own evidence which, on this occasion is an admission against his own interest. That this was Mr Yurov's belief is apparent from what was said on the face of his June 2015 memorandum (as already quoted in Sections C.3.1 and G.3.1), from his Second Affidavit and from his oral evidence. It suffices at this point to repeat what he said at paragraph 30 of his Second Affidavit and when giving his oral evidence as this unequivocally establishes his belief (a belief to which the other Shareholders did not demur on receipt of the June 2015 memorandum):-

(1) "31. As a result, **there was considerable concern** that if those losses had all been recorded on the Bank's balance sheet, **it would have had its licence revoked** by the Central Bank of Russia and consequently been declared bankrupt. For obvious reasons, the Bank's management wished to do everything possible to prevent this from happening, and took steps to manage its balance sheet using its pre-existing offshore structure…"

(emphasis added)

(2) Mr Yurov's oral evidence (Day16/103:15 to Day16/104:1):

> "**My understanding is that** if that Bank had to, like, literally two options: first to realise losses which were not actual losses at the time and to reflect this on its books and in that case there was a risk that capital of the Bank will decrease for more than 20 percent**, which might lead to the withdrawing of the licence as one of the possible options for Central Bank**. Or the other option was not to -- not realise this mark to market losses but to take over the assets and to recover

them and to proceed accordingly with the reporting. I mean, to reflect in the reporting this course of action."

(emphasis added)

831. It is equally clear that Mr Yurov's intention was to mislead the CBR given that he admits that "**a decision was made** to start submitting **false accounts** to the CBR (which, in his understanding, was only an administrative offence punishable at most by a fine and licence revocation (June 2015 memorandum)). Whatever the precise translation, this is a clear admission of a conscious decision to mislead (for that is what false accounts or mis-stated accounts are inherently intended to do – present a false picture and so mislead), and as such this is an equally clear admission of conscious dishonesty – it is inherently dishonest to seek to mislead a regulatory body. It is no less dishonest whether or not they are successfully misled. Neither Mr Fetisov, or Mr Belyaev reacted with surprise or sought to distance themselves from such conduct upon receipt of the June 2015 memorandum, the reason being, I am satisfied, that they each knew of such decision and were party to it (as already addressed above).

832. However, there were in fact multiple respects in which matters were either concealed from or misrepresented to the CBR, namely:-

(1) The concealment of the Shareholders' personal ownership of companies (including but not limited to the admitted Shareholder Companies) coupled with positive representations that the various nominee shareholders and fake "nominee UBOs" were the real beneficial owners of the admitted Shareholder Companies and other Borrowers when they were not (addressed in Section I.3.2 and I.3.3 below).

(2) Borrowers were presented as being owned by separate "investors" so as to mislead the CBR into believing that there was no undue concentration of risk with a single borrower (so as to (falsely) claim compliance with the CBR N6 requirements) when the Bank was in substantial breach of the same in circumstances where all the Borrowers were owned and controlled by the Shareholders (as addressed in Sections F.6 and I.2).

(3) Various companies including Erinskay and Baymore were falsely presented to the CBR as arm's length commercial lending to genuine independent businesses based in Cyprus with their own employees and offices (addressed in Section I.3.3 below), and

(4) The Bank repeatedly represented to the CBR that the development and other real estate projects to which the Bank was heavily exposed (Gelendzhik, Kodinsk, Glukhovo and Yaposha) had good prospects and would lead to substantial future revenues, when the reality was that they were consuming a steady stream of very substantial loans from the Bank without ever being in a position to service them still less repay them (memorably being described by Mr Yurov as "garbage").

I.2 The CBR and its role

833. The CBR regulates the Russian banking sector. Ms Podstrekha's evidence is that, as one would expect of any bank regulator, the CBR pays special attention to matters such as loans to connected parties, concentration of risk, liquidity and capitalisation. In this regard (as with other bank regulators) it has rules limiting the extent to which banks can

be exposed to a single borrower or group of related borrowers - the purpose of which is obvious as over exposure to individual borrowers, or related borrowers, could result in very substantial losses (and connected losses) which is relevant to reserving (as Ms Podstrehka explained in her evidence) with the possibility of a very substantial loss being suffered by a bank on the collapse of one group of related borrowers (which could itself jeopardise the survival of the bank itself).

834. As Ms Podstrehka also explained in her evidence if the operations of a particular bank posed a real threat to the interests of depositors, the CBR had a range of sanctions available to it including, ultimately, the revocation of the bank's licence and the appointment of provisional administrators to take over its affairs. The contemporary correspondence shows that the risk of licence revocation by the Bank was one that the Shareholders were well aware of and its use of "balance sheet management" was designed to circumvent (as recognised by Mr Yurov in his June 2015 memorandum and in his Affidavit).

I.2.1 The N6 Standard

835. In relation to lending, it is common ground (as addressed in the pleadings) that the associated rules are contained in CBR Instruction 110-I and later No. 139-I (which are in material respects in similar terms) and provide (what is known as the "N6" standard):

> "[C]orporate borrowers are regarded as a part of a group of related borrowers where one of the borrowers is able, directly or indirectly (via third parties), to exercise material influence upon decisions taken by the management bodies of another borrower (other borrowers), or where a third party, who can also act as an independent borrower, exercises, directly or indirectly, material influence on decisions taken by the management bodies of another borrower (other borrowers)."

836. The N6 standard is of obvious relevance to the operations of the Bank in the context of the myriad of offshore companies and the ultimate control and beneficial ownership of the Shareholders. The Shareholders were perfectly well aware of this, and one of the very purposes of the offshore network was to circumvent it (which again can hardly have been in the best interests of the Bank). Whatever the precise meaning of the N6 standard its purpose is both clear and obvious. Attempting to circumvent it cannot possibly be in the best interests of a bank. It should go without saying but banking standards are to be obeyed not circumvented by a bank.

837. Whilst Mr Yurov denied that he knew that the N6 standard was being breached saying that he had relied upon those who were managing the companies and dealing with the CBR to ensure compliance, such evidence is not (contrary to the submission in Mr Yurov's Closing Submissions) "credible evidence". I am satisfied that it is untrue evidence, which I reject. Mr Yurov and Mr Fetisov knew perfectly well that the N6 standard was being evaded by the Bank, as is clear from an email from Mr Worsley to Mr Yurov and Mr Fetisov:

> "We have to think of N6 issues. Hence **the need for a structure that shows multiple 'owners'** and also **shows multiple separate structures**. We cannot respect N6 and have it all owned by one person in one company."
>
> (emphasis added)

838. An attempt is made in Mr Yurov's Closing Submissions to suggest that this email is ambiguous, and whilst acknowledging that *"a structure that shows multiple owners"* could be interpreted as indicative of evasion (something of an understatement), it is suggested that the reference to "respect N6" suggests avoidance. It is then submitted, *"If, as it obviously is, N6 is a complex and formal requirement then a structure which had multiple persons who were owners for the purposes of N6, which might well be a formal matter, would not evade N6, though it might evade it".* I am satisfied that this email smacks of evasion rather than mere avoidance, but I consider that the submission in any event misses the point – in the context of a regulated bank "avoidance" cannot possibly be an acceptable tactic given the very purpose of N6 and the protection of the capital of Bank and its investors. It certainly cannot be regarded as in the best interests of the Bank nor can the actions of those acting on behalf of the Bank.

839. Mr Yurov's knowledge of the evasion of N6 is reinforced by another email from Mr Worsley to Mr Yurov which brings home the true enormity of the operation that was required, over time, to continue to circumvent the N6 standard:-

"We now have just over 200 companies. This sounds like a huge number, but it is not unreasonable. Bear in mind that we have to separate structures in layers, when we make financing schemes, **so that when the CBRF looks** [at] incoming/outgoing financial flows, **they do not see connections between layers**. We always minimize the numbers of companies in layers, using companies that are in neutral visual positions in multiple structures. **We also have to take into account N6 issues, which mean that we need multiple silos**."

(emphasis added)

840. On any view this is about deceiving the CBR (ensuring that they do not see connections that they would otherwise see – the connections between the layers and between the companies) and it is also an implicit recognition that if the CBR did see the connections it would consider that the companies were related - this would impact on the N6 standard and further reserving would be required (given the whole purpose of the N6 standard). An attempt is again made in Mr Yurov's Closing Submissions to suggest that this email is again ambiguous given the reference to *"take into account N6 issues"* and that it is about avoidance not evasion, but taken as a whole it clearly involves deception of the CBR – that is the territory of evasion not avoidance but again the submission misses the point in the context of a regulated bank that should not be embarking upon avoidance still less evasion.

841. Indeed there is a degree of brazenness in Mr Yurov's submissions, not least when he refers to the reference in one of the emails to an "N6-friendly ownership structure" as being hardly even ambiguous, and *"its natural meaning would be a structure that* ***exploited*** *lawfully, the formalities of N6"* (emphasis added). The clue is in the word "exploited". Once again I do not consider that a regulated Bank should be exploiting the N6 standard, and if those acting on its behalf seek to do so, it cannot possibly be suggested that they are acting in the best interest of the Bank (set against the backdrop of the regulatory powers of the CBR).

842. The Shareholders' submissions also fail to recognise, and have regard to the fact, that the express wording of the N6 standard makes clear that it is about "material influence" and so is looking to the substance rather than the form – an approach which was reflective

of the general approach of the CBR, as Ms Podstrekha explained when giving oral evidence:-

> "The thing is that in banking supervision, we analyse transactions based on their economic content, not based on their form. If in the form it's an interbank lending, that does not mean that indeed the risk will stay with counterparty bank. In its essence, that is crediting other borrowers via that bank. However, as a rule, in cases like this, if loan is not repaid by the borrower to the intermediary bank, it does not repay the loan to the Russian bank. That's the way it looks in essence."

843. Ultimately it is necessary to stand back and look at the overall picture, which is that of the vast majority of the Bank's corporate lending being to companies which were (as I have found) beneficially owned by the Shareholders, through a massive, opaque, offshore network of companies employing multiple fake "nominee UBOs" (of which all the Shareholders were aware, as I have found), that gave rise to a great, and obviously unacceptable, concentration of risk. No one can credibly say that they considered this to be acceptable, or a course of conduct that a director could acquiesce in consistent with his duties, and I reject the attempts of the Shareholders to do so.

I.2.2 The N1 Standard

844. As addressed in Ms Podstrekha's evidence, the CBR also has "capital adequacy ratios" which were known as the "N1" standard. It is calculated by reference to the degree of credit risk amongst other matters.

845. The classification of loans into different categories of quality is governed by Bank of Russia Regulation 254-P. There are essentially five different quality categories from Category I ("no credit risk") to Category V ("bad loans"). As would be expected, there is an increase in the provision that must be made by a bank as the quality of a loan decreases. Ms Podstrekha's evidence was that this regulation is consistent with international principles and is regularly checked by the International Monetary Fund.

846. The N1 standard was problematic for those involved in the operation of the offshore network as Mr Yurov and Mr Fetisov knew, and as can be seen from an email from Mr Worsley to Mr Yurov and Mr Fetisov:-

> "There is a new CBRF specialist in NBT. He is sniffing around, and we are losing the ability to do intra-month re-structurings as a result…. The result is that N1 is dangerously low…. As a result of the N1 levels, we cannot make the deposit into Anton that we need to close the Winter Bank deal…. The loss if the intra-month flexibility plus the N1 levels is a problem. Potentially a serious problem…"

847. Mr Yurov accepted when cross-examined that he knew what the N1 standard was, and I am satisfied that he cannot but have been aware that if the Bank's lending had been properly recorded the Bank would have been in serious and persistent breach of N1 and N6 (though he denied it). I am equally satisfied that Mr Fetisov knew the same (not least as a recipient of the same emails). In the light of my findings in relation to balance sheet management and Mr Belyaev's knowledge of the same, he too must have had such knowledge.

I.2.3 The CBR's contemporary concerns in relation to beneficial ownership and related party lending

848. When considering evidence given on behalf of the CBR as to its concerns in relation to beneficial ownership and related party lending it is relevant to note that the contemporary documentation evidences that the CBR did have such concerns contemporaneously, and that presents the backdrop to its communications with the Bank, and the false statements made in response.

849. Thus, on 8 April 2010, the CBR published a document entitled "Information of 8 April 2010" dealing with the risks of related-party lending by banks. It provided amongst other matters as follows:-

> "The Department of External and Public Relations of the Bank of Russia informs that a letter from the Bank of Russia No. 04-15-6/1550 of 05/04/2010 "On Owner-Related Risk Assessment of Banks" was sent to the territorial agencies of the Central Bank of the Russian Federation, as follows.
>
> One of the most important lessons of the crisis for the Russian banking system was the confirmation of the fact known from the worldwide experience that **transactions with owners and other persons affiliated with the bank are generally more risky than transactions with third parties (not affiliated with the bank)**.
>
> Almost all banks that experienced serious shocks during the crisis were characterised by an increased concentration of risks related to business owners. Moreover, it is this circumstance, coupled with the nature of the subjects of investment of funds (investment projects), that in the vast majority of cases was the main reason for the financial problems
>
> In connection with the foregoing, **the Bank of Russia invited its territorial agencies to conduct purposeful work on assessing the level of risks assumed by the banks related to actual (beneficial) owners and their affiliates** (in accordance with the definition of affiliated persons provided for in Article 4 of the Federal Law No. 948-1 of 22/03/1991 "On Competition and Restriction of Monopolistic Activity in Commodity Markets"), including assumed risks related to business owners and affiliated persons (these risks are hereinafter referred to as the "owner-related risks").
>
> **Assessment of the level of bank owner-related risks will be based on the content approaches, i.e. not only by the criterion of legal relations or ties with respect to capital, but also on the basis of actual ownership of the bank by individuals and the relevant business (organisations).**"
>
> (emphasis added)

850. This document went on to identify a number of factors considered to indicate the presence of undisclosed related-party dealings, such as transactions conducted "without obvious economic sense", lending to companies that did not conduct actual business activity, "deliberately complicated" ownership structures, lending for vague purposes such as "replenishment of working capital", lending to companies at "mass registration addresses" and "fiduciary (trust) transactions" taking the form of "placement of funds at correspondent accounts at correspondent banks and/or in the form of interbank loans". These are all features which the CBR clearly considered were unacceptable indicia of

bank-owner related risks. It was also noted (as could have been written in respect of what was to be instigated at the Bank):-

> "When banks service their owners' business, there are usually several characteristics signs of such activity. It is also necessary to take into account that the "schemes" used by banks in order to conceal the real content of transactions related to servicing the owners' business change over time and become more complicated. In this regard, the list of signs given in this letter cannot be regarded as exhaustive."

I.3 The Bank's concealment of admitted ownership of Personal Companies and false information about UBOs

1.4.1 Relevance of such matters

851. The very fact of concealment of ownership of Personal Companies and the use, and concealment of the use of UBOs from the CBR (and associated misrepresentations) was self-evidently dishonest (and it also begs the question why such UBOs were being used in the first place). In this regard it also goes without saying, that it cannot be reasonable, or in the best interests of the Bank or in good faith to conceal ownership of Personal Companies from, or provide false information about UBOs to, the CBR, not least given that such information was regarded as of relevance by the CBR as the Bank and its Shareholders knew. The same is true of "balance sheet management" more generally (in the sense utilised by the Bank).

852. What was of most concern to the CBR (as already addressed in Section F.2.4.1 above) was not ownership *per se* or related party lending *per se* (though it did expressly ask about ultimate beneficial ownership, contrary to what was submitted on Mr Yurov's behalf in closing – see the CBR's letter to the Bank dated 19 October 2012) but what the implications on that were for reserving. This was expressly addressed by Ms Podstrekha in her oral evidence (in relation to a meeting on 24 February 2011):-

> "Q. […] the whole topic of discussion had nothing to do with how these companies were controlled, did it?
> B. Because for us the main thing was not how they were controlled but **how the risk related to the companies would be evaluated**. They could be controlled by the shareholders indeed **but please do 100 per cent reserve for them** and **reflect that in the profits** and then you can issue loans to whoever."
>
> (emphasis added)

853. This also emerged clearly from the following series of questions and answers in the cross-examination of Ms Podstrekha that have already been referred to in Section F.2.4.1 but will be repeated for ease of reference:-

> "… it is very important to assess the risks correctly. I wanted to draw your attention to this fact, that there is no prohibition to provide loans to repay loans, provided that the risks are adequately assented, mathematically it turns out that the capital is decreased in the Bank and then there will be reasons to give rise to bankruptcy. If we were to provide adequate reserves, adequate provisions for the loans

provided.

Q. And I think that's -- put it differently. Your real concern wasn't who was running these companies, your real concern was whether the reserves were reasonable reserves, wasn't it?

A. Our main concern is the adequate assessment of risks of those companies. If a company has no possibility to repay the loan and it is obvious from whatever we have read in the inspection report, then the reserve for the company, the provision, should be formed in accordance with 254B, not less than 21 per cent and preferably more, up to 50 per cent. That is how the reserves should be formed. The Bank always sets the reserve as 1-2 per cent for those companies. The Bank thought that they were risk-free loans, practically, despite all the things that we saw now that one pays the other, they pay the third and it goes round in circles.

Q. But you raised that with the Bank and the answer that they gave you is that underlying these loans there were investment projects which the loans were financing. That was what they told you.

A. Yes, that's correct. And we were telling them the risk is high in those loans and they were saying, no, it's not high.

Q. But that wasn't because of whether they were owned or run by the Bank. You've just told my Lord that that didn't matter; it was all down to the judgement that you made about the underlying investment projects, wasn't it?

A. What is important is the essence, the substance, the form or the shape, the semblance, is secondary.

Q. Well, the essence and the substance here, as was obvious from the report, was that the bank was running these investment projects, wasn't it?

A. The Bank was managing them but they never acknowledged it at our meetings. They were always saying, no, no, they are not our projects."

(emphasis added)

I.3.2 Concealment of admitted ownership of Personal Companies

854. There were a number of discussions between the Bank and the CBR in relation to the business of admitted "Personal Companies", as well as correspondence, and the various minutes and correspondence make no mention that the Shareholders owned these companies, nor is there any evidence that the CBR knew of such ownership (and I am satisfied they did not).

855. Indeed Ms Podstrekha was not even asked about the written exchanges in 2012 (addressed below) in which the CBR specifically asked for information about the beneficial owners of the borrowers; and the Bank responded with a series of false

statements to the effect that the Cypriot nominee shareholders or Mr Worsley's fake "nominee UBOs" were the beneficial owners of the companies (including the "Personal Companies" that the Shareholders now admit owning).

856. It was not suggested to Ms Podstrekha that the CBR knew that all of this information was false. The reality is that the CBR had no means of knowing, and the very purpose of the elaborate and opaque network of offshore structures was to hide the true ownership behind such companies from the CBR and others (including auditors). As also appears below, it is plain that the CBR continued to believe that the Borrowers had independent owners as is evidenced by its 2014 Audit. This also impacts upon Issue 22 and the Shareholders' assertion that the CBR was aware of, and implicitly approved, the Bank having concealed off-balance sheet subsidiaries used for "balance sheet management" purposes.

857. On 10 November 2011, the CBR wrote to the Bank stating:

> **"On owner-related risk assessment**
>
> As part of the work on the assessment of risks level**, related to actual (beneficial) owners and persons affiliated with them**, assumed by credit institutions, including NB TRUST (OJSC), Branch No. 5 of the Moscow MTA of the Bank of Russia asks to submit information on the assessment of the risks related to business owners of a credit institution in accordance with the approaches set forth in the Bank of Russia Letter No. 04-15-6/1550 of 05/04/2010 by 22/11/2011, including:
>
> - detailed information on individual operations and transactions carried out by the credit institution **with actual owners and persons affiliated with them**, indicating the amounts, names, surnames of the said persons;
> - information on measures taken to deconcentrate risk;
> - questionnaires of LLC Business Group and Mourija Trading Limited."

858. The Bank replied on 25 November 2011. In its reply the Bank identified the Shareholders as the beneficial owners of the Bank itself (thus it cannot be suggested the concept of beneficial ownership was not understood). It then listed entities with whom it was said the Shareholders "*have affiliation*". Whilst particular companies in the Bank's ownership structure were mentioned (e.g. Tactio, TIB Holdings) it did not list indisputably "Personal Companies" such as Priangarskiy, Business Group, Willow River or RCP (nor did it list Moscow River and Taransay). It was not a proper or honest response.

859. On 7 December 2011, the CBR wrote to the Bank expressing its view that, Sapkont Holdings Limited, Sapkont LLC, SiberianKD, Priangarskiy and Business Group should be recognised as a single group of connected borrowers. No mention was made (I am satisfied because the CBR was not aware) of the fact that the Shareholders were personally the beneficial owners of SiberianKD/Business Group/Priangarskiy (which they admit, and Sapkont which they deny, but which I am satisfied they were also the beneficial owners of). There was also correspondence between the Bank and the CBR in relation to NRT/Yaposha in which no mention was made of the Shareholders' beneficial interest in NRT.

860. The following year, on 12 April 2012, the Bank wrote a long letter to the CBR responding in detail to the CBR's 2012 audit report. In relation to Stivilon, the Bank sought to rebut the CBR's concerns about the project and the adequacy of the Bank's security in a lengthy part of the letter in which it was stated, amongst other matters, that:

> "The Report contains a reference to the following indicia of the opacity of the loan debt of **Stivilon LLC**.
>
> 1. The credit facilities provided by the Bank were used mostly to repay the debt of Ellis Trade LLC to the Bank. **In actual fact the Bank started its participation in the project as the creditor of Ellis Trade LLC, a participant of Stivilon LLC. Subsequently, the financing structure was changed so that the Bank acquired rights of claim directly against Stivilon LLC, the project operator and owner of its core asset.** This event decreased the level of risk assumed by the Bank, and the Bank has in the past repeatedly notified the Bank of Russia of its position on this issue.
>
> 2. **Black Coast** Property Development and Management Ltd – a participant in Stivilon LLC – is a resident of the Republic of Cyprus and provides its subsidiary with the funds required for the execution of its obligations before the Bank. **The Bank does not see anything unusual either in the participation of the owners of the project in its financing with their internal funds or with foreign investments in a development project being implemented in Russia**. The working group also proposes increasing the rate for establishing the calculated provisions on the loan debt of Stivilon LLC to 30%, with due account of the specifics of the investment project being implemented. The Bank also believes its position is completely substantiated, which assumes that the risks of the development project had been duly considered in the preliminary reserve rate determined in the amount of 3% and increased to 21%, with due account of the target use by the borrower of the credit facilities provided by the Bank. We would like to point out that this rate of the loan loss provisions complies with Compliance Order No. 55-22-11/5663DSP of the Bank of Russia dated 20/04/2011 previously received by the Bank.
>
> In view of the above, the Bank holds that the conclusions of the working group that it underestimated the level of risk on the loan debt of Stivilon LLC and should have established additional provisions regarding this asset are unsubstantiated."
>
> (emphasis added)

861. In this letter the Bank was presenting itself to the CBR has having provided finance to the project as a lender to Elis Trade and then Stivilon itself. It was not mentioned (as was the case) that the Shareholders were the beneficial owners of 51% of Stivilon (and so this was certainly related-party lending), nor even what is the Bank's case (that the Bank itself owned 70% of Stivilon). The letter then goes on to discuss SiberianKD, without mentioning that was also beneficially owned by the Shareholders personally (as the Shareholders now admit). Further, in the section headed "*On the assessment of the risk of the owners of the Bank", the Bank's letter referred to the CBR's "assumption that the companies Crylani Trading Ltd., Oldehove Trading Ltd. and other clients of the Bank are related parties of its owners*" (which had been based on a similarity with other

transactions), the incorporation in Cyprus where TIB Holdings was also based; and the "opacity of the information on the ultimate beneficiaries".

862. Far from accepting all of this the Bank expressly denied such connections existed:.

> "To all intents and purposes, transactions that are similar in nature are understood to mean the organisation by the Bank of issues of credit notes, possibly, here the participation of C.R.R. B.V. in the issue of securities as the issuer is considered a principled factor. In connection with this fact, the Bank notes that in the past it was the organiser or co-organiser of CLN issues by AvtoVAZ OJSC, NOVATEK OJSC, Siberian Service Company CJSC, and also Tatfondbank JSCB, which were also issued by C.R.R. B.V. Taking into account the patent erroneous assumption that the Bank is a related party with the aforementioned borrowers, the first of the criteria used by the Working Group should be considered wrong. The second criterion can hardly be deemed substantiated – its application would imply a widespread ban on the Bank and its related parties and subsidiaries from concluding asset transactions with the residents of an entire country that is a member of the European Union and ranks first in terms of the volume of investments in Russia's economy. Finally, the last of the aforementioned grounds looks particularly strange in light of the fact that the working group did not request information from the Bank during the audit regarding the ultimate beneficiaries of Crylani Trading Ltd. and Oldehove Trading Ltd."

863. This is entirely inconsistent with the existence of the balance sheet management being openly disclosed to the CBR – it was being actively concealed. In cross-examination it was put to Ms Podstrekha that the Bank's answers were "*completely unconvincing*" and she agreed that the explanations were "*not convincing*", but the fact is the Bank was concealing the true picture, and it lies ill in the mouth of the Shareholders (and Mr Yurov on whose behalf the questions were put) effectively to suggest that the CBR should have seen through the Bank's denials, and realised what was actually going on.

864. On 23 July 2012, the CBR issued an Order "*On the application of enforcement measures*" making various criticisms of the Bank's retail and corporate business and requiring the Bank to take a number of remedial actions including making additional provisions in respect of Stivilon, RCP, Mourija, LB Collection Services, NRT Holdings and other companies. It is clear, however, that the CBR remained unaware of the true nature and extent of the offshore network of companies and their ultimate beneficial ownership by the Shareholders themselves.

I.3.3 False information in relation to UBOs

865. The actual/ultimate beneficial owners of entities was a matter of obvious interest to the CBR, as the Bank (and its Shareholders) were well aware, and the CBR asked the Bank specifically for information in this regard. However, the Bank's response was demonstrably untrue, and cannot have been anything other than designed to deceive, and conceal the Shareholders true ultimate beneficial ownership.

866. In this regard on 19 October 2012, wrote to the Bank in these terms:

> "As part of the assessment of the level of risks for **actual (beneficiary) owners and their affiliates** assumed by credit institutions, including NB TRUST (OJSC),

> Branch No. 5 of the Moscow MTA of the Bank of Russia requests the provision of information on the assessment of risks for the business done by the credit institution owners in accordance with the approaches set forth in the Bank of Russia's Letter No. 04-15-6/1550 dated 05.04.2010 by 30.10.2012, and also:
>
> **- detailed information in terms of individual operations and transactions entered into by the credit institution and its beneficiary owners and affiliates**, specifying the amounts, titles, names of the said persons/entities;
>
> - information about the measures taken to deconcentrate the risks;
>
> **- information on the ultimate beneficiary owners of the borrowers**, reported in forms 0409117 "Data on large loans" and 0409118 "Data on the credit risk concentration" as at 01.10.2012, as well as the profiles of such legal entities."

867. It was accompanied by a form, to be filled out by the Bank. The form was entitled *"Information about the assessment of risks for the business done by the credit"* and one of its columns was headed, *"Information about the owners' business financed by the bank (projects, facilities, companies, etc.)".* From the letter, and from the form, it was obvious that the CBR was seeking information as to the ultimate beneficial owners of borrowers from the Bank.

868. The Bank provided a response on 1 November 2012 in a letter signed by Mr Pospelov (the Chairman of the Management Board). It identified the Shareholders as its beneficial owners and provided a list of companies with which the Shareholders were said to "*have affiliation*". It was a wholly misleading list. It only contained companies in the Bank's own holding structure, including Tactio and TIB Holdings. It did not mention (but clearly should have mentioned) the admitted "Personal Companies" (Willow River, RCP, SiberianKD, Business Group, Priangarskiy, Taransay or Moscow River) nor any of the other Borrowers.

869. A key part of the letter was its Appendix 3 in relation to which it was stated *"Data on large loans" and 0409118 "Data on the credit risk concentration" as at 01.10.2012, is provided in Appendix 3 to this letter".* Appendix 3 is the best possible evidence that the Bank's intention was to mislead the CBR that the named UBOs were the true ultimate beneficial owners, when they were not – containing, as it does numerous false statements to the CBR about the "beneficial owners" of various borrowers from the Bank.

870. In relation to "Personal Companies" in respect of which it is common ground that the true beneficial owners of these companies at this time were the Shareholders, Appendix 3 stated that a Ms Mary Ioannou was the beneficial owner of RCP, a Ms Maria Mylona was the beneficial owner of Business Group and Priangarskiy, and a Mr Nicholas Laing (who was in fact a travel agent friend of Mr Worsley) was the beneficial owner of Willow River.

871. It is not disputed that these are all untrue statements. They are also untrue statements being made by Mr Pospelov, the Chairman of the Management Board, and Mr Yurov's own case (as reflected in his Defence) is that Mr Pospelov was aware of the balance sheet management exercise and that the Shareholders' interest in the "Personal Companies" was known to each of the CEOs at all material times. Accordingly these statements were

knowingly false when made. The obvious inference, which I draw, not least given the inherent improbability of Mr Pospelov taking such active steps to deceive the CBR without the knowledge, direction and approval of the Shareholders, is that this was all done, at the instigation of, and with the knowledge of the Shareholders, to conceal from the CBR their ownership of their "Personal Companies" that had borrowed very large sums from the Bank (and which in the case of Priangarskiy would continue to borrow very large sums from the Bank). In this regard it is apparent, as I have found, that the Shareholders knew of the use of such (fake) UBOs, and the purpose of their use.

872. Appendix 3 contained a raft of further false statements about a whole catalogue of entities and associated (fake) UBOs. It perhaps again goes without saying but the very fact of doing so shows that the true position was being (deliberately) concealed from the CBR. Of course none of this would have been necessary (or indeed make any sense) if the CBR did have knowledge of the "balance sheet management" exercise being undertaken. The list of fake UBOs and associated false statements are identified at paragraph 144 of the Bank's Closing Submissions and featured the likes of Mr Scheffel, in fact a lecturer in Latin American Studies being identified as the beneficial owner of 51% of Stivilon (that is the stake actually held by Black Coast for the ultimate benefit of the Shareholders) and Mr Worsley's gardener, who was stated to be the 99% UBO of Filenta. What little truth existed in Appendix 3 featured in the Shareholders being identified as the UBOs of the Bank itself and of TIBH and TIBI.

873. It was not put to Ms Podstrekha that the CBR knew this was all untrue or that the CBR (for some incomprehensible reason) turned a blind eye to it. I am satisfied that the reality is the opposite, and that Appendix 3 shows that it was necessary to make such untruths as the CBR did <u>not</u> know what was going on, and to ensure that that remained the position.

874. Thereafter in early 2014, the CBR asked questions of the Bank concerning Priangarskiy. The Bank replied in a letter on 30 January 2014. It did not mention that the UBOs of Priangarskiy were none other than the Shareholders themselves, a fact of obvious materiality which would have been of undoubted interest to the CBR.

875. The CBR's 2014 Audit Report is of particular relevance as it evidences the fact that the CBR had been, and continued to be, deceived in relation to beneficial ownership. In relation to admitted "Personal Companies", false information had again been given to the CBR as to their beneficial ownership, with a Maria Milona being said to be the 85% owner of Business Group and Priangarskiy and the sole beneficial owner of SiberianKD, an "Alexander Grandt" (seemingly a reference to the travel agent Nicholas Alexander Grant Laing) was said to be the beneficial owner of Willow River, whilst a Mary Ioannou (a Cypriot nominee) was said to be the sole shareholder of RCP. All untrue. Equally false information was given in relation to supposed "Bank Companies" (in fact beneficially owned by the Shareholders as I have found). Thus, by way of example, Mr Scheffel who it was said to be an Argentinian national, was the "beneficial owner" of Stivilon, whilst the "beneficiary owners" of StroyEcologiya were said to be a Cypriot national called Nota Pelikanu and a Ukrainian named Natalia Grebennikova, a Theodora Kiriyakou of Cyprus was said to be the beneficial owner of Mourija, another of the "nominee UBOs", a Ms Chloe Vos, was said to be the beneficial owner of Spartakovskaya 5 LLC (LLC5), a Richard Creasey, another 'nominee UBO' was said to be the beneficial owner of the Yaposha companies, including NRT and a Paraskevas Zacharoulus, another Cypriot national, was said to be the beneficial owner of LB Collection Services (LBCS). Again,

all untrue. Once again none of this deception would have been necessary had there been nothing to hide and/or had the CBR known the true position.

876. It is also apparent from the 2014 Audit Report that the CBR had also been misled in a further (material) respect, namely that various of the (shell) companies, had real offices and employees. Thus in relation to Erinskay, the CBR referred to (fabricated) information that the company had 6 employees and rented 113 sq. m of office space in Nicosia. It was also misled into believing that companies such as Erinskay and Baymore had genuine businesses and substantial assets in the form of Russian government bonds (the CBR examining Baymore's (apparent) "business" taking account of (false) information as its supposed substantial asset base, history of servicing of loans, accounts and credit rating.

877. The CBR's overall conclusion (based on false evidence and representations) was that there was no undue concentration of risk with a single beneficial owner when, of course, the contrary was true. The real importance of the 2014 Audit Report is to tell the lie to the CBR's alleged knowledge, it having been systematically misled, over an extended period, about the Bank's financial position, including in relation to the ownership of companies that the Shareholders accept they beneficially owned.

878. The Bank even went so far as to draft correspondence between the Bank and Columba so as to create the (false) impression of arm's length commercial dealings. Thus on 11 June 2012, Mr Worsley told Mr Iskandyrov:-

> "Marat, We really need to stop sending email chains back and forth between Columba and Trust. It looks REALLY bad if CBR ever audit the NBT email system..... Please write clean emails, rather than replying to email chains. I just told Ilya the same thing."

879. The nature of the charade for the CBRs' benefit can also be seen from Mr Worsley's email of 1 August 2012:-

> "Things are changing. This is critical because CBRF now have a Curator in NBT so we must make all requests must look similar for Columba companies and also for non Columba companies. Otherwise NBT will be in trouble… In addition CBRF is starting to 'see' beyond Cypriot nominees and to ask about real UBOs… "

Once again none of this would have been necessary had the CBR had the knowledge that the Shareholders allege they had.

880. Nor would there have been any need to hide matters from the CBR (to prevent discovery of the true position) when the CBR inspected the Bank, but that is what happened. For example, when the CBR carried out an inspection in May 2014, Mr Worsley suggested to Mr Iskandyrov: "*I heard about the CBR inspectors. May be best to hide your computer*" and he later said to Mr Postnov, *"If the CBR ask about your IPad..? Do u get Columba email on your iPhone..? If not I can give you one. Then we SMS you and you look at iPhone. And iPad as and when possible..? Just a thought."*

I.4 The CBR's relationship with the Bank and its alleged knowledge of balance sheet management

I.4.1 The CBR's relationship with the Bank

881. Ms Podstrekha had been with the CBR since 1996, and was well placed to give evidence in relation to the CBR's relationship with the Bank being the Chief Banking Supervision Administration since May 2000 (and from April 2012 Deputy Director of the Banking Supervision Department). Her evidence as to the CBR's relationship with the Bank, which I accept, is set out in her witness statement, and is in these terms:-

> "29. NBT was always considered by the CBR to be a "high risk" institution that gave rise to increased concerns. There were a number of reasons for this: (1) the asset quality was considered to be low, meaning a higher risk of default; (2) it had limited capital reserves and no institutional shareholders from which capital could be raised; (3) there had been some audits by the CBR that revealed significant risks in the Bank's activity; (4) the Bank was offering interest on deposits well above the market; and (5) we did not trust the Shareholders to be open and honest with us.
>
> 30. We raised various supervisory issues with the Shareholders and NBT's senior management at our supervisory meetings, many of which I attended with colleagues. Meetings usually were held in Moscow at the CBR's address: 12 Zhitnaya Street or at the CBR's address: 2 Balchug Street, and lasted about 1 hour. A minute of each meeting was prepared after each meeting by one of the attendees from the CBR side and then sent to NBT.
>
> 31. As a result of the financial crisis, the Russian banking sector come under significant pressure, which happened with most advanced economies, and therefore supervision increased and was aimed at identification of distressed assets of banks, including NBT, final assessment of risks which put pressure on the capital. The CBR relaxed some regulatory requirements (as did almost all central banks worldwide) given the scale of the crisis, but these were short-term measures.
>
> 32. The CBR was concerned that NBT might run into difficulties because almost all of its share capital was held by just three individuals and we were aware that many of NBT's loan assets were concentrated in the Russian property sector, which was suffering badly with values falling by more than 25%.
>
> 33. NBT's position, in summary, was that although economic conditions were challenging, they were weathering the storm because (they said) NBT had a conservative lending policy, loans were issued to reliable borrowers and were performing well, they had diversified assets and created adequate provisions for possible losses. The CBR was always sceptical about the Bank management's positive reports, because we never felt that we could trust Mr Yurov, who in his dealings with us acted non-cooperatively (refusing to provide complete and comprehensive information on the Bank's activity and not taking into account the recommendations of the CBR). Those concerns were enhanced because, for example, as part of control over the implementation of two of the biggest projects being funded by NBT loans (the development in the Black Sea at Gelendzhik and the timber plant in Siberia) our local offices reported on rather slow progress with the developments in contrast to the reports of management of the Bank that the projects would generate income very soon.
>
> 34. I confirm that NBT never stated in any meetings that I attended that it had an offshore network of companies that it used for balance sheet purposes. If this

information had been disclosed to the CBR (formally or informally) it would almost certainly have led to the immediate revocation of NBT's licence (both because of the breach of formal requirements and also due to the concealment of this). "Balance sheet management" is not legal. It is fraudulent and deceives not only the CBR but auditors and depositors."

882. So far as the CBR seeking information from the Bank as to the ownership of companies, her evidence was as follows (paragraph 44 of her witness statement):-

> "From time to time we also pressed Mr Yurov on the ownership of some of NBT's largest borrowers as we were concerned all of them were Cyprus companies and we had no independent information on them or their owners. Mr Yurov always insisted that the borrowers were owned by, what he called, the Shareholders' "business partners", which we understood to mean they were people known personally to the Shareholders. We never obtained clear information despite repeated requests and without clear evidence of wrongdoing by NBT, there was little we could do."

883. The surest guide in relation to such matters (and indeed any alleged knowledge on the part of the CBR) is the contemporary correspondence (not least in circumstances where what is now asserted by Mr Yurov and the other Shareholders is to be viewed against the backdrop of the findings I have made in relation to the veracity of their evidence). That correspondence is entirely consistent with Ms Podstrekha's evidence (and inconsistent with the evidence of Mr Yurov).

884. In relation to Ms Podstrekha's evidence of the CBR pressing the Bank and Mr Yurov, this is entirely consistent with the contemporary correspondence that has already been addressed in Sections I.3.2 (concealment of admitted ownership of Personal Companies) and I.3.3 (false information in relation to UBOs), and so far as the responses are concerned, the Bank's responses were to mislead the CBR (as addressed in Sections I.3.2 and I.3.3).

885. Perhaps the clearest evidence of all in that regard (and a blatant lie on Mr Yurov's part to boot) was what Mr Yurov told the CBR in a minuted meeting on 3 February 2010:-

> "…the borrowers of the bank are **not** related to the Bank owners and the investment projects which are credited by the Bank are **not** the business of the Bank owners."
>
> (emphasis added)

886. This lie also tells the lie to Mr Yurov's claim (as addressed in Section 1.4.2 below) that he disclosed balance sheet management to the CBR in 2009. The minutes of the meetings of 22 July 2009, 19 August 2009 and 3 February 2010 contain no such revelations as they surely would have, but in any event the minutes of 3 February 2010 and what is there recorded as having been said by Mr Yurov (which I consider is the most reliable evidence as to what was said) are simply inconsistent with such disclosure by Mr Yurov or knowledge on the part of the CBR. Once again such statements by Mr Yurov (and the various statements by the Bank in relation to UBOs and the various companies admitted to be Personal Companies) would make no sense whatsoever if the CBR did

have knowledge of such matters, and the very fact that these statements were being made to the CBR shows (1) that the CBR did not know, and (2) that the Bank and Shareholders were taking steps to ensure that they did not know, and (3) that the Bank and Shareholders were going so far as to make false statements to further such end.

I.4.2 The CBR's alleged knowledge of balance sheet management

I.4.2.1 Mr Yurov's claim

887. In paragraph 36 of his first statement Mr Yurov stated:-

> "The RCB knew not only about the widespread practice of using such companies among Russian banks, **but that the Bank used such companies: I remember myself discussing it at a meeting in 2009 with Mr Genady Melikan, a deputy governor of the RCB, and I am aware of other meetings with, in particular, Mr Plyakin (head of the RCB's department of banking supervision) at which they were discussed.**"
>
> (emphasis added)

888. Whilst I have no doubt that the CBR knew about a practice of Russian banks using such companies (though I am satisfied it did not agree with that based on Ms Podstrekha's evidence which I accept), and whilst, as addressed below, the CBR did have suspicions as to the Bank's use of "technical companies" (another euphemism liked by the Shareholders) I am satisfied that the evidence of Mr Yurov that I have highlighted above is untrue for any number of reasons.

889. First, there is no record of Mr Melikyan attending any meeting with the Bank in 2009, and whilst Mr Yurov asserted that there had been a meeting in Mr Melikyan's office where he had made such disclosure there is no evidence that supports such assertion and one would have expected such a revelation to be documented and passed to senior colleagues (as was Ms Podstrekha's evidence which I accept). Second, any alleged discussion with Mr Melikyan has to be viewed in tandem with the allegation that Mr Yurov told Mr Plyakin, and that allegation does not bear examination and indeed is, I am satisfied, itself a lie. There were three meetings at which both Mr Plyakin and Mr Yurov were present (22 July 2009, 19 August 2009, and 3 February 2010) yet there is no statement in the Minutes (as I am sure there would have been) had the Bank stated it owned or controlled any of the borrowers discussed or that it was holding its interest in such borrowers "off balance sheet" (with the consequences in that regard in relation to N6 and N1 and the veracity of the accounts). Once again I also accept the evidence of Ms Podstrekha that, "if information on the existence of NBT's network of subsidiaries and offshore affiliates had been disclosed by NBT to Mr Melikyan and Mr Plyakin they would have immediately told their superiors".

890. Third, and fundamentally, any such alleged discussion is simply inconsistent with what was said by Mr Yurov in the meeting of 3 February 2010, which I am satisfied was accurately recorded in the Minutes, as "…*the borrowers of the bank are **not** related to the Bank owners and the investment projects which are credited by the Bank are **not** the business of the Bank owners"* (emphasis added). He could not have said this consistent with his alleged discussion, and what he did say was a lie (which goes to his credit, and the worth of his evidence as to the alleged discussions). Fourth, and given the attitude of the CBR to such lending (as set out in Ms Podstrekha's evidence which I accept) the CBR would, I am satisfied, have responded in forthright (and negative) terms but there is no evidence of that. Fifth, and again fundamentally, any such alleged discussion is also

inconsistent with the Bank's subsequent enquiries, and with the false information in relation to UBOs supplied by the Bank to the CBR and the concealment of the admitted ownership of the Personal Companies (as addressed above in Sections I.3.3 and I.3.2). Sixth, it is contrary to Ms Podstrekha's evidence (which I accept) that "*NBT never stated in any meetings that I attended that it had an offshore network of companies that it used for balance sheet management purposes"* and Ms Podstrekha was an attendee of the 3 February 2010 meeting. Seventh, Mr Yurov is not a witness of truth for the reasons addressed in Section C.3.1, and in one of the very meetings under consideration, he demonstrably lied. I do not consider this aspect of his evidence to be any more capable of belief, inconsistent as it is with contemporary documentation, and witness evidence that is consistent with such documentation.

891. Accordingly, and for the reasons identified above, I reject Mr Yurov's evidence that he made the CBR aware of balance sheet management (or indeed the personal ownership of the Shareholders of companies in the offshore network) and whether in 2009 or thereafter (the subject matter of Sections 1.3.2 and 1.3.3, and the associated omissions and falsehoods on the part of the Bank and the Shareholders, being entirely inconsistent with the Bank having any such knowledge and being entirely consistent with the CBR not having such knowledge, and the Bank and its Shareholders taking steps (including through false statements) to ensure that that remained the position.

892. Mr Fetisov's evidence is even vaguer, and is in any event not substantiated by the contemporary documentation. For example, he referred to the Bank having *"taken over certain assets"* and that the CBR knew that *"such assets were being held through offshore structure and not on the Bank's own balance sheet"*. Yet, as addressed in Section G.3.1 above, this is not even an accurate statement of the (limited) assets that could possibly be said to have been taken over, and again is inconsistent with the Bank's enquiries and the Bank's (false) responses as highlighted in Sections 1.3.2 and 1.3.3, and indeed with the steps being taken to evade N6 ratio (and the consequences of N1 ratio) – neither of which it can sensibly be submitted that the CBR would have been sanguine about (given the very purpose of those standards). In any event Mr Fetisov is himself not a witness of truth and I have no hesitation in rejecting his evidence in this area. Mr Belyaev denied knowledge of balance sheet management (which I am satisfied itself was untrue). In any event given his stance, he could hardly advance a positive case on balance sheet management.

893. Mr Yurov's counsel, at paragraphs 201 to 212 of Mr Yurov's Closing Submissions, relies on answers given by Ms Podstrekha when cross-examined to submit that the Bank was aware of the use of "technical companies" and even that the CBR suspected that the companies were being used by the Bank as part of a scheme (though as addressed below neither of these submissions take the Shareholders anywhere). The reliance on such matters was all brought together, and culminated in the denouement of Mr Yurov's submissions, in paragraph 213 of Mr Yurov's Closing Submissions:-

> "Thus, there is no support for Ms Podstrekha's written evidence that the CBR pressed Mr Yurov on the ownership of some of the Bank's largest borrowers which were Cypriot companies or that he said were owned by the Defendants' 'business partners': Podstrekha WS 1 ¶44... Nor is there any support for the Bank's claim that the CBR was deceived as to the ownership or control of the borrowers. In fact, the CBR knew

that the companies were related to and controlled by the Bank but never once asked for confirmation as to their ownership."

894. That submission is breath-taking in its audacity given the evidence, including contemporary documentary evidence, before the Court (and drew a suitably explosive response from the Bank in oral closing), but as will be readily apparent from Sections I.3.2 and I.3.3 it simply does not bear examination and is inconsistent with the contemporary correspondence with the CBR, and contemporaneous lies told to the CBR. In this regard: Firstly (1), and as will be apparent from the contents of Sections I.3.2 and I.3.3 above, both the Bank and Mr Yurov were pressed about beneficial ownership and secondly (2) they lied in response thereby deceiving the recipient as to the ownership and control of the borrowers, and the CBR clearly were deceived.

895. As to (1), and by way of example, as addressed in Section I.3.2, it will be recalled that on 19 October 2012, the CBR wrote to the Bank in these terms:

> "As part of the assessment of the level of risks for **actual (beneficiary) owners and their affiliates** assumed by credit institutions, including NB TRUST (OJSC), Branch No. 5 of the Moscow MTA of the Bank of Russia requests the provision of information on the assessment of risks for the business done by the credit institution owners in accordance with the approaches set forth in the Bank of Russia's Letter No. 04-15-6/1550 dated 05.04.2010 by 30.10.2012, and also:
>
> **- detailed information in terms of individual operations and transactions entered into by the credit institution and its beneficiary owners and affiliates**, specifying the amounts, titles, names of the said persons/entities;
>
> - information about the measures taken to deconcentrate the risks;
>
> **- information on the ultimate beneficiary owners of the borrowers**, reported in forms 0409117 "Data on large loans" and 0409118 "Data on the credit risk concentration" as at 01.10.2012, as well as the profiles of such legal entities."
>
> (emphasis added)

896. This in itself tells the lie to Mr Yurov's submission – the request for information could not be clearer. Be that as it may, it was accompanied by a form, to be filled out by the Bank. The form was entitled *"Information about the assessment of risks for the business done by the credit"* and one of its columns was headed, *"Information about the owners' business financed by the bank (projects, facilities, companies, etc.)".* From the letter, and from the form, it was obvious that the Bank was seeking information as to the ultimate beneficial owners of borrowers from the Bank and the contrary is not arguable.

897. The Bank's response on 1 November 2012 (signed by Mr Pospelov the Chairman of the Management Board) was disingenuous, misleading and was obviously drafted with the intention to deceive (for the purpose of submission (2) above). It identified the Shareholders as its beneficial owners and provided a list of companies with which the Shareholders were said to "*have affiliation*" which was wholly misleading containing as it did only companies in the Bank's own holding structure, including Tactio and TIB

Holdings. It did not mention (but clearly should have mentioned) the admitted "Personal Companies" (Willow River, RCP, SiberianKD, Business Group, Priangarskiy, Taransay or Moscow River) nor any of the other Borrowers. Appendix 3, in relation to which it will be recalled it was stated that *"Data on large loans" and 0409118 "Data on the credit risk concentration" as at 01.10.2012, is provided in Appendix 3 to this letter".* Appendix 3 is, as I have already noted and found, the best possible evidence that the Bank's intention was to mislead the CBR that the named UBOs were the true ultimate beneficial owners, when they were not – containing, as it does numerous false statements to the CBR about the "beneficial owners" of various borrowers from the Bank.

898. Thus in relation to "Personal Companies" in respect of which it is common ground that the true beneficial owners of these companies at this time were the Shareholders, As I have set out above, Appendix 3 stated a Ms Mary Ioannou was the beneficial owner of RCP, a Ms Maria Mylona was the beneficial owner of Business Group and Priangarskiy, and a Mr Nicholas Laing the beneficial owner of Willow River. It is not disputed that these are all untrue statements. They are also untrue statements being made by Mr Pospelov, the Chairman of the Management Board, and Mr Yurov's own case (as reflected in his Defence) is that Mr Pospelov was aware of the balance sheet management exercise and that the Shareholders' interest in the "Personal Companies" was known to each of the CEOs at all material times. Accordingly these statements were knowingly false when made. The obvious inference, which I draw, not least given the inherent improbability of Mr Pospelov taking such active steps to deceive the CBR without the knowledge, direction and approval of the Shareholders, is that this was all done, at the instigation of, and with the knowledge of the Shareholders, to conceal from the CBR their ownership of their "Personal Companies" that had borrowed very large sums from the Bank (and which in the case of Priangarskiy would continue to borrow very large sums from the Bank). In this regard it is apparent, as I have found, that the Shareholders knew of the use of such (fake) UBOs, and the purpose of their use.

899. Appendix 3 contained a raft of further false statements about a whole catalogue of entities and associated (fake) UBOs. I would repeat that the very fact of doing so shows that the true position was being (deliberately) concealed from the CBR. Of course none of this would have been necessary (or indeed make any sense) if the CBR did have knowledge of the "balance sheet management" exercise being undertaken. The list of fake UBOs and associated false statements are identified at paragraph 144 of the Bank's Closing Submissions and featured the likes of Mr Scheffel and Mr Worsley's gardener. What little truth existed in Appendix 3 featured in the Shareholders being identified as the UBOs of the Bank itself and of TIBH and TIBI.

900. Notwithstanding the vast number of matters that were put to Ms Podstrekha on Mr Yurov's behalf, it was not put that the CBR knew this was all untrue or that the CBR (for some incomprehensible reason) turned a blind eye to it. What was put to Ms Podstreka was at a much more granular level in relation to particular companies. The difficulty for the Shareholders is that the wider picture is perfectly clear – the CBR did not know <u>as a fact</u> the true ownership of the Borrowers, nor could it <u>prove</u> that the Bank was undertaking illegal, fraudulent balance sheet management (which is precisely what was being undertaken, albeit that all that ultimately matters is that it was not in the best interests of the Bank). That is hardly surprising given the concerted efforts to deceive the CBR with the false information as to UBOs, the concealment of admitted ownership of Personal Companies, and the head-on express lies that were told – such as Mr Yurov stating that

*"…the borrowers of the bank are **not** related to the Bank owners and the investment projects which are credited by the Bank are **not** the business of the Bank owners"*.

901. Again and again, the Shareholders' case veers towards the suggestion that the CBR should have done more to bottom matters out, but such suggestion misses the point. What was being done was not reasonable and it was not in the best interests of the Bank (it was also dishonest and in bad faith but that is not necessary in order for the Shareholders to be in breach of their directors' duties). That is so whether or not the CBR suspected what was going on, or indeed whether or not it was actually deceived. It is clear, however, not least from the contemporary documentary evidence, that the CBR was deceived – otherwise it would not have continued to seek the information it did, and the 2014 Audit Report would not have been in the terms it was (nor would it have been necessary for the Bank to continually provide false information when asked for information concerning ultimate beneficial ownership).

902. Curiously, in Mr Yurov's Closing Submissions (paragraph 223 to 225) it was submitted that the CBR knew that the Borrowers were controlled by the Bank (itself a misstatement as the Borrowers were controlled by the Shareholders as I have found) and that the only "deception" was that the Bank disputed or refused to accept this position. But the CBR was continually being deceived (in circumstances where the Bank continued to lie to it and the CBR continued to ask the questions evidencing that it was being deceived), and I am satisfied that the reality was that the CBR was always trying to get to the bottom of matters, but the Bank was always determined to ensure that the CBR never got to the bottom of matters, and that the Bank succeeded in that regard.

903. Contrary to what is submitted on Mr Yurov's behalf, I consider that this did clearly emerge from Ms Podstrekha's oral evidence (quite apart from the contemporary documentary evidence showing that the CBR continued to press on ownership), and that her oral evidence in this regard did confirm her written witness evidence:-

> "Q. And you are talking about the network of companies used for balance sheet purposes and you say: 'If this information had been disclosed to the CBR (formally or informally) it would almost certainly have led to the immediate revocation of NBT's licence (both because of the breach of formal requirements and also due to the concealment of this). "Balance sheet management" is not legal. It is fraudulent and deceives not only the CBR but auditors and depositors.'
>
> A. Quite right. I confirm those words **because the fact that 'we are managing the balance' was never voiced. As soon as we hinted that we saw what was happening, the Bank immediately objected to our conclusions and was arguing with us.** If the balance really reflects what's happening, how it should be, the balance is simply a reflection of the operations that are being carried out. So if it's honest and transparent, there is no need for balance management. It reflects the picture in fact but when they are hiding the losses, hiding the losses and the myriad of technical companies, that is − that is balance sheet management. Why? So nobody would get to the bottom of it. What's really happening.
>
> Q. But, Mrs Podstrekha, you knew − we look at the very first audit report from 2008, we see a myriad of technical companies that you agreed with me are obviously being used for balance sheet management. You saw that.

A. **We wanted to receive confirmation from the Bank. We are saying that's bad. That is bad. They say no, no, it's good. We are saying, please prove to us**. We will provide you with all the documents next meeting, you are underestimating your risks, please look at it. These companies will never repay the loans. No, these are good companies. **As soon as we started getting closer to anything, a refinancing occurred. And we were constantly travelling this road. So they would understand that − at last they would understand that it will end, end very soon because it's impossible to travel this road indefinitely and they could have taken measures to prevent this situation but they didn't do that."**

904. The reality, I am satisfied, is that whilst Ms Podstrekha considered it obvious that the Bank was using technical companies, with various companies being related to the Bank (or more accurately with hindsight apparently related to the Bank given that it has now transpired they were ultimately beneficially owned by the Shareholders), as explored with her in the evidence identified at paragraphs 201 to 210 of Mr Yurov's Closing Submissions) the CBR could never prove that, or get to the bottom of matters.

905. I am satisfied that the position was as Ms Podstrekha stated in evidence, *"As soon as we started getting closer to anything, a refinancing occurred. And we were constantly travelling this road."*. That was, of course, precisely, what the Bank and its Shareholders were trying to do, namely to keep one step ahead of the CBR through the use of an increasingly complex network of offshore companies, and indeed succeeded in doing for some considerable time until (inevitably) the music stopped, and the true position was revealed. But what the Bank and its Shareholders were doing was not (as seemingly portrayed by the Shareholders) in the best interests of the Bank, or reasonable, or in good faith, whether or not the CBR was deceived, although I am satisfied it was through the misstatements and omissions that I have identified which concealed the Shareholders' ultimate beneficial ownership and meant that reserving that should have taken place was not being taken place. As Ms Podstrekha put it:

"Q. It's obvious why it was happening. It was happening to avoid taking reserves on the Bank's balance sheet, wasn't it?

A. Yes, **it was happening to deceive the regulator. So the regulator would not be to assess − wouldn't be able to assess properly the quality of the assets of the Bank**." (emphasis added)

906. There is also something of a surreal quality to the Shareholders' case that the CBR would, essentially, entirely abrogate its responsibilities, despite the documentation showing the very opposite – namely that it took beneficial ownership very seriously, not least because (as Ms Podstrekha made plain) that was highly relevant to reserving (which was the CBR's ultimate concern and the very reason why its questioning was directed at beneficial ownership). The Shareholders' case also lies uneasily with (if not is actually inconsistent with) Mr Yurov's contemporary beliefs as set out in Mr Yurov's June 2015 memorandum and in his Affidavit that if the CBR had known the actual position it would have revoked Bank's licence (which is the very reason given for submitting false accounts in the first place). Finally, I would only add that much of the Shareholders' submissions are based on the (false) premise that the offshore companies were Bank Companies (and presumably that the CBR knew this) when in fact, as I have found, they were Shareholder

Companies, beneficially owned not by the Bank but by the Shareholders, something that on any view was concealed from the CBR, and the world, to the very end.

907. For the reasons identified above, I am satisfied, and find, in relation to Issue 22, that notwithstanding the suspicions that the CBR had, the CBR did not know, and neither Mr Yurov or Mr Fetisov believed that the CBR knew, that the Bank was lending money to off-balance sheet companies in order to service or repay debts owed to the Bank by other borrowers. However, that is, itself, a false premise in that what was actually being done was lending for the benefit of the Shareholders and not for the benefit of the Bank nor was it to rescue previous projects following the 2008 financial crisis. Nor did the CBR tacitly approve or not require the Bank to cease such practices – on the contrary the CBR was always trying to bottom such matters out, but never succeeded in doing so due to the Shareholders' breaches of duty. In any event, and as already addressed, what matters (in the context of the Shareholders' breaches of duty) is that the Shareholders intended to deceive the CBR (whether or not they were successful in doing so), and what they were doing (in terms of balance sheet management) was neither reasonable nor in the best interests of the Bank in any event (and was in fact dishonest and in bad faith as I have found).

908. I am also satisfied, based on the evidence of Ms Podstrekha, which I accept, that had the CBR discovered that the Bank was undertaking balance sheet management (in the senses in which it was being deployed including to evade banking standards including N6, and to facilitate connected lending to companies of which the Shareholders were the ultimate beneficial owners, all without appropriate reserving) and/or if the accounts had not been falsified and the true financial position had been revealed (as addressed in Section I.5), it would have revoked the Bank's licence, and would have done so with immediate effect. On this hypothetical, this would have occurred immediately (i.e. as soon as such balance sheet management and/or false accounting occurred).

909. For the avoidance of doubt balance sheet management (in the senses in which it was being deployed) is not (contrary to Mr Yurov's submission) permissible and legal, it is impermissible and illegal as Ms Podstrehka made clear in her written evidence which I accept. Nor did she say the opposite in her oral evidence (as alleged on behalf of Mr Yurov). Such submission mischaracterises her evidence (in particular it ignores her evidence in relation to the need for reserving), it ignores the misrepresentation that occurred, and it also ignores the fact that it was (at the very least) an administrative offence and also involved the production of misleading accounts. What was particularly objectionable (and not permissible) was dressing up lending as something that it wasn't, and hiding the true position as a result of which inadequate provisioning/reserving was made.

I.5 The Audited accounts

910. The Bank's audited and published IFRS accounts for the period 2008 to 2013 (the last set of audited accounts available), were audited by the Moscow offices of Western accountancy firms: KPMG for each year from 2008 to 2011 and Deloitte for 2012 and 2013. Those accounts were, I am satisfied, false and misleading in recording the various "balance sheet management" loans to Cypriot shell companies as valuable "assets" of the Bank (Issue 27.10).

911. There is no suggestion that the accountancy forms were complicit, and I am satisfied that they too were deceived as to the actual financial state of the Bank (as was necessary in order that they be induced to sign off on (false) accounts) (Issue 27.7). I do not understand Issue 27.7 to be a free-standing point, but rather one deployed to support other aspects of the Bank's case and to undermine the Defendants' defences thereto. Thus in order for the "balance sheet management" to work, the accounts had to be manipulated to reflect something other than the true state of the Bank's balance sheet, and in order for this to happen the auditors would have to be deceived.

912. In circumstances where the accounts were approved both by the Supervisory Board and by the AGM of Shareholders, the Shareholders were necessarily involved in considering and approving them. The purpose of those accounts was to present the (genuine) financial state of the Bank to the outside world.

913. The accounts themselves address the fact that their preparation under IFRS required the consolidation of the accounts of subsidiaries and controlled companies. They also explained that financial assets such as loans would be recognised as "*impaired*" in circumstances such as:

> "…default or delinquency by a borrower, breach of loan covenants or conditions, restructuring of a financial asset on terms that the Group would not otherwise consider, indications that a borrower or issuer will enter bankruptcy, the disappearance of an active market for a security, deterioration in the value of collateral, or other observable data relating to a group of assets such as adverse changes in the payment status of borrowers in the group, or economic conditions that correlate with defaults in the group."

914. It was also stated that when such a financial asset was "*uncollectable*" it was

> "…written off against the related loan impairment allowance. The Group writes off an asset's balance (and any related allowances) when management determines that the financial asset is uncollectible and when all necessary steps to collect the asset are completed…"

915. It will be seen, therefore, that the accounts were representing that "bad debt" was recognised and written off whereas, in fact, that was not the case.

916. Mr Zavadsky was involved in the preparation of the Bank's audited accounts (being himself in charge of IFRS reporting and reported to the Deputy CFO and the CFO). His evidence is that he had no role in relation to the Bank's business or the compilation of the information that was provided to his department, and that he had no knowledge of the "balance sheet management" exercise – i.e. his belief was that the information being supplied to him in order to deal with the auditors was correct (when it was not).

917. I have already addressed Mr Zavadsky, and his evidence, in Section C.2.5. When cross-examined, Mr Zavadsky admitted being involved in back-dated securities documentation in the months before the Bank's collapse. He also (ultimately) accepted

that he knew that the Bank could request that companies managed by Columba enter into transactions connected with the Bank. Whilst such matters do impact upon his credibility, and whilst I also bear in mind that he was a relatively junior employee, he was in a factual position to comment on how the IFRS accounts were, as a matter of fact, put together, and what was, and was not, included in the category of "related-party" transactions. He was not challenged in that regard, and I accept his evidence in relation to that. In large part, in any event, the documents speak for themselves (for example, in terms of the size of loans to Willow River and RCP which were, and remained, around US$110 million (at least RUB 3 billion), and so they cannot have been included in the related-party lending figures in the accounts. I also bear in mind that he was a factual witness and that there was no permission to call an expert on IFRS accounting. Nevertheless, from his knowledge and involvement in the preparation of such accounts, he was in a position to give factual evidence in relation to the Bank's IFRS accounts and the associated IFRS requirements. Overall I accept his evidence as to his lack of knowledge of "balance sheet management", and his evidence as to how the IFRS accounts were prepared.

918. I am also satisfied that the Bank's audited accounts were misleading in that they painted a picture of a bank in good financial standing and having substantial assets in the form of corporate loans to (genuine) "*customers*" when the reality was very different (Issue 27.10).

919. In this regard, and taking the 2013 accounts as an example, the "*Consolidated Statement of Financial Position*" showed total assets of RUB 193.4 billion including, RUB 141.8 billion of "*loans to customers*". The largest elements (identified on page 36) were "*Loans to large corporates*" (c. RUB 39 billion) and loans "*to individuals*". As is apparent from Mr Zavadsky's evidence, as at 31 December 2013, about RUB 40 billion was outstanding from the companies owned by the Shareholders (including c. RUB 9 billion from companies the Shareholders now admit to owning such as Willow River/RCP). Pages 36-38 set out an appraisal of the quality of the loan portfolio, with the majority of corporate loans said to be "*Standard loans*", defined as "*representing loans without any indicators of impairment and thus representing the best level of credit quality*". The accounts recorded that: "*Included in loans to corporate customers as at 31 December 2013 are RUB 11 290ms of loans to unrelated off-shore companies for the purpose of buying and selling securities…*" (emphasis added). This was misleading as a reference to the likes of Erinskay and Baymore (even more so if Shareholders' case had been correct that these were Bank Companies). Equally misleading was the statement that interest paid on "*loans to customers*" was a significant source of income, leading to a recorded pre-tax profit for 2013 of RUB 580 million.

920. The most misleading aspect of the accounts concerned "Related Party Transactions" which was addressed in Note 30, and recorded that only RUB 421 million of loans fell within this category (of a total loan portfolio of RUB 141.8 billion). As Mr Zavadsky explained, that figure did not include **any** loans to the Borrowers, only including transactions such as loans to TIB Holdings (i.e. one of the companies in the Bank's own ownership structure, and a related-party transaction actually approved at the AGMs). The accounts identified the Bank's subsidiaries. None of the Borrowers was identified as a Bank subsidiary, despite the Shareholders' present case that they all were. It is common ground that the loans to Willow River and RCP were and remained at all times around US$110 million (at least RUB 3 billion), so it is impossible that the related-party lending figures in the accounts included these, or the other personal companies' borrowings.

921. I am also satisfied (in the context of Issue 27.7) that these steps, including through the provision of false information in interviews, were taken to mislead and deceive the auditors. Thus, for example, the auditors (like the CBR) sought further information about the beneficial ownership of the companies transacting with the Bank and they too were supplied with false information in relation to the fake nominee UBOs, which was discussed between Mr Vartsibasov and Mr Worsley in January 2013. In this regard, and in response to an email from Mr Vartsibasov to Mr Worsley asking, *"They should be independent private investors with no affiliation with each other.? It should be helpful if we could describe their current ? business as much information as possible. To persuade auditors that they are real investors. ? Or we should imagine some details"* Mr Worsley responded, "*my imagination is working"*.

922. The Shareholders cannot but have known that the accounts were misleading and that the accountants had been misled (Mr Yurov's June 2015 memorandum itself evidences that a decision was taken to start submitting false/misleading accounts). The relevance of the falsification of the accounts has already been addressed in Section I.1 above.

I.6 Issue 23

23. Is the Bank entitled to advance a case that the lending caused the Bank to be in breach of the Instructions and, if so (i) has that case been made out and (ii) to what extent did the Shareholders have knowledge of such breaches?

923. As already noted, Issue 23 is an aspect of the Bank's case, but it is not suggested that it gives rise to any separate cause of action. The Shareholders contend that, if the Bank is entitled to advance this case, it will be necessary for the Court to consider: (a) what was the Bank's capital on each relevant date and (accordingly) what was the "N6" limit, (b) what is the test for whether borrowers form part of a group of related borrowers for the purposes of the Instructions and did the Borrowers (or any of them) constitute a group or groups of companies, (c) what was the total amount lent to a group of related borrowers on each relevant date, (d) were the Loans and/or Transactions in breach of those Instructions, and (e) were the Defendants aware of this fact?

924. I have already addressed the N6 and N1 standards in Sections I.2.1 and I.2.2 above. In circumstances where it is not suggested that Issue 23 gives rise to any separate cause of action it would be disproportionate to address whether the Bank was in breach of the Instructions on any specific date. For the purposes for which breaches of the Instructions are relevant (in particular balance sheet management and the misleading of the CBR) I am satisfied that the pleaded issues are wide enough to cover such allegations and that (as found in Section I.2) Mr Yurov and Mr Fetisov knew perfectly well that the N6 standard was being evaded by the Bank and that all the Shareholders cannot but have been aware that if the Bank's lending had been properly recorded the Bank would have been in serious and persistent breach of N1 and N6 standards. That the Bank was in persistent breach of the N6 standard is evidenced by the calculations at Appendix B to the Bank's Closing Submissions, the methodology of which I accept. This demonstrates that at every relevant year end the Bank's N6 ratio was exceeded in relation to the loans to the Borrowers and all categories combined, and I consider that the overwhelming likelihood is that this would also be true at any particular time within the years.

J. GENUINENESS/COMMERCIALITY OF PARTICULAR ENTITIES' BUSINESS (ISSUE 24)

925. This issue goes to the genuineness/commerciality of particular entities' business. Such matters are addressed in Section R.

K. THE NATURE OF THE "BALANCE SHEET MANAGEMENT" EXERCISE (ISSUES 25-26)

25. In view of the Court's findings on the issues set out above, were the Loans and Transactions the result of a dishonest scheme, directed and/or implemented by the Shareholders for the knowingly unlawful and improper use of the Bank's money, contrary to the Bank's best interests, for their own ends and/or for their personal benefit, as summarised at paragraphs 20 and 21 of the Particulars of Claim?
26. Was the making of the Loans and Transactions in bad faith and/or contrary to the Bank's best interests and/or unreasonable and/or and in breach of (a) the Bank's Charters, (b) the Credit Committee Regulations, (c) the CBR Instructions relating to "N6" and if so, did each of the Shareholders know that?

926. These issues go to the nature of the balance management exercise and the associated allegations of dishonesty. The nature of the balance sheet management has been addressed in Sections G.3.1 and G.3.2 above (balance sheet management), and is further addressed in Section M (Russian Law) and the Borrower Schedules (in Section R). However, as addressed in Section G.3.1 and those other Sections I have found that the Shareholders acted dishonestly, as well as unreasonably and not in the best interests of the Bank, in relation to "balance sheet management", the accounts and misleading the CBR. Equally in relation to the individual Loans and Transactions (and associated pattern of behaviour) I am satisfied that these involved multiple and repeated breaches of the Shareholders' duties, such Loans not being reasonable, or in the best interest of the Bank or in good faith for the reasons addressed in Section R below, such lending being done without appropriate scrutiny, due diligence or disclosure, being (as the Bank notes) waved through the Credit Committee (often by absentee ballot in circumstances where the contemplated requirements for such a ballot do not appear to have been met) without any appropriate scrutiny, due diligence or disclosure of personal interest, coupled with the inappropriate extension of loans as repayment deadlines approached without any disclosure of the Shareholders' personal interests or benefit to them.

927. Equally, the "balance sheet management" scheme was agreed between and implemented at the direction and with the knowledge of the Shareholders, and involved (to the knowledge of the Shareholders) the use and development of the offshore network for that purpose, as well as for the purpose of acquiring and financing (using the Bank's money) personal interests in development and other business projects (as furthered, following the recruitment of Mr Worsley by an even more opaque and labyrinthian offshore network, with fake UBOs to conceal Shareholders' beneficial interests). As I have also found the Shareholders were acting dishonestly and in bad faith in that regard (as addressed in Section G.3.1).

L. ENTITLEMENT TO RELY ON SPECIFIC MATTERS (ISSUES 27-28)

928. This has already been addressed in Section D.4 above.

M. RUSSIAN LAW (ISSUES 39 to 47; 3 and 18A).
M.1 English Law Principles in relation to foreign law

929. Before addressing the substantive issues of Russian law it is first necessary to set out a number of principles of English law which are of relevance when addressing the issues of Russian law that arise.

930. In English courts matters of foreign law are treated as fact and must be proved as such. This is reflected in Rule 25(1) of *Dicey, Morris & Collins on the Conflict of Laws*, 15th Edn:

> "In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means."

931. On the topic of expert evidence, the editors of *Dicey, Morris & Collins* comment at paragraph 9-13:

> "It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority. Such materials can only be brought before the court as part of the evidence of an expert witness, since without his assistance the court cannot evaluate or interpret them. This may be especially important (even if the ultimate task of the judge is made little easier) when the foreign law in question is found in a number of sources whose relationship to each other is not easily understood or explained."

932. I was assisted on issues of Russian law by the Bank's expert, Dr Rachkov, and the Defendants' expert, Dr Gerbutov. Whilst I have borne in mind the observations of the parties as to each expert, ultimately I consider that each was doing their best to provide the Court with independent expert evidence. The differences between them largely arose out of genuine uncertainty as to the position under Russian law.

933. As will become apparent, Dr Rachkov and Dr Gerbutov's views differed in a number of important respects. I have carefully considered and attached due weight to the evidence given by both experts. It was common ground between the parties that when faced with conflicting expert evidence of foreign law, it is appropriate to look at the relevant sources of law. The court is not confined simply to accept either one witness or the other. This is reflected in D*icey, Morris & Collins* at paragraph 9-17:

> "If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony."

934. The parties addressed me on two important principles which I bear well in mind. The first relates to the weight which should be attached to judgments of foreign courts. In this regard I was referred to the observations of Simon J in *Yukos Capital v. OJSC Oil Company Rosneft* [2014] 2 Lloyd's Rep 435 at [26]:

> "…although in the present case this involves looking at Article 395 of the Russian Civil Code and the various other provisions of Russian law relied on by the parties, it is not the Court's function to interpret the codified provisions. The Court's task is to determine how the Russian Courts have (or would) interpret them…"

935. At [27], Simon J cites the dictum of Scott LJ in *A/S Tallinna Laevauhisus and others v. Estonian State SS Line and another* (1947) 80 Lloyd's Rep 104, at pp.107-109, indicating that the task of the foreign law expert is to:

> "… interpret [the law's] legal effect, in order to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it, if it applied correctly the law of that country to the questions under investigation by the English Court."

936. The task of the Court is to apply the law that a properly-directed court of the relevant jurisdiction would apply. In that regard existing foreign judgments are to be given due weight and consideration. I bear in mind that under Russian law judgments of lower courts are not formal sources of law in the same way as they are in England. When considering the Russian decisions, I have also had regard to the legislative framework and wider constitutional background in which they sit.

937. Secondly, I was addressed on the principle that foreign law should be assessed from the perspective of the highest appeal court of the foreign jurisdiction. On this point, I was referred to the case of *Re Duke of Wellington* [1947] Ch. 506 at [514] where it was held:

> "It is clear from the expert evidence that in Spain the only court, whose decisions are binding in other cases, is the Supreme Court. The decisions of lower courts may be cited in other courts, but do not bind such courts. In these circumstances, I must address myself to the question, what is the law on the matter in question which would be expounded by the Supreme Court of Spain if it were before that court?"

938. In practical terms, this means I should consider the Russian law issues from the perspective of the Russian Supreme Court and not simply whichever first instance court is seized of the dispute.

M.2 What Claims can be Brought – Civil Claims and/or Labour Claims?

M.2.1 Provisions of the Russian Civil Code and Joint-Stock Companies Law

939. As members of the Bank's Supervisory Board, the Shareholders were subject to a number of duties contained in the Russian Civil Code (RCC) and the Joint-Stock Companies Law (JSCL):

(a) Up until 1 September 2014, the Shareholders were subject to RCC initial Article 53(3), which provides:

> "A person who, by virtue of a statute or the founding documents of a legal person, acts in its behalf must act in the interests of the legal person represented by him **in good faith and reasonably**. This person shall be obligated on the demand of the founders (or participants) in the legal person, unless otherwise provided by a statute or the contract, to compensate for the losses caused by him to the legal person."
>
> (emphasis added)

It is common ground between Dr Gerbutov and Dr Rachkov that paragraph 1 of Resolution No 62 of the Supreme Arbitrazh Court's Plenum of 30 July 2013 ("Resolution 62") confirms the obligations under initial Article 53(3) extended to members of the Supervisory Board.

(b) On 1 September 2014, new Article 53 came into force, which made the confirmation given in paragraph 1 of Resolution 62 express:

> "A person who, by virtue of a statute, other legal act or the founding document of a legal person is authorised to act on its behalf, must act in the interests of the legal person represented by him **in good faith and reasonably**. Members of collegial bodies of the legal person (supervisory or other board, management, etc) have the same obligation." (emphasis added)

New Article 53(1)(1) provides:

> "A person authorised to act on behalf of the legal person by virtue of a statute, other legal act or the founding document (Article 53 (3)) must compensate the losses caused to the legal person **because of his fault** upon the claim of the legal person, its founders (participants) acting in the interests of the legal person." (emphasis added)

940. The Shareholders were also subject to JSCL Articles 71 and 81 to 84 (considered separately below). Article 71 contains a general obligation on members of the Supervisory Board:

> "1. Members of the company's board of directors/supervisory board, the company's sole executive body (director/general director), temporary sole executive body and members of the company's collective executive body (management council/directorate), as well as the managing organization or manager **shall, in exercising their rights and performing their duties, act in the company's interests, exercise their rights and perform their duties with respect to the company in a bona fide and reasonable manner**.
>
> 2. Members of the company's board of directors/supervisory board, the company's sole executive body (director/general director), its temporary sole executive body and members of the company's

collective executive body (management council/directorate), as well as the managing organization or manager, are liable to the company for any damages incurred by the company as a result of their culpable actions or inactions, unless other grounds for and scope of liability are established by federal law…

3. In determining the grounds for and the scope of liability of members of a company's board of directors/supervisory board, the company's sole executive body (director/general director) and/or members of the company's collective executive body (management council/directorate), as well as the managing organization or manager, the usual terms and conditions of doing business and of any other relevant circumstances shall be taken into account."

(emphasis added)

941. It is common ground that if the Shareholders were not employees, civil claims could be brought against them under RCC Article 53 and JSCL Article 71 (and Articles 81 to 84 if applicable) directly.

942. However, the Defendants contend they were employees at all material times and that, in consequence, any claim against them must be brought under Article 233 of the Russian Labour Code ("RLC"). This Article provides:

> "**Article 233. Conditions for material liability of the parties to the labour contract**
>
> A party to the labour contract bears the liability for harm caused to the other party to that contract as a result of its **culpable unlawful behaviour** (though acts or omissions), unless otherwise stipulated by this Code of other federal laws. Each party to a labour contract shall be required to provide proof of the amount of damage it has incurred." (emphasis added)

943. The Bank denies it is required to bring its claim solely under the RLC. Its primary case is that it is entitled to elect either to bring a civil claim under the RCC/JSCL or a labour claim under the RLC (the subject matter of Issue 41). Further, it contends that Mr Yurov was not properly to be regarded an employee during the relevant period.

944. It is common ground that if the RLC does apply, RCC Article 53 and JSCL Articles 71 and 81 to 84 are obligations which, if breached would be culpable unlawful behaviour for the purposes of Article 233. Therefore, the substantive obligations of the Shareholders are the same whether the action is brought as a civil or labour claim.

945. However, there are significant differences between labour and civil claims:

(a) Firstly, pursuant to RCC Articles 196 and 200(1), the general limitation period for civil law claims under the RCC or JSCL is three years from the date when a person knew or should have known of the violation of his rights. Pursuant to RLC Article 392, the limitation period for an employer's claim for damages is one year, running from the date when harm was revealed.

(b) Secondly, a statutory limitation of liability applies to claims made under the RLC. Pursuant to RLC Article 241, unless otherwise provided in the code or other federal laws, an employee's liability is limited to one month's earnings:

> "Article 241. Limits of the Material Liability of an Employee
>
> An employee shall bear material liability for damages caused within the limits of his average monthly earnings, unless otherwise stipulated by this Code or other federal laws."

According to Articles 242 and 243, this limitation on liability does not apply in the case of intentional causing of harm:

> "Article 24.2 Full Material Liability of an Employee
>
> Full material liability of an employee shall consist of his obligation to compensate the employer in full for the direct actual harm that was caused.
>
> An employee may only be charged with material liability in the full amount of the damage caused in the instances stipulated by this Code or other federal laws.
>
> Article 24.3. Cases of Full Material Liability
>
> Material Liability in the full amount of the harm caused shall be imposed in the employee in the following cases:
>
> …
>
> (3) **intentional causing of harm**
>
> …"

No such rules on the limitation of liability apply to civil claims under the RCC or JSCL.

(c) Thirdly, civil claims under RCC Article 53 and JSCL Articles 71 are subject to rebuttable presumptions of bad faith and unreasonable acts as contained in paragraphs 2 and 3 of Resolution 62.

(d) Fourthly, there is no liability under the RLC for lost profits, which can be recovered under the RCC and JSCL.

(e) Lastly, unlike civil claims, labour claims are not subject to joint and several liability where harm is caused jointly. Liability under the RLC is shared between defendants in such circumstances.

M.2.2 Matters in Dispute

946. The following matters are agreed issues in dispute between the parties on the issue of which claim can be brought:

> **(1) Were the Shareholders employees of the Bank as a matter of Russian law after 15 October 2003 (Mr Yurov), 1 January 2009 (Mr Belyaev) and 2 June**

2014 (Mr Fetisov) (it being common ground that the Shareholders were employees up to those dates)? In particular, does Russian law recognise a contract by which a person is purportedly employed act as a member of the company's Supervisory Board as creating an employment relationship? (Issue 39)

(2) Is the Bank estopped from alleging the Shareholders were not employees of the Bank at all material times? (Issue 40)

(3) Is the Bank entitled to bring claims against the Shareholders under the RCC and/or JSC Law, or (as the Shareholders contend) is the Bank required to bring any claim against them solely under the RLC as a matter of Russian law? In particular:

(i) Does the Labour Code apply and prevail over the Civil Code, so that any liability of the employee is governed exclusively under the Labour Code?

(ii) Is there a Russian law principle against "competition of claims" that operates to prevent a company from bringing non-contractual claims against directors under the RCC and/or the JSC law when those directors have employment contracts?

(iii) Do the claims relate, in whole or in part, to activity in the Shareholders' capacity as employees (as opposed to as members of the Supervisory Board), in respect of which it is common ground that the Labour Code applies;

(iv) What presumptions arise under the Civil Evidence Act in light of the *Fiona Trust* judgment and have any relevant presumptions been rebutted by the Bank?

(Issue 41)

947. In relation to Issue 39, although the Bank initially put Mr Belyaev and Mr Fetisov to proof as to the validity of their 2010 and 2013 employment agreements, it now accepts that they were valid. It concedes that because Mr Belyaev and Mr Fetisov's contracts gave them executive roles separate from their roles on the Supervisory Board, they were employees at all material times. The validity of Mr Yurov's employment contracts (which purported to employ him solely as chairman of the Supervisory Board) remains in issue. The Bank claims that Mr Yurov's contracts should be treated as a civil law contracts, and are not governed by the RLC.

M.2.3 Sources of Russian law

948. Before addressing the parties' substantive arguments, it is necessary to say something about the hierarchy of sources in Russian law.

949. It is agreed between Dr Gerbutov and Dr Rachkov that legislation is the main source of Russian law. The Constitution of the Russian Federation is the highest in the hierarchy of Russian law.

950. After the constitution, legislation such as the RCC, JSCL and RLC are the next most important source of Russian law.

951. Another important source of Russian law is Supreme Court Resolutions. These are written clarifications on matters of court practice which do not relate to specific cases. Up until August 2014, the Supreme Arbitrazh Court had the power to issue such resolutions in relation to the practice of Arbitrazh courts. However, following August 2014, the functions of the Supreme Arbitrazh Court were transferred to the Supreme Court, which is now the highest court of the two otherwise separate systems of Russian courts. Provided Supreme Court Resolutions have not been repealed or made obsolete, they are binding on lower courts.

952. Additionally, Russian senior courts may issue less formal guidance on court practice in the form of Information Letters (in relation to the old Supreme Arbitrazh Court) or Reviews of Court Practice (in relation the new Supreme Court). Such documents are not binding but are important for understanding Russian law and practice.

953. Judgments by Russian courts are not a formal source of Russian law, but the experts agree that they are important for understanding the content and practical effect of Russian law. Court judgments in Russia concerning civil matters are given by either the Arbitrazh courts or the courts of common jurisdiction, which are two separate court systems. As a general rule, Arbitrazh courts consider commercial disputes between legal entities and/or individuals registered as private entrepreneurs and the courts of common jurisdiction consider other disputes.

954. Lastly, the experts agree that scholarly writings, especially ones of reputable Russian scholars, may be taken into account by Russian judges, but are not a formal source of law.

M.2.4 RLC Article 11

955. For convenience, I set out RLC Article 11 here, which is relevant to a number of the issues in dispute. Article 11 provides:

> "This Code, the laws and other normative legal acts containing the labour law norms shall not cover the following persons (unless they simultaneously act as employers or their representatives):
>
> …
>
> members of boards of directors (supervisory boards) in organizations (except for the persons that concluded a labour contract with that organization)…"

956. The Article establishes that, without an employment contract, members of the Supervisory Board do not fall under the labour law norms. There is a dispute as to the precise effect of the provision. The Shareholders claim it supports their arguments that members of a Supervisory Board can be employed as such. The Bank claims it applies only to members of the Supervisory Board who have an employment contract relating to a separate distinct role.

M.2.5 Entitlement to elect

957. The Bank's primary case is that it is entitled to elect whether to bring a civil claim, or labour claim and therefore it does not matter whether the Shareholders were employees. If the Bank establishes it was entitled to elect between a civil claim and a labour claim,

any issues about whether the Shareholders were employees fall away. I will therefore consider this question first.

M.2.5.1 The Bank's case

958. In support of the Bank's case, Dr Rachkov relied on paragraph 9 of Resolution 62, which he considered clarified that a civil claim can be brought against an employed director, including a member of a Supervisory Board. The Shareholders' translation of paragraph 9 is as follows:

> "A claim for the recovery of damages (in the form of direct loss and (or lost profit) caused by actions (omissions) of a director of a legal entity is subject to examination in accordance with the provisions of article 53(3) of the Russian Civil Code, including in cases where the claimant or the defendant refers in support of their claims or objections to article 277 of the Labour Code of the Russian Federation. Pursuant to provisions of article 255.1(4) of the Arbitrazh Procedure Code of the Russian Federation (hereinafter – the "Russian Arbitrazh Procedure Code"), disputes on claims seeking to hold liable persons who are or were members of the management bodies of the legal entity, including pursuant to paragraph one of article 277 of the Labour Code of the Russian Federation, have a corporate character, and cases regarding such disputes are subject to the jurisdiction of the Arbitrazh courts (article 33(part 1(2)) of the Russian Arbitrazh Procedure Code) and subject to examination under the rules of Chapter 28.1 of the Russian Arbitrazh Procedure Code."

959. Paragraph 1 of Resolution 62 defines "director" to include any person who is a member of the bodies of a legal entity, including a member of the Supervisory Board. The reference to RLC Article 277 concerns claims against heads of organisations (which in the present context means the CEO). It is common ground that Article 277 does not apply to members of a Supervisory Board, but it is the functional equivalent of Article 233, which does. Article 277 provides:

> "**Article 277. Material Liability of the Head of the Organization.**
>
> The head of the organization bears full liability for the direct actual damage caused to the organization.
>
> In the events stipulated by the federal law, the head of the organization should reimburse damages inflicted to the organization by his culpable activities. The damages are estimated in accordance with norms stipulated by the civil legislation."

960. According to Dr Rachkov, Resolution 62 clarifies that a civil claim can be brought on the basis of RCC Article 53(3) against an employed director, including employed members of the Supervisory Board.

961. Before coming to the cases relied on by Dr Rachkov in support of his position, I note one point which was agreed by the experts. There is no Russian case addressing how the RLC applies to a claim by an employer against a Supervisory Board director with an employment contract. The cases relied on are analogous and none of them deal directly with the present issue.

962. Dr Rachkov relied on some fifteen Arbitrazh court judgments which he considered supported his position. A notable feature of many of the judgments is that they apply a three-year limitation period, which is consistent with them being civil rather than labour claims. He relies on the following:

(a) In *Butorina v Chetvertkov (Resolution of the Arbitrazh Court of the Far Eastern Circuit dated 15 February 2017)*, a claim was made against a former director who was also an employee. During the appeal the defendant raised a time bar defence based on the RLC. The Court found that it was too late to raise the defence at the appeal stage, but went onto say that the defence in any event was a bad one:

> "… RF LC article 392, part 2, sets the deadline for filing in court to resolve an individual labour dispute; in particular, the employer has the right to go to court on disputes over an employee's restitution to the employer within one year after that damage is discovered.
>
> According to RF LC article 381, part 1, an individual labour dispute is an unresolved difference between an employer and employee over the application of labour law and other regulations containing labour law norms, a collective bargaining agreement, accord, local regulation, or employment contract (including setting or modifying individual terms of employment), regarding which an application was submitted to a body for examining individual labour disputes.
>
> To justify her statement of claims, O. N. Butorina refers to the losses to the Company caused by G. V. Chetvertkov as the Company's sole executive. The dispute in this case is therefore unrelated to differences between O. N. Butorina and G. V. Chetvertkov over the application of labour law and other regulations containing labour law norms, a collective bargaining agreement, accord, local regulation, or employment contract
>
> In this respect RF LC article 392, part 2, is not relevant to the disputed legal relationship. The dispute in question is subject to the general limitation period set by RF CC article 196 at three years…"

Dr Gerbutov made the point that the claim in this case was brought not by the company itself but by a shareholder of the company. Therefore, it was possible that part of the reasoning of the court was that the dispute was not strictly between an employer and employee. However, Dr Gerbutov ultimately considered the case to be an example of the court refusing to apply the RLC limitation period to a claim against an employed director when the claim should have been governed by that code. Indeed, in his expert report he also drew attention to two further Arbitrazh court judgments which reached the same conclusion in relation to claims brought by companies: *Trio v Prikhoko (Resolution of the Arbitrazh Court of the West Siberian Circuit dated 16 February 2017)*; *StroyTransAuto v Kozemaslov (Resolution of the Arbitrazh Court of the West Siberian Circuit dated 16 February 2017*). Dr Gerbutov considered that such cases were wrongly decided.

(b) *Kurgan Factory (Federal Arbitrazh Court of the Ural district dated 1 October 2013)* also concerned a claim brought against an employed director. The court expressly rejected the defendants' argument that the RLC applied and dismissed the application of the labour limitation period:

> "… In substantiating his objections, the citing by N.S. Vlasov of provisions of the Labour Code of the Russian Federation, including his assertion that the dispute is not within the jurisdiction of a court of arbitration, is based on an erroneous interpretation of the legislation.
>
> Therefore, the compensation claim for damages caused by the actions of the sole executive body of a legal entity should be considered in accordance with Paragraph 3 of Article 53 of the Civil Code of the Russian Federation. Furthermore, bearing in mind the provisions of Paragraph 4 of Article 225.1 of the Arbitration Procedural Code of the Russian Federation, disputes in claims to hold accountable individuals who are or once were a part of the management bodies of a legal entity are corporate disputes, and the cases involving such disputes are within the jurisdiction of courts of arbitration (Paragraph 2, Part 1 of Article 33 of the Arbitration Procedural Code of the Russian Federation) and should be considered under the rules of Chapter 28.1 of the Arbitration Procedural Code of the Russian Federation.
>
> Pursuant to Article 195 of the Civil Code of the Russian Federation, judicial remedy in a claim of a party whose rights have been violated is possible within the time frame allowed by law (statute of limitations on actions).
>
> According to Article 196 of the Civil Code of the Russian Federation, the overall statute of limitations on actions is set at three years. This time period is measured starting from the day when the party realized or should have realized that its rights had been violated (Article 200 of the Civil Code of the Russian Federation).
>
> Pursuant to the explanations put forth in Paragraph 10 of Ruling No. 62 of 30.07.2013 of the Plenum of the Supreme Arbitration Court of the Russian Federation "On Certain Matters Surrounding Compensation of Damages by Parties Who Are a Part of the Bodies of a Legal Entity", in instances when the given compensation claim has been filed by the legal entity itself, the statute of limitations on actions shall be measured not from the moment of the violation, but rather from the moment when the legal entity, or its new director, for example, was first given a real opportunity to learn of the violation."

Dr Gerbutov again contended that the point was wrongly decided.

(c) In *Bank VEFK-Ural v Chechushkova and ors (Resolution of the l 7tlt Arbitrazh Appeal Court dated 25 May 2015)*, a claim was brought by the DIA acting as receiver in bankruptcy on behalf of a bank against three directors (the chairman and deputy chairman of the bank's Management Board and the chairman of its Supervisory Board). The claim was for wrongfully causing the bank to enter transactions, including two loans to borrowers who stopped servicing their

loans after the bank was taken over by the DIA. The appeal court referred to RCC Article 53 and JSCL Article 71, and found that the three-year civil limitation period had been properly applied. Dr Gerbutov made the point that, although the case was decided in accordance with RCC Article 53 and JSCL Article 71, this was not inconsistent with it being a labour claim under RLC Article 277. However, he accepted the judgment did not mention the RLC and that in relation two of the directors (the head and deputy head of the Management Board, appeared to be employees of the bank), the court applied the three-year limitation period established by the civil code despite them apparently having employment contracts. Dr Gerbutov suggested one reason for this may have been that the defendants did not raise the labour limitation point.

(d) *Lipetsk Regional Bank v Bobyleva and ors (Ruling of the Arbitrazh Court of Lipetsk Region dated 12 May 2017)* concerned a claim by the DIA acting as receiver in bankruptcy on behalf of a bank against four members of its Management Board for wrongfully executing loan agreements and disposing of assets. The first two defendants were the chairman and acting chairman of the Management Board. The third and fourth defendants were members of the Management Board, the third defendant also being the bank's chief accountant. The Court applied a limitation period of three years pursuant to RCC Article 196. Dr Gerbutov made the point that in relation to the third and fourth defendants, there was no indication in the judgment that they were employed as members of the Management Board and so their liability may have properly been governed by the RCC and JSCL. However, even if this is correct Dr Gerbutov accepted that the court had applied the three year limitation period to the first and second defendants who were employed directors. Therefore, he contended that the court applied the wrong limitation period.

(e) In *Orlovsky Sotsialny Bank v Golodukhin (Ruling of the Arbitrazh Court of Orlovsky Region dated 5 April 2016)*, a claim was brought by the DIA acting as receiver in bankruptcy on behalf of a bank against its director for granting a loan and approving a debt transfer. The defendant was employed as the first deputy of the general director of the bank and was a member of the Management Board and Credit Committee. The court decided liability based on JSCL Article 71, applying the civil 3-year limitation period despite the defendant's employed status. The court expressly refused to apply the limitation period contained in the RLC:

> "Taking into account the foregoing, in the opinion of the court, the claim of the bankruptcy administrator to recover damages from the respondent on the basis of Article 71 of the Federal Law No. 208-FZ of 26/12/1995 "On Joint-Stock Companies" is an appropriate way of protecting one's rights, as N. N. Golodukhin was not only a member of the Bank's Management Board but also a member of the Credit Committee to whom the Credit Department of the Bank was directly subordinate.
>
> In accordance with paragraph 9 of the Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation No. 62, disputes

> on claims to hold liable persons who are part of the management bodies of a legal entity, including in accordance with p. 1, Art. 277 of the Labour Code of RF, are corporate, cases on such disputes are subject to the jurisdiction of the Arbitrazh courts and are subject to consideration according to the rules of chapter 28.1 of the APC RF.
>
> In this connection, the respondent's argument about the expiry of the one-year limitation period for holding N. N. Golodukhin liable, provided for in Art. 392 of the LC RF, is subject to rejection."

Dr Gerbutov considered that the court in this case misapplied JSCL Article 71 by finding that it could apply to a first deputy of the general director and member of a Credit Committee, irrespective of whether they had a role on the Management Board. Ultimately, Dr Gerbutov accepted that the court treated the claim as a civil claim and applied the three-year limitation period. His opinion was that this could only be correct with respect to actions taken in the defendant's capacity as a member of the Management Board (for which he was not employed and so for which the labour relationship did not extend), but it was not clear from the judgment which actions, performed in which capacity, the director was held liable for.

(f) *Commercial Bank Investment Trading Bank v Shurmina and ors (Judgment of the Arbitrazh Court of Moscow dated 11 July 2016)* concerned a claim by a bank against two defendants. The first was a former Chairman of the Supervisory Board and Chairman of the Management Board. The second was the deputy Chairman of the Management Board. The court applied the RCC to the claims. Dr Gerbutov argues that this case does not support the Bank's position as there is no indication in the judgment that either of the defendants were employees. In cross examination it was put to Dr Gerbutov that the judgment contained two references to the second defendant having been an employee. Dr Gerbutov disputed the English translation, claiming that the reference was to "official" rather than employee. The Bank maintained the second defendant would obviously have been an employee which supports their case that a civil claim can be brought against an employed director.

(g) Dr Rachkov also put forward the following four cases where Arbitrazh courts applied a three year limitation period in claims against CEOs:

> *Resolution No. F09-3635/17 of the Arbitrazh court of Urals District dated 19 January 2018 on case No. A50-24467/2016;*
>
> *Resolution No. F09-6292/16 of the Arbitrazh court of Urals District dated 27 June 2016 on case~No. A47-7767/2013;*
>
> *Resolution No. F05-5554/2015 of the Arbitrazh court of Moscow District dated 27 May 2015 on case No. A40-62162/14;*
>
> *Resolution No. F07-931/2015 of the Arbitrazh court of North-West District dated 7 April 2015 on case No. A56-16114/2014*

Dr Gerbutov maintained that a claim against an employed CEO must be made pursuant to the RLC Article 277 and is subject to a one year limitation period. Therefore, in his view, these cases were wrongly decided.

963. It will be apparent from the above that whilst Dr Gerbutov could rationalise the findings of the Arbitrazh courts with his own views in some cases, he was forced to say that a number of judgments were simply wrongly decided. Even in his own expert report Dr Gerbutov recognised that a body of Russian scholars and courts opine that relationships between a company and its corporate officials should be governed by civil law, rather than the RLC.

964. His explanation that the RLC argument was not raised by some of the defendants only goes so far. There were a number of cases where the Arbitrazh court expressly refused to apply the labour limitation period, favouring the three year civil limitation period.

965. There is one Arbitrazh court judgment which goes against the grain of the Arbitrazh authorities above - *Security Organization Credo v Loktionov (Judgment of the Arbitrazh Court of Saint-Petersburg and Lenlngradskaya Region dated 14 January 2016)*. I consider this case further below.

966. Ultimately, the weight of authority in the Arbitrazh courts is very much in favour of allowing a claim under the civil law in respect of employed directors. The Bank submits that the practice of the Arbitrazh courts, which they say would have jurisdiction over this claim had it been brought in Russia, is the best guide to the true position under Russian law.

967. In fact, ultimately, the Shareholders did not contest that the practice of the Arbitrazh courts was in favour of allowing civil claims. Instead, they sought to argue that this approach was unprincipled and inconsistent with the approach of other courts.

M.2.5.2 The Shareholders' case

968. Dr Gerbutov's evidence was that claims against employed directors are made under RLC Article 233 (or in the case of liability of the Head of Organisation, Article 277). A party is entitled to rely on RCC Article 53 and JSCL Article 71 in the context of such a claim, but does so through Articles 233 or 277 and not directly. As counsel for Mr Yurov put it, the RLC provisions act as a *renvoi* to the civil law. Such a claim remains a labour claim with all the associated implications.

969. In relation to Resolution 62, Dr Gerbutov' view was that, strictly speaking, paragraph 9 applies only to a Head of Organisation. He drew attention to the term "director of a legal entity" which is used in paragraph 9 and which he suggested was narrower than the term "director".

970. In any event, Dr Gerbutov claimed that Resolution 62 should not be interpreted as contended by the Bank.

971. The first sentence of paragraph 9 (which I set out again for ease of reference) provides:

> "A claim for the recovery of damages (in the form of direct loss and (or lost profit) caused by actions (omissions) of a director of a legal entity is subject to examination in accordance with the provisions of article 53(3) of the Russian Civil Code, including in cases where the claimant or the defendant refers in support of their claims or objections to article 277 of the Labour Code of the Russian Federation."

Dr Gerbutov opined that this sentence was entirely consistent with his position that claims by a company against an employed director are labour claims. He made the point (which was agreed by the experts), that even in claims under RLC Article 277, the substantive law principles of RCC Article 53 apply. Therefore, he contends the first sentence of paragraph 9 simply makes clear that labour disputes under Article 277 should be examined in accordance with the principles in RCC Article 53. It does not provide that such claims can be decided under the RCC, without regard to the RLC. The Shareholders argued that Resolution 62 mostly concerns the substantive principles applicable under RCC Article 53, and so paragraph 9 should be read as referring to those principles, rather than settling any conflict between civil and labour law.

972. The second sentence of paragraph 9 provides as follows:

> "Pursuant to provisions of article 255.1(4) of the Arbitrazh Procedure Code of the Russian Federation (hereinafter – the "Russian Arbitrazh Procedure Code"), disputes on claims seeking to hold liable persons who are or were members of the management bodies of the legal entity, including pursuant to paragraph one of article 277 of the Labour Code of the Russian Federation, have a corporate character, and cases regarding such disputes are subject to the jurisdiction of the Arbitrazh courts (article 33(part 1(2)) of the Russian Arbitrazh Procedure Code) and subject to examination under the rules of Chapter 28.1 of the Russian Arbitrazh Procedure Code."

Dr Gerbutov contended that this sentence was concerned only with jurisdiction and not applicable law. The reference to the dispute being of a "corporate character" simply means that the Arbitrazh courts can determine claims under RLC Article 277. It does not mean that the Arbitrazh court should not apply the procedural protections in the RLC.

973. The Shareholders submit that if Dr Rachkov's interpretation of Resolution 62 is correct, it would contradict his own evidence that a party can choose whether to bring a civil claim or labour claim. This is because the wording of Resolution 62 makes clear that disputes are decided in accordance with RCC Article 53, including where a claimant refers to RLC Article 277.

974. Dr Gerbutov considered that his views were supported by Resolution 21 of the Supreme Court's plenum of 02 June 2015 ("Resolution 21"). This resolution was decided after Resolution 62 and before some (but not all) of the cases relied on by Dr Rachkov. It was common ground that the resolution did not deal directly with the position of members of the Supervisory Board. The preamble to the Resolution indicated that one of the Resolution's purposes was:

> "In order to ensure consistency in the courts' application of law governing the labour of an organization's head and members of an organization's collegial executive body…"

Paragraphs 1 and 2 make clear that the RLC applies to the labour of the head of an organisation:

> "1. Legal regulation of the labour of the head of an organization is provided by the Russian Federation Labour Code (hereinafter RF LC), other federal laws and other legal regulations of the Russian Federation, laws and legal regulations of Russian Federation regions, legal regulations of local self-government agencies, the organization's constitutional documents and internal policies and procedures, and the employment contract (RF LC article 273, part 1, article 274)…
>
> 2. When reviewing disputes pertaining to the application of law governing the labour of the head of an organization and members of the organization's collegial executive body, courts must proceed from the fact that the organization's head is an organization's employee who performs a particular employment function under an employment contract (RF LC article 15, part one, article 57, part 2)."

Dr Gerbutov also relied on paragraphs 5 and 6 which he said confirmed that the liability of the head of an organisation is governed by RLC Article 277:

> "5. Under RF LC article 277, part one, an organization's head (including former) assumes full material liability for direct actual damage to the organization. RF LC article 238, part two, defines direct actual damage as a real decrease in the employer's property or a deterioration in the condition of that property (including property of third parties in the employer's possession if the employer assumes liability for safeguarding that property) and the need for the employer to incur costs or make excessive payments to acquire or restore property or for reimbursement of damage that the employee causes to third parties. Imposing upon the organisation's head a full material liability in the amount of direct actual damage caused to the organization is done under RF LC section XI "Material Liability of Parties to an Employment Contract" (chapter 37 "General Principles" and chapter 39 "The Employee's Material Liability").
>
> 6. On the basis of RF LC article 277, part two, an organization's head (including former) shall compensate to the organization the losses caused by its culpable action only in cases specified by federal laws (e.g., article 53.1 of the Russian Federation Civil Code (hereinafter RF CC), article 25 of Federal Law N 161-FZ dated 14 November 2002 "On Federal and Municipal Unitary Enterprises", article 71 of Federal Law N 208-FZ dated 26 December 1995 "On Joint-Stock Companies", article 44 of Federal Law N 14-FZ dated 8 February 1998 "On Limited Liability Companies", etc.). Losses are calculated in accordance with the norms of civil law, which define losses as real damage and forgone income (non-received profit) (RF CC article 15)."

Paragraph 7 provides that such claims can fall under the jurisdiction of both the Arbitrazh courts and the courts of common jurisdiction:

> "7. Cases concerning the recovery of losses from an organization's head (including former) are reviewed by courts of general jurisdiction and Arbitrazh courts according to rules defining their competence established by procedural law RF CPC article 22, part 3, RF APC article 33, part 1, section 2 and article 225.1, section 3)."

975. Dr Gerbutov suggested that Resolution 21 was intended to reassert that claims for damages against a head of organisation are labour claims under RLC Article 277. His position was that the sentiments in Resolution 21 can be applied by analogy to claims against other employed directors (including employed members of the Supervisory Board).

976. Dr Gerbutov relies on an official speech delivered by Dr Mikhail Zinovievich Schwarz (a member of the academic advisory board of the Supreme Court, which is a permanent body of the Supreme Court appointed by the Plenum of the Supreme Court) indicating that the purpose of Resolution 21 was to reassert the primacy of the labour law character of relationships between a company and its head above the civil law:

> "The presented draft of the resolution of the plenum was discussed at the academic advisory board, as was already said before, and should be approved. And, first of all, its urgency is caused, in my view, by the fact that the reform of the civil legislation has given rise to a new turn of disputes on the nature of the relationships between the company and its head. I mean the provisions of Article 53, 53.1 of the Civil Code. In such circumstances, an emphasis that these relationships do not lose their labour law character and remain the labour law ones, at least to a great extent, as is clarified in the resolution of the plenum, is appropriate and timely, since the court practice could feel a pressure from the current discussion over the civil code reform and make a step towards a refusal from application of the labour code when considering relevant disputes."

977. Dr Gerbutov also relied on a number of judgments which he said supported his position that claims against an employed director must be brought under the RLC:

(a) *Rostov-ZentrStroy v Bachevsky (Ruling of the Supreme Court, 28 February 2014)* was a Supreme Court judgment concerning a claim brought by a company against its head for wrongfully receiving cash from the Company whilst acting as a director. The court found that the claim was a labour claim falling within the jurisdiction of the courts of common jurisdiction. The court held:

> "(…) based on provisions of Articles 11, 16, 17, 19 of the Labour Code, if relationships between the company and its head, being a sole participant (founder) of that company and owner of its assets, are formalized by an employment contract, general provisions of the Labour Code apply to such head.
>
> Therefore, a case upon a claim of the company against the general director (including the former one) on recovery of damages caused to the company during performance of his duties arises from employment relationships, and, as a case of employment dispute, falls within competence of courts of common jurisdiction on the basis of Article 22 (1 (1)) of the Civil Procedure Code."

The Bank makes the point that the Supreme Court's judgment deals with jurisdiction rather than substantive law, and did not refer to any limitation issues. In cross examination the Bank put to Dr Gerbutov that the Supreme

Court's finding that the district courts had jurisdiction did not affect the practice of the Arbitrazh courts.

(b) Dr Gerbutov relies on a number of judgments decided by the courts of common jurisdiction where the court applied the RLC in claims made by a company against a Head of Organisation. A number of these cases explicitly apply a one-year period of limitation:

> *Astapov (Appeal Ruling of the Kursk Regional Court dated 22 October 2015);*
>
> *Avraamovsky v Gorobtsov (Appeal Ruling of Volgogradsky Regional Court dated 16 September 2015);*
>
> *OOO v Ivanov (Appeal Ruling of the Supreme Court of the Chuvashkaya Republic dated 9 March 2016);*
>
> *Rubin v Zimenkova (Ruling of the Ivanovsky Regional Court dated 14 March 2016);*
>
> *Feniks v Erin (Judgment of the Leninsky District Court of Nizhny Tagil City of Sverdlovsk region dated 11 January 2016)*
>
> *Telekom-Development v Malashii (Judgment of the Zheleznodorozhny District Court of Krasnoyarsk dated 8 July 2015)*

(c) In particular, the Shareholders rely on dicta in *Astapov* suggesting that in a claim by a company against its head, the RLC rather than RCC applies:

> "… It is not possible to agree with the claimants' submissions in the appeal regarding application to the current legal relationships civil law provisions, and not the labour law provisions, since these submissions are based on incorrect interpretation by the claimant of the rules of substantive law.
>
> The relationships regulated by civil law provisions are defined in Article 2 of the Civil Code. The civil provisions define legal status of participants of the civil commerce, the basis of the origin of and a procedure for execution of the property right and other real rights, rights for results on the intellectual activity and means of individualization (the intellectual rights) related to them, regulates contractual and other obligations, and also other property and personal non-property relationships based on equality, an autonomy of will and property independence of participants.
>
> By virtue of Article 5 of the Labour Code, regulation of the labor relationships and other directly related relationships, according to the Constitution of the Russian Federation, federal constitutional laws, is carried out by labor legislation (including the legislation on labor protection) consisting of the present Code, other federal laws, laws of subjects of the Russian Federation and other regulations containing provisions of labor law.

Thus, regulation of labor relationships by means of direct or by analogy application of civil legislation contradicts to Article 5 of the Labor Code, is not provided for by Article 2 of the Civil Code and is based on incorrect interpretation and application of provisions of these two independent branches of the legislation.

Labor law has its own subject and method of regulation of the public relationships, which differs from the subject and method of civil law. Because of features of the subject and the method of regulation, questions of material liability of parties of the employment agreement are regulated by section XI of the Labor Code, the provisions of civil legislation regulating obligations out of unjust enrichment do not apply during settlement of disputes on compensation of the harm caused by one party of the employment agreement to the other party."

(d) Dr Gerbutov also relied on *Security Organization Credo*, which was an Arbitrazh court judgment concerned with the liability of a Head of Organisation. The judgment set out the allegation of breach of duty and held:

"Defendant did not agree with the claim, motivating his objections mainly referring to the rules governing the employment relationship between him and the Company that it is impossible to recognize the undeniable right, since, according to paragraph 1 of Resolution of the Plenum of the Supreme Court No. 21 dated 02 June 2015 "On Certain Questions Arose by Courts When Applying Legislation Governing Labour of the Head of the Company and of Members of Collegial Executive Body of the Company" that the company's head is regulated by the Labour Code, other federal laws and normative acts of the Russian Federation, laws and normative acts of subjects [regions] of the Russian Federation, municipal normative acts, charter documents of the company, local normative acts, labour contract (Article 273, Article 274 of the Labour Code}.

Thus, in accordance with paragraph 6 of the aforementioned Plenum, by virtue of Article 277 (2) of the Labour Code, only in cases provided by federal laws, in particular Article 53.1 of the Civil Code of the Russian Federation (the "Civil Code"), Article 44 of the Federal Law "On Limited Liability Companies" (the "LLC Law"} the head of the company may be held liable for the damages caused to the company by his guilty acts.

The reference of the claimant to the application of the limitation period provided in the Article 196 of the Civil Code, subject to the provisions of the Article 197 of the Civil Code, which stipulates that this period will apply if the a particular type of limitation period is not established by the law, special limitation period provided in the Article 392 of Labor Code of the Russian Federation for disputes on recovering of damages caused to the employer by the employee is not established, and that the employer has the right to apply to the court within one year from the date of discovery of the damage, is inconsistent and cannot be

taken into account, since the defendant is an executive body of the Company up to 18 May 2015."

978. The Shareholders rely on the express rejection of the claimant's argument that the civil limitation period should apply and the court's application of the labour limitation period. For its part, the Bank points to the fact that the claim was, comparatively, for a very small amount (approximately £2,700). It maintains that the case is not comparable to the Arbitrazh authorities relied on by Dr Rachkov, especially the banking cases which are concerned with complex banking litigation similar to the present case.

979. The Bank contends that these cases are at best neutral and do not support the view advanced by Dr Gerbutov. The Bank's position is that a claimant can elect to commence either a civil or labour claim. Therefore, where a claimant has chosen to commence a labour claim, it is proper for the court to apply the RLC and labour limitation period. Accordingly, cases where the RLC was applied to an employed Head of Organisation do not address the question of whether a labour claim is the only type of claim that can be brought.

980. Dr Gerbutov disputes Dr Rachkov's position that a party can choose whether to bring a civil or labour claim. He contends that where the RLC applies, it prevails over the RCC and JSCL.

981. Firstly, he claims the prevailing nature of the RLC is a general principle of Russian law, reflected in RLC Article 5. This Article provides:

> "Labor relations and other relations directly linked to them shall be regulated, pursuant to the Russian Federation Constitution, federal constitutional laws, by the labor laws (including the law on occupational safety) and other normative legal acts containing the labor law norms:
>
> • this Code; • other federal laws; • decrees of the Russian Federation President; • resolutions of the Russian Federation Government and normative legal acts of federal executive authority bodies; constitutions (charters), laws and other normative legal acts of the Russian Federation subjects; • acts of local self-government bodies and local normative acts containing the labor law norms.
>
> The labor law norms contained in other laws shall comply with this Code.
>
> Decrees of the Russian Federation President containing the labor law norms shall not be in conflict with this Code and other federal laws.
>
> Resolutions of the Russian Federation Government containing the labor law norms shall not be in conflict with this Code, other federal laws and decrees of the Russian Federation President.
>
> Normative legal acts of federal executive authority bodies containing the labor law norms shall not be in conflict with this Code, other federal laws, decrees of the Russian Federation President and resolutions of the Russian Federation Government.
>
> Laws and other normative legal acts of the Russian Federation subjects containing the labor law norms shall not be in conflict with this Code, other federal laws, decrees of the Russian Federation President, resolutions of the Russian Federation Government and normative legal acts of federal executive authority bodies.

Acts of local self-government bodies and local normative acts containing the labor law norms shall not be in conflict with this Code, other federal laws, decrees of the Russian Federation President, resolutions of the Russian Federation Government, normative legal acts of federal executive authority bodies laws and other normative legal acts of the Russian Federation subjects.

Should there be conflicts between this Code and other federal laws containing the labor law norms, this Code shall apply.

Should a newly adopted federal law be in conflict with this Code, this law shall be applied provided the relevant amendments and addenda are entered in this Code."

(emphasis added)

982. The Bank denies the relevance of Article 5 in the present context, contending that it is relevant only to federal law containing labour norms. It argues that the relevant provisions of the RCC and JSCL are not labour law norms but concern directors' duties.

983. Secondly, Dr Gerbutov claimed there is a general principle of Russian law whereby contractual claims have priority over non-contractual claims. In his view, according to this principle, disputes between parties to a contract are decided applying the provisions of law concerning contracts rather than on any other basis.

(a) In support of this, Dr Gerbutov referred to two Russian judgments:

(i) *Russian Post v Tel MTK (Resolution of the SAC's Presidium, 18 June 2013)*, where the court held:

"…where the harm has arisen as a result of non-performance or improper performance of a contractual obligation, provisions on torts do not apply, and the harm shall be compensated in accordance with the rules on liability for non-performance of the contractual obligation or according to the terms of the contract executed between the parties…"

(ii) *RTK Logistika v BORS, (Ruling of the Supreme Court dated 18 May 2015)*, where the court held:

"(…) The final appeal court correctly concluded on significantly different legal nature of obligations depending on the grounds for their creation: from the contract and tort. When the harm arose as a result of non-performance or improper performance of the contractual obligation, the provisions on liability for torts do not apply and the harm shall be compensated in accordance with the rules on liability for violation of the contractual obligation or according to the terms of the contract executed between the parties. (…)"

(b) Dr Gerbutov also referred to *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm) where he said that this court had accepted the existence of a general principle against competition of claims. In that case Andrew Smith J accepted

the evidence of Dr Maggs (who was instructed by the Bank in earlier stages of these proceedings):

> "85. The relationship between the parties is key to deciding which provisions of the Codes are relevant to determining a dispute. Thus, as between parties to a contract, generally disputes are to be resolved in accordance with the law concerning contracts and the contract itself, and the contracting parties cannot bring claims on any other basis. Professor Maggs explained that this reflects a prohibition under Russian law against "competition between claims" and is an application of a broader principle that a special rule prevails over a general legal rule. As he puts it: "Where a claim concerns or arises from contractual relations (which would include the claims in the present case, being (i) claims arising from contracts said to have been uncommercial; and (ii) claims resulting from the alleged diversion of moneys by third parties in breach of contractual duties owed by them to the claimants), the provisions of the Civil Code… do not allow a party to the contract to avoid the structure of Russian law and bring any non-contractual claim arising out of the same facts against the other party".
>
> 86. Professor Maggs considered that, because of the principle of Russian law prohibiting competition against claims, Sovcomflot cannot bring claims against Mr Skarga otherwise than on the basis of their employment contracts and under the Labour Code, and similarly NSC cannot bring claims against Mr Izmaylov on any other basis. Professor Sergeev disagreed: he cited in his report of 8 May 2009 eleven Russian cases as examples of cases in which a corporate director-general had been held to be liable otherwise than under the Labour Code, and considered that Mr. Skarga and Mr. Izmaylov might be liable under Russian law under the Civil Code for non-contractual liability. I do not consider that on examination these cases provide support for Professor Sergeev's opinion. Seven of the cases are shareholder suits, and another two are claims brought by a joint-stock company against another company and not against a director-general. In none of the cases was any reference made to an employment contract between the director-general and the company, and Professor Sergeev accepted that sometimes a director-general is not an employee, although it is relatively unusual for him not to be employed. The cases cited by Professor Sergeev were all decided in the Arbitrazh Courts, which deal with commercial disputes and not disputes concerning individuals, such as employment law disputes. Moreover, Professor Maggs' views seem to me to be supported by a decision of the Federal Arbitrazh Court dated 24 June 2004 in the case of Hotel Sportivnaya. As I understand the report of this decision, the Court considered that an employer can bring against an employee only a claim of a contractual nature. Professor Sergeev accepted that he could cite no precedent for an employer making a claim under article 1064 of the Civil Code. I conclude that such a claim would offend against the principle that Professor Maggs identified and would not be permitted."

(c) In his first expert report in these proceedings Dr Rachkov distanced himself from the idea that there is a principle against the competition of contractual and non-contractual claims in Russian law:

> "128. Another possible distinction (for the purposes of competition of claims) is that between claims arising out of a contract and those arising out of a tort. There are some views that suggest the claimant can decide whether he prefers to file a lawsuit based on the violation of the contract or based on an extra-contractual tort and these two claims cannot be combined in the same court proceedings.
>
> 129. However, this distinction is not supported by Russian law. Under Article 9 of the RF Civil Code, individuals and legal entities should exercise their civil rights at their own discretion (para. 1). The refusal, by individuals and legal entities, to exercise rights which belong to them does not entail the termination of such rights, save for circumstances that are specified by law (Article 9 para. 2 of the RF Civil Code). The idea that parties are generally free to choose which remedies to pursue is supported by Russian court practice and scholars. The remedies available under Russian civil law are listed in Article 12 of the RF Civil Code."

(d) In cross examination, Dr Rachkov sought to defend his position, and disagreed that if a defendant breached their duties under a contract any claim against that person must be brought on the basis of the contract and not on any other basis. He denied that there was a doctrinal principle against competition of claims or that this was commonly acknowledged court practice. However, he indicated that in practice it was easier and simpler for Russian courts to entertain claims based on non-performance of a contract rather than tort.

(e) Dr Rachkov was questioned about an expert report he prepared in litigation previously before this court in *PJSC Tatneft v Bogolyubov & others* [2016] EWHC 2816 (Comm). In that report he stated:

> "47. Russian law gives effect to a fundamental distinction between claims arising out of a contract and claims arising out of non-contractual liability under provisions of the CCRF that cover (in general terms) the same ground as English tort law and unjust enrichment. Article 1064 CCRF is often referred to as the Russian law equivalent of tort or delict, although the analogy is of course not perfect.
>
> 48. ln this context, Russian law gives a strong priority to contractual obligations and liability. If there is a contract between the parties, and the damage was caused by the debtor to the creditor as a result of the debtor's non-performance or improper performance of the contract, the claimant's remedy is a claim based on the contract, and he cannot choose instead to bring a claim under Article 1064 CCRF or, for example, the provisions governing unjust enrichment (Articles 1102-1 109 CCRF 2 7).

49. The priority of contractual claims over tort claims is not expressly provided for in any Article of the CCRF. It is, however, commonly acknowledged by the court practice and doctrine. For example:

(1) The Presidium of the Supreme Arbitrazh Court stated in its Resolution No. 1399/ 13 of 18 June 2013 28 that in the event when the damage was caused as a result of a failure to perform or improper performance of a contract, tort liability shall not be applied and the damage caused shall be compensated on the basis of contractual liability. In that case, the Presidium of the Supreme Arbitrazh Court overruled the decisions of the lower courts that initially refused to impose contractual liability on the contractor for the damage caused by a fire that arose due to the defects in stove heating, installed by the contractor. The lower courts considered the damage in question to be recoverable under Article l 064 (i.e. as tort liability) and had dismissed the claim brought on the basis on violation of contractual obligations. The Presidium of the Supreme Arbitrazh Court overruled those conclusions and specifically stated that so long as the damage resulted from a violation of contractual obligations, contractual liability shall be imposed, and the claimant is not obliged to prove all the elements required for imposition of tort liability.

(2) The opinion expressed by the Presidium of the Supreme Arbitrazh Court is supported by academic writings, for example, by Professor Sadikov in his recent article on delimitation between contractual and tort liability (Sadikov 0. N, Delimitation between Contractual and Tort Liability II Moscow, KONTRAKT, 2015, Issue 2t P. 123 - 131 2 9).

(3) Competition for claims is tolerated only in cases expressly provided for by law. For example, in the context of product liability, where defective goods cause damage to a consumer who is an individual, he may assert a claim for non-contractual harm despite the existence of a contract between himself and the defendant: see Article 1096 CCRF 30. This is confirmed in the academic literature (see, for example, Sukhanov E.A. Civil Law: Text Book II Moscow, 2010, Volume 4, P. 697 31).

50. As a further exception to the general principle, it is possible to establish tort liability regardless of the existence of a contract between the relevant parties where the damage in question was caused outside the sphere of the performance of the contractual obligations and/or exercise of contractual rights. For example, I am aware of a case in which the court imposed tort liability on the landlord on the basis of Article 1064 CCRF (regardless of the contractual arrangements for lease existing between the parties) for damages suffered by the lessee as a result of a fire accident that occurred due to violation of fire safety rules by the landlord and its contractor that performed repair works in the premises (the latter and the landlord were held jointly liable). In those circumstances, the claim in tort was not precluded by the existence of a contractual relationship between the parties because the facts giving rise to the harm occurred outside that contractual

relationship. As I have said, this is however an exception to the usual principle that in a contractual relationship contract law takes precedence and excludes a claim in tort."

(f) Notwithstanding this report, in cross examination Dr Rachkov did not accept that there was a de jure principle that contractual claims take priority over other claims. He accepted there was de facto priority (due to Russian Courts preferring to determine matters based on contract rather than tort) but maintained that parties are not prevented from bringing other claims simply because they have a claim in contract.

(g) In relation to the evidence of Dr Maggs, accepted by this Court in *Fiona Trust*, Dr Rachkov expressed the following views in his first report:

> "I have read the Professor Maggs' evidence in Fiona Trust, which states that Russian law generally prohibits parallel claims in contract and tort. However, in my opinion, this principle does not apply in the current case because a director who is also an employee can be sued in two distinct capacities i.e. as a board director and/or as an employee and the employer is permitted to freely choose what claims it issues. Thus, Professor Maggs' conclusion is not correct as a matter of Russian law."

(h) The Bank sought to distinguish competition between contract and tort from competition between labour law and civil law. They claimed that there is no principle in Russian law that a civil claim against an employed director should be defeated.

M.2.5.3 Discussion

984. I consider that the evidence of Dr Rachkov in relation to election is to be preferred, and that his evidence correctly identifies that under Russian law an entity in the position of the Bank is entitled to elect to bring either a civil claim or a labour claim, and I so find.

985. I have found the Arbitrazh judgments referred to by Dr Rachkov, including cases with striking similarities to the present, and his analysis of the same, to be of the greatest assistance, and the most helpful guide, as to the position of Russian law. There is a clear and unquestionable practice in the Arbitrazh courts, as identified by Dr Rachkov (and indeed acknowledged by Dr Gerbutov) in favour of accepting jurisdiction and applying the RCC in claims against employed directors. It is clear that if the Bank had commenced proceedings in Russia it would have been entitled to do so in the Arbitrazh court and that the claim would have been resolved in accordance with civil law, including the three year limitation period.

986. I bear well in mind that in the Russian system, unlike in this jurisdiction, judgments are not formal sources of law and do not create precedent. I also bear in mind that the position under Russian law should be considered through the lens of the Russian final appeal court, and not simply through the lens of the court of first instance which accepts jurisdiction. However, I do not consider that either Russian legislation or Supreme Court resolutions lead to a contrary conclusion.

987. The clear message from the Arbitrazh judgments is that a civil claim can be brought against an employed director. I accept Dr Rachkov's evidence that this reflects the true position in Russian law. Indeed, Dr Gerbutov has accepted from the beginning that there is line of authority permitting civil claims to be brought (albeit he contends that those cases were wrongly decided).

988. As to paragraph 9 of Resolution 62, I do not consider its application is limited to Heads of Organisation as contended by Dr Gerbutov. The definition of *"director"* in paragraph 1 expressly includes members of the Supervisory Board. I do not consider that *"director of a legality entity"* in paragraph 9 has any other special meaning. Further, paragraph 9 makes clear that the resolution applies in claims against directors including where one party relies on Article 277. I do not consider that it applies only to such claims.

989. Whilst Dr Gerbutov's interpretation of paragraph 9 is a possible interpretation, I prefer and accept Dr Rachkov's evidence that in fact Resolution 62 goes further and permits civil claims to be commenced against an employed director – which is strongly supported by the weight of Arbitrazh judgments, in particular *Orlovsky Sotsialny Bank v Golodukhin* where the court expressly relied on paragraph 9 of Resolution 62 when rejecting the argument that the one-year limitation period contained in the RLC should apply.

990. I also reject the argument that Resolution 62 is inconsistent with Dr Rachkov's position that a claimant can choose to bring a civil claim or labour claim. I attach little significance to the fact paragraph 9 states that disputes are determined in accordance with RCC Article 53 where either a plaintiff or defendant refers to RLC Article 277. I consider the overall sense of paragraph 9 is that civil claims against employed directors are decided according to RCC Article 53, even where there is a reference to the RLC. I do not regard the wording to be inconsistent with Dr Rachkov's position.

991. As to the cases relied on by Dr Gerbutov, I do not consider that they contradict Dr Rachkov's position. The fact that there are cases where Russian courts have applied the RLC, and in particular the one-year limitation period, in claims against employed directors is consistent with Dr Rachkov's view that the claimant is entitled to choose to bring its claim under either the RCC or RLC. None of the cases relied on by Dr Gerbutov establish that the claim can only be brought as a labour claim. I accept that in *Astapov* and *Security Organization Credo* the court appeared to reject the application of a three-year limitation period even despite it being contended by the claimants. However, there is no evidence to suggest that the claims in those cases were civil claims, rather than simply labour claims in which the claimants sought to apply a different limitation period.

992. In relation to Resolution 21, as was agreed by Dr Gerbutov and Dr Rachkov, it applies only to Heads of Organisation. It could only ever apply to the present defendants by analogy. However, in my judgment Resolution 21 does not assist with the issue of whether a claimant can elect to bring a civil claim. It simply provides guidance on how Russian courts should approach claims made under RLC Article 277 and says nothing about whether a claimant is barred from bringing a claim under the RCC and/or JSCL. Whilst I accept that some Russian commentators, including a member of the Supreme Court's academic advisory board, regard Resolution 21 as reasserting the primacy of the RLC over the RCC, ultimately I accept Dr Rachkov's evidence that these views are not supported by the text of Resolution 21 itself.

993. I do not consider the effect of RLC Article 5 is that the RLC prevails over the RCC in all circumstances. Article 5 lists possible sources of labour law (one of which is federal

law) and makes clear that where such sources conflict with the RLC, the RLC applies. However, the Shareholders' reliance on Article 5 simply begs the question whether RCC Article 53 and JSCL Article 71 are labour law norms in the first place. I accept Dr Rachkov's evidence that they are not. I consider Articles 53 and 71 are directors' statutory duties. The fact that directors can be employed does not turn them into labour law norms.

994. As to any wider principle of competition of claims, it has not been demonstrated that such a doctrine extends beyond competition between contractual and tortious claims and applies to the Bank's claims. The two cases relied on by Dr Gerbutov arise in that context. I was not shown any Russian cases applying the same principle to claims against directors under RCC Article 53 and JSCL Article 71. As I understand the judgment of Andrew Smith J in *Fiona Trust*, it accepts the principle exists where contractual claims compete with claims under RCC Article 1064 (the Russian general tort provision) and Article 1102 (the Russian unjust enrichment provision). At paragraph [129] the Andrew Smith J noted that Russian lawyers differ on whether it is possible to bring a claim based directly on the RCC without relying on the RLC. At paragraph [139] he held that in view of his other conclusions nothing turned on the point, but he accepted Russian law would not allow the RLC regime to be circumvented in this way. It is not clear to me that Andrew Smith J was intending to find that the principles against competition of claims extends to a context such as the present, but to the extent that he intended to do so, any such finding is not binding upon me, and I prefer the evidence of Dr Rachkov.

995. I am reinforced in this conclusion by the large number of Arbitrazh cases set out above in which the court has applied RCC Article 53 and JSCL Article 71 directly in claims against employed directors. None of these cases refer to a prevailing nature of the RLC over the RCC, either by reference to Article 5 of the RLC or a principle against competition of claims.

996. Accordingly, in the above circumstances, and for the reasons I have given, I am satisfied and find that the Bank is entitled to elect to bring its claim as a civil claim, and is not required to bring it under the RLC. In this regard if the present claim had been brought in Russia, the Bank could and would have brought civil claims against the Shareholders relying on RCC Article 53 and JSCL Article 71 based on losses suffered by the Bank as a result of the Shareholders' breaches of their directors' duties, in the Arbitrazh courts, and irrespective of the employment status of the Shareholders, the Arbitrazh courts would accept jurisdiction over such a claim, and decide it in accordance with civil law (and accordingly a 3 years limitation period would apply).

997. I therefore answer Issue 41 as follows:-

The Bank is entitled to bring claims against the Shareholders under the RCC and/or JSC Law, and the Bank is not required to bring any claim against them solely under the RLC as a matter of Russian law. In particular (I address issue 41.3 separately below):

(1) Issue 41.1: The Labour Code does not apply and prevail over the Civil Code, so that any liability of the employee is governed exclusively under the Labour Code.

(2) Issue 41.2: No Russian law principle against "competition of claims" has been proven which would operate to prevent a company from bringing non-contractual claims against directors under the RCC and/or the JSC law when those directors have employment contracts.

(3) Issue 41.4: Any presumption that might have arisen under the Civil Evidence Act in light of the *Fiona Trust* judgment, could only be a (weak) presumption in respect of the position as at 2010, following which there have been significant developments including in the context of Resolution 62 (dated 30 July 2013) and the authorities identified above, and in any event I accept the evidence of Dr Rachkov that any principle against "competition of claims" in Russian law does not extend to a non-contractual claim against directors under the RCC and/or the JSC law. Accordingly to the extent that any presumption arose, it has been rebutted based on the expert evidence of Dr Rachkov, which I have accepted in the relevant respects.

M.2.5.4 Acting in the capacity of an employee

998. There is a further issue that arises (Issue 41.3). It is common ground between the experts that where a claim is brought against an individual in their capacity as employee and not in their capacity as a member of the Supervisory Board, the Labour Code (and not civil legislation) will apply to such claim (paragraph 36 of the Agreed Facts and Issues). The Shareholders contend that even if the Bank is otherwise entitled to elect which claim to commence (as I have found), it cannot do so where the claim relates to activities as an employee.

999. As set out in the experts' joint memorandum:

> "13. It is agreed that - when the claim is made against the employee of the company who has a labour contract with that company and simultaneously is a member of the board of directors - for his/her activity in the capacity as employee of the company (and not in the capacity as member of the board of directors), the Labour Code (and not civil legislation) will apply to such claim."

1000. In relation to Mr Yurov, I agree with the Bank that it is not possible to separate out his actions *qua* director from his actions *qua* employee. His employed capacity is one and the same as his Supervisory Board capacity. Counsel for Mr Yurov did not seriously pursue this argument in relation to his client and I consider he was right not to do so.

1001. There is a potential difference in relation to Mr Fetisov and Mr Belyaev, who were employed in distinct executive capacities at the same time as being members of the Supervisory Board. It is conceptually possible for them to argue that the actions complained of were taken in their capacities as employees, and not as members of the Supervisory Board.

1002. Thus it might be argued that Mr Belyaev was acting as president of the Bank's investment unit (which he was employed as pursuant to his 2010 employment contract) when he carried out the actions which form the basis of the Bank's claim. However, counsel for Mr Belyaev did not seriously pursue this argument, although it was theoretically open to him.

1003. Out of all the Shareholders, counsel for Mr Fetisov pressed the argument most strongly. Mr Fetisov argued that the actions forming the basis of the Bank's claim against him relate to his work as the Bank's President and the competencies listed in his 2010 employment agreement:

> "The competence of the President of the Bank includes the following matters:

…

1.3 General management and coordination of the activities of the following supervised units and areas of activities of the Bank:…

- work with distressed assets;

- debt financing and securitization"

1004. Mr Fetisov points out that none of the claims against him relate to voting on the Supervisory Board or competencies entrusted to the Supervisory Board under the Bank's Articles of Association. He argues that he did not need to be a member of the Supervisory Board in order to carry out the alleged actions and that any role played by Mr Fetisov in arranging transactions, coordinating the Bank's management (including individuals such as Mr Iskandyrov), and sitting in the Distressed Assets Group fell squarely within the scope of his role as President. Similarly, it is submitted that Mr Fetisov's role in reviewing and approving loans on the CC was part of his role of working with distressed assets and debt financing and securitization.

1005. The Bank's position is that none of the Shareholders were acting solely in their capacity as employees, and not as members of the Supervisory Board. It argues as follows:

(a) Issue 41.3 only arises when a person has been employed for an entirely distinct role which has no bearing on their role as a member of the Supervisory Board- for example where a claim is made against an individual who is a company's head of legal and a member of the Supervisory Board relating to negligent legal advice completely unrelated to their role on the Supervisory Board. The Bank accepts that in such circumstances it might be said that the advice was given *qua* employee and therefore any claim must be brought under the RLC. However, it maintains that the actions of the Shareholders in the present case cannot be characterised in this way. It is not possible to say the Shareholders' conduct in arranging transactions and/or sitting in CC meetings was separate and distinct from their roles on the Supervisory Board, and as such they were bound by their duties as members of the Supervisory Board.

(b) In any event, it was not part of either Mr Belyaev or Mr Fetisov's job descriptions to approve lending decisions on the CC or arrange transactions. This was something they did *qua* their roles as board members and not *qua* their role as employees:

(i) Mr Belyaev's role as President of the Bank's investment unit focussed on the Bank's operations in the financial markets rather than corporate lending.

(ii) Mr Fetisov's contractual job description as President of the Bank refers to the organisation of the work of the Management Committee and the general management and coordination of the activities in the Bank. It does not include approving loans. Further, on Mr Fetisov's own evidence, his role in relation to distressed assets concerned the projects themselves rather than the manner in which they were financed. Therefore, he cannot say he approved the loans in his capacity as employee only.

1006. I do not consider that any of the Shareholders were acting solely in the capacity of employees. Firstly, I am satisfied, and find, that under Russian law the duties which attach to members of the Supervisory Board attach to them in all capacities, save where they are an employee carrying out a distinct piece of work which has no bearing on their status as a member of the Supervisory Board. This conclusion is consistent with my findings in relation to the scope of RCC Article 53 and JSCL Article 71, which I set out below. I do not consider that any of the actions which form the basis of the Bank's claim relate to a separate and distinct employed capacity.

1007. Counsel for Mr Fetisov relies on a statement in Dr Rachkov's first expert report which provides:

> "107. …In the given hypothetical situation (i.e. when one member of the board of directors is the CEO having a labour contract and the other member of the board of directors is also an employee having a labour contract), labour law would only apply to these members of the board if the claim is made against them as employees of the company. The Labour Code will not apply to a claim made against the two individuals in their capacity as the members of the board of directors."

Mr Fetisov argues that Dr Rachkov's position is that somebody with a senior role (such as the CEO) is so hopelessly intermingled between his employee and Supervisory Board capacities that he is never required to be sued as an employee under the RLC.

1008. I do not regard Dr Rachkov's statement as supporting Mr Fetisov's position. I did not understand Dr Rachkov to be saying anything other than it is <u>possible</u> a CEO would, in some circumstances, be acting solely as an employee.

1009. Counsel for Mr Fetisov also argues that adopting the Bank's approach, the principle that a member of a Supervisory Board can be sued as an employee is almost written out of existence. He claims it is simply not realistic that there are individuals who would be appointed as members of a Supervisory Board, but have a role that is in no way linked to their directorship.

1010. I do not accept this argument. Firstly, it appears to me that there may be cases where an employee acts separately and unrelatedly to their position on the Supervisory Board (the example of a legal officer giving negligent legal advice illustrates this). Secondly, to the extent that the principle is restricted by the finding I have made, that is the effect of Russian law and I do not consider that such a consequence militates against that representing the position under Russian law.

1011. In any event, I am satisfied that, on the facts, the argument does not get off the ground. None of the actions forming the basis of the Bank's claim fall within Mr Belyaev or Mr Fetisov's employed capacities:-

(a) In relation to Mr Belyaev, his own evidence was that, under his 2010 employment contract, his main responsibilities as President of the Bank's Investment Unit were (i) overseeing the Bank's proprietary portfolio, including making decisions on the Bank's proprietary and securities positions (ii) working on the Bank's Asset and Liability Committee, which was

responsible for defining the Bank's policies in terms of currency risk and setting general guidelines with respect to liquidity management. I do not consider that Mr Belyaev was acting in this capacity when arranging the transactions, approving the lending on the CC, or conspiring to do so, as alleged by the Bank.

(b) In relation to Mr Fetisov, his own evidence was that he was involved in the loans and transactions and the financing of projects only at a very high level. As Mr Fetisov stressed in his second witness statement:

> "I became involved in some of the projects and investments underlying the defaulted loans, as a result of my work with the Distressed Assets Group. Such work concerned the projects themselves, rather than the manner in which they were financed."

I therefore consider that Mr Fetisov's work with distressed assets and debt financing/securitization, as provided in his employment contract, does not cover the actions which form the basis of the Bank's claim. I do not consider that Mr Fetisov was acting as President when arranging the impugned transactions, approving lending on the CC, or conspiring to do so, as alleged by the Bank.

1012. Accordingly, and for the reasons I have given, I do not consider that any of the Shareholders was acting as an employee rather than as a member of the Supervisory Board in relation to the subject matter of the Bank's claims under the RCC and JSCL which it is entitled to elect to make. In relation to Issue 41.3, the Bank's claims do not relate in whole or in part, to activity in the Shareholders' capacity as employees, as opposed to as members of the Supervisory Board.

M.2.5.5 The Bank's alternative argument in relation to Mr Yurov

1013. In relation to Mr Yurov, and as an alternative if necessary, the Bank argues that Russian law does not recognise a contract which purports to employ an individual as a member of a Supervisory Board (Issue 39). Because Mr Yurov was employed from 2003 solely as chairman of the Supervisory Board (and not in any other capacity), the Bank submits that he was not an employee during the relevant period.

1014. The Bank acknowledges that the same argument does not apply in relation to Mr Belyaev and Mr Fetisov. The Bank initially put Mr Belyaev and Mr Fetisov to proof as to the validity of their employment agreements but now recognises that, because they were given defined executive roles in addition to their membership of the Supervisory Board, they were properly to be regarded as employees.

1015. The Bank submits that it is unreal to contend that Mr Yurov was subordinate to the Bank's CEO and could be given binding instructions under penalty of disciplinary sanction. The Bank draws attention to the fact that the Supervisory Board had hiring and firing powers in relation to the executive board. It argues that this demonstrates the implausibility of employment relations between a company (which enters employment agreements through its executive body) and members of its Supervisory Board. The Bank also relies on the fact that, when applying for a UK visa for his wife, Mr Yurov described himself as "self-employed". It suggests that this reflects the reality of how Mr Yurov saw

himself as the dominant shareholder. In support of its argument, the Bank also relies on a number of cases and academic commentary cited by Dr Rachkov.

1016. On balance, had the same been relevant (which on my findings it is not), I would have rejected the Bank's alternative argument for the reasons set out below. I consider that, whilst it may not be common practice in Russia, there is no restriction on a company's ability to enter an employment contract with a member of its Supervisory Board.

1017. In this regard, the relevant legislation does not give an unequivocal answer to the issue.

(a) Article 37 of the Russian Constitution provides that each person may freely dispose of his or her labour. As was agreed by the experts, and as has been found by the Russian courts, this includes the right to decide how to formalise a labour relationship and whether to enter a civil or employment law contract. I accept, as a starting point, that the Constitution provides for this freedom, however this is subject to any mandatory rule of law providing otherwise.

(b) RLC Article 11 (which indicates that labour norms do not apply between a company and a member of its supervisory board, unless a labour contract has been executed) could be read either as supporting Dr Gerbutov's view that it is possible to employ individuals as members of the Supervisory Board, or as being limited to members of a Supervisory Board who have a separate and distinct employed capacity, as was contended by Dr Rachkov.

1018. I do not consider that the terms of the Russian Constitution or RLC offer much by way of assistance. My conclusion is mostly informed by the judgments and academic commentary I have been referred to. Ultimately I accept that Dr Gerbutov's interpretation of RLC Article 11 is the most natural. The provision contains no express reference to the capacity in which a member of a Supervisory Board must be employed.

1019. As to the cases referred to by Dr Rachkov, I am not persuaded that they support his position. Although Rulings 1169-O and 1170-O of the Constitutional Court contain general statements that the relationship between a company and members of its Supervisory Board is civil in nature, as Dr Rachkov accepted, the members of the supervisory board in those cases did not have employment contracts. Therefore, I do not consider they take the argument very far. Similarly, many of the other authorities relied on by Dr Rachkov concerned Supervisory Board members who did not enter into contracts at all, failed to establish a labour contract evidentially, or entered civil (rather than labour) contracts (see: *Plast-Rifey v. Inspectorate of the Ministry of Taxes and Dutie*s (Presidium of the RF Supreme Arbitrazh Court dated 26 July 2005)*; Information Letter No. 106 of the Presidium of the RF Supreme Arbitrazh Court dated 14 March 2006*; *OAO Halogen v. Inter-District Inspectorate* (Resolution of the Federal Arbitrazh Court of the Ural District, 05 March 2018; *OAO Investment Company Yermak v. Inspectorate of the Federal Tax Service* (Resolution of Federal Arbitrazh Court of the Ural District, 27 December 2006); ZAO *Kurganstalmost v. Inspectorate of the Federal Tax Service* (Resolution of Federal Arbitrazh Court of the Ural District, 6 August 2006); *Avtotor Holding v Inspectorate No 9* (Resolution of the Arbitrazh Court of the Moscow district, 06 June 2017); *Kazan Engine-Building Production Unit v Regional Department of the Social Insurance Fund for Tatarstan* (Resolution of the Federal Arbitrazh Court for the Povolzhye District, 06 August 2009).

1020. Nor do I consider that the cases relied on by Dr Rachkov which did involve employment contracts support his position either. In *OAO Stavropolkraygaz OAO v. State Institution Stavropol* (Resolution of the Federal Arbitrazh Court of the North Caucasus District, 13 February 2007), the issue whether members of the Supervisory Board had labour contracts was not central to the judgment, as the court found the relevant social dues accrued to the remuneration paid to members of the Supervisory Board because of their managerial functions in any event. As to the guidance given by the Kemerovo regional court in its Overview of court practice dated 15 March 2007, the appeal referred to as *Anatoliy Polevik v ZAO Kuzbass Cell Communication* appears to have been decided on the basis that the lower court erred by not checking the relationship between the company and members of the Supervisory Board. If anything, therefore, the judgment supports the possibility of such an employment contract.

1021. As to the academic articles relied on by Dr Rachkov, in my judgment the majority of commentary is aimed at setting out the position *de lege feranda* or outlining best corporate practice. Neither of these are helpful in determining the actual position under Russian law. To the extent that any of the commentary goes further than this, I am not persuaded in light of the cases relied on by Dr Gerbutov that this is sustainable.

1022. I accept Dr Gerbutov's evidence that the qualification guide adopted by Ruling 37 of the Ministry of Labour, dated 21 August 1998 does not constitute an exhaustive list of possible labour relationships under Russian law. The fact that Supervisory Board member is not on that list is not decisive. As to the letters sent by the Russian ministries for Health and Social Development; Finance; and Labour and Social Protection, it is common ground that they have no normative value under Russian law. In any event, it appears to me that the letters address the specific competences of the relevant government departments. I am not convinced that they establish a general rule that individuals cannot be employed as members of the Supervisory Board. Nor am I persuaded that the outcome of the 2014/2015 Russian tax proceedings regarding the status of payments made to Mr Yurov as chairman of the Supervisory Board establishes such a rule.

1023. As to the cases relied on by Dr Gerbutov, I consider that they demonstrate the possibility of employing individuals as members of a Supervisory Board. It seems to me that the Russian courts in *Alsiko v Zeomaks* (Resolution of the Supreme Court, 08 June 2015) and *EKOR v Tax Inspectorate* (Resolution of the Federal Arbitrazh Court of the Moscow District, 13 December 2010) at least contemplated the possibility of such contracts. In *Sh v Instryogaz* (Appeal Ruling of the Moscow City Court, 28 November 2013), whilst the claim was dismissed due to the expiry of limitation, the court appeared to dispose of it as a labour claim. I also attach weight to the cases Dr Gerbutov referred me to concerning the recovery of remuneration of Supervisory Board members as salary. Dr Rachkov accepted, as he was forced to, that these cases were not consistent with his position.

1024. I accept Dr Gerbutov's evidence that the hiring and firing powers of the Supervisory Board is exercised by the board as a whole and not by individual members. Therefore, no single member has direct control over the employment terms they are offered. I also accept that a CEO would be entitled to give binding instructions to employed members of a Supervisory Board, provided such instructions were lawful, did not interfere with the competence of the Supervisory Board and fell within the relevant employment duties of the board member.

1025. Therefore, in my judgment, there is no Russian law prohibition on entering an employment contract with a member of a Supervisory Board, and I answer Issue 39 accordingly. The Bank's alternative argument (which could only have succeeded in relation to Mr Yurov) would therefore have failed. However, the point is academic in light of my finding in relation to the Bank's entitlement to elect.

1026. As to Dr Rachkov's position that a Russian court would re-categorise a contract purporting to employ an individual as a member of the Supervisory Board as civil, it was accepted by the Shareholders that there are cases where Russian courts will reclassify contracts which parties have labelled. Dr Rachkov referred me to cases where a lawyer was hired by a company about to enter bankruptcy in order to assist in preventing the bankruptcy. These appear to have been attempts to gain the benefit of a priority under Russian insolvency law. Dr Rachkov accepted that none of the cases he relied on involved the reclassification of a contract with a member of a Supervisory Board. In my judgment, the present case is not comparable to the cases cited by Dr Rachkov. Once it is accepted that under Russian law a company is entitled to employ a member of its Supervisory Board, I find that there is no reason to reclassify Mr Yurov's employment contract as a civil law one.

1027. In light of these conclusion it is not necessary for me to go on to consider whether an estoppel arises (Issue 40).

M.3 Civil Claim under RCC Article 53 and JSCL Article 71

1028. I have concluded that the Bank is entitled to elect to bring a civil claim under RCC Article 53 and JSCL Article 71. It is therefore necessary to address the principles that apply to such a claim.

1029. The essential issue in dispute in relation to the claim under RCC Article 53 and JSCL Article 71 is set out at Issue 42:-

> "In view of the findings made on the issues identified above in relation to the nature of the Loans and Transactions and the Shareholders' knowledge and involvement in them, were the Shareholders in breach of Article 71 of the JSC Law and/or Article 53 of the RCC in respect of the Loans and Transactions?... it is common ground that, if the Shareholders were in breach of these obligations, they would also be in breach of their Labour Code obligations."

1030. There are a number of sub-issues which arose during the course of the trial which are of relevance when considering whether the Shareholders were in breach of RCC Article 53 and/or JSCL Article 71, and it is convenient to address these below.

1031. In their joint memorandum the experts agreed:

> "under the Initial Article 53(3), the New Article 53(3), and under Article 71(1) of the JSC Law, members of the board of directors were obliged to act **in the interests of the company** when performing their rights and obligations of members of the board of directors and **to perform their rights and obligations in relation to the company in good faith and reasonably**."
>
> (emphasis added)

1032. There are a number of differences between the experts as to how exactly the duty under Articles 53 and 71 operates.

M.3.1 Obligation to act in the (best) interest of the Bank

1033. The Bank submits that Articles 53 and 71 require the Shareholders to have acted in the (best) interest of the Bank, as well as in good faith and reasonably. Dr Gerbutov's view is that this is an inaccurate characterisation of Articles 53 and 71. His view is that in the context of Articles 53 and 71, the phrase *"act in the interest"* is not used as a synonym for "in good faith and reasonably", but instead simply means "on behalf of the company or in capacity as an officer of the company". He maintains that the obligation under Articles 53 and 71 is simply to act in good faith and reasonably.

1034. I do not consider that anything turns on this debate given that both parties accept that the Shareholders were required to act in good faith and reasonably. Further, both parties accept that Resolution 62 establishes rebuttable presumptions of bad faith, one of which being where a defendant should have been aware that his actions were not, at the time when they were taken, in the best interests of the legal entity (paragraph 2(5)) which I consider is particularly apt in the context of the use of "balance sheet management" (including, in particular, to mislead the CBR). Thus, something that is not in the best interests of the company is likely in any event not to be an act in good faith and/or reasonably (and so contrary to Articles 53 and 71). However, had it mattered, I consider that *"in the interests of the company"* does not simply mean "on behalf of the company" but also encompasses what is in the best interests of the company. Whilst it is in a different context (employment) the Bank also points out that the Shareholders promised in their employment contracts to act exclusively in the Bank's best interest.

M.3.2 Scope of duties

1035. There is an issue between the parties as to the scope of the Shareholders' duties under RCC Article 53 and JSCL Article 71 and, in particular, whether those duties extend to the Shareholders' participation in CC meetings.

M.3.2.1 The Shareholders' position

1036. The Shareholders refer to the wording of JSCL Article 71 that members of the Supervisory Board shall in exercising their rights and performing their duties, act in the company's interests, exercise their rights and perform their duties with respect to the company in a bona fide and reasonable manner. Dr Gerbutov's view was that this obligation is limited to actions taken by members of the Supervisory Board during the performance of their rights and obligations as members of the board (for example, when voting on the Supervisory Board) and not whilst acting outside of that capacity, or discharging duties to the company in a separate capacity, so that (in his view) RCC Article 53 and JSCL Article 71 do not extend to the acts of the Shareholder when sitting on the CC.

1037. In support of his position, Dr Gerbutov referred to two main sources:

(1) Firstly, he relies on views expressed in an article written by Zhukova U.D and Pavlova K.P (2015, "Perspectives of Development of the Concept of Liability of the Members of the Board of Directors"). That article provides:

> "In conclusion, we should mention cases when losses are caused by a single director not due to his participation in making decisions by the supervisory board as a corporate body, but due to the influence on, e.g., making such a decision by a company's sole executive body or even actual making decision instead of a sole executive body (if there is interrelation between such persons and the sole executive body depends on such person's opinion in any way, especially if the election of the company's sole executive body falls within the competence of the board of directors). In such a case this person shall be liable not as a member of the board of directors (since the decision resulting in losses is not connected with his activity as a member of the board of directors; he is not entitled to make decisions separately from the other members of the board of directors), but "as a person having an actual possibility to influence the legal entity's actions" in accordance with paragraph 3 of Article 53.1 of the Civil Code of the Russian Federation. If members of the board of directors (one or several) having possibilities directly, but beyond their competence, to influence decisions to be made by the general director in respect of the company actually realize such possibilities to the detriment of the company, they must be liable jointly with the director who is to be brought to the liability for the caused losses as a result of the actual implementation of the decision of so-called "shady" directors".

(2) Secondly, he relies on the judgment in *Maxell Invest Ltd v Koshevarov,* (Resolution of the Arbitrazh Court of the Far Eastern Circuit dated 13 October 2015). In that case, claims were brought under articles 53 and 71 against directors who had set up a competing company. The claims were dismissed and the court found as follows:

> "The arguments of the applicant of the final appeal that the Harbour suffered damages as a result of the incorporation by Koshevarov D.V. and Koshevarova M.V, members of the of the Board of Directors, of the legal entity with the name identical to the name of the company previously incorporated by the Harbour, whereas both legal entities render analogues services however the price of the services of the company incorporated by the defendants is significantly lower are dismissed. In this case unlawfulness of the actions of the defendants as members of the Board of Directors of the Harbour is not proven. For the present claim the actions of the defendants exactly as of the persons participating in corporate bodies of a legal entity are relevant and not as of private individuals having certain rights and obligations."

Dr Gerbutov considers that this is an example of directors being found not liable under article 53 and 71 because the unlawful actions were not taken in their capacity as directors. When cross-examined, Dr Rachkov did not agree with this characterisation. He was of the view that the conclusion of the court did not turn on the capacity in which the directors were acting, but failed because none of the elements in articles 53 and 71, including bad faith/unreasonableness and loss were proved. Dr Rachkov suggested that the claimant company's charter may not have required directors to refrain from participating in competing business. The Shareholders maintain the judgment implies that the reason the defendants were not liable was because they were not acting as directors when setting up the competing company.

1038. Dr Gerbutov also relies on three further cases which he considered were consistent with his views:

(1) *Bank Sochi v Controlling Persons* (Fifteenth Arbitrazh Appeal Court, 7 December 2017) where members of a Management Board were held not liable for their actions approving loans as part of a CC.

(2) *Bank VEFK-Ural v Chechushkova and ors* (Resolution of the l7th Arbitrazh Appeal Court dated 25 May 2015) where directors were found not liable in relation to transactions which they did not execute, even though they had approved them whilst sitting on a Credit Committee.

(3) *Bank Russkii Bashkirsky Dom v Bondorovich and ors.* (Resolution of the Ninth Arbitrazh Appeal Court dated 27 September 2017), where members of the Management Board and Supervisory Board were found not liable for their actions when voting on the CC. The court held:

> "According to Part 14 of the debtor's Charter, management bodies of the Bank are: General meeting of shareholders, Board of Directors, Chairman of the Bank's Management Board (sole executive body), Bank's Management Board (collective executive body) (volume 67, sheet 23 of the case).
>
> According to Part 17.3 of the debtor's Charter, the Bank's executive body (both sole and collegial) is responsible for managing the Bank's day-to-day activity excluding the duties falling within the competence of the General Meeting of the shareholders and Bank's Board of Directors (volume 67, sheet 23 of the case).
>
> Therefore, the 'Big' Credit Committee (members of which - the defendants - signed protocols on granting loans to the borrowers) is a collective advisory body of the Bank with no powers of executive bodies and was created to ensure the efficient realisation of the credit strategy and the Bank's loan policy.
>
> The 'Big' Credit Committee, being an internal Bank's structure, was not defined by law and internal regulations as an executive body of the Bank and was not administering the Bank's day to day activity, and did not make decisions on their execution mandatory for fulfilment by the Bank's executive bodies. The Loan Regulation does not contain provisions making the execution of the loan agreement unconditionally mandatory for members of the Credit Committee, other authorised persons, just because its execution was approved by the Credit Committee. The Credit Committee does not predetermine the decision on granting a loan and does not implement it".

1039. Dr Gerbutov was of the view that these three cases support the general proposition that actions taken by directors on a credit committee are not within the scope of their responsibilities as members of the relevant corporate board.

1040. In cross examination, Dr Rachkov considered that: (i) in relation to *Bank Sochi v Controlling Persons* there was no evidence that the court engaged with whether there had been a breach of RCC Article 53 or JSCL art 71; (ii) in relation to *Bank VEFK-Ural v*

Chechushkova the conclusion relied on by Dr Gerbutov was due to the inability of the claimant to prove its case because of missing credit files.

1041. Dr Gerbutov accepted that there could be a dispute *de lege ferenda* whether the position under Russian law is satisfactory, but maintained that it is the law.

1042. More generally, the Shareholders urge me to be astute not to carry any English law notions of fiduciary duties over into Russian law. I confirm that I have been, and that the findings I make are based on the evidence as to Russian law that is before me.

M.3.2.2 The Bank's position

1043. Dr Rachkov's evidence is that directors are subject to the duties in RCC Article 53 and JSCL Article 71 at all times, and regardless of the context in which they act. Therefore, if someone signs up to being a director of a Russian company (whether on the supervisory or management board) they accept the obligation to act reasonably and in good faith in the interests of the company and must do so in all capacities and no matter which committees they sit on.

1044. Dr Rachkov disagreed that any of the cases relied on by the Shareholders support Dr Gerbutov's view. He argued that the views expressed by Zhukova U.D and Pavlova K.P are not supported either by court practice or authorities.

1045. In support of his view, reliance is placed on the case of *Lipetsk Regional Bank v Bobyleva and ors* where the court held:

> "The provisions of the Civil Code of the Russian Federation, the Federal Law "On Joint Stock Companies" do not determine the list of actions of the persons that are members of the executive bodies of the Bank, whose performance entails legal consequences in the form of the reimbursement of losses. The main criteria in the indicated case are the unreasonableness and bad faith of the actions of management of the legal entity, and also their failure to adopt all the necessary measures to prevent damages. The form in which the members of the management bodies expressed their will has no legal relevance. Consequently, the case materials contain all the necessary documents that make it possible to establish the expression of the will of the members of the Management Board on the conclusion of the transactions relating to the provision of the respective loans. According to the Bank's practice, loans should not be issued without the adoption of a decision by the credit committee at the meetings where the defendants took decisions (see the Regulations on the Credit Committee, case page 10-10, volume 26.)"
>
> (emphasis added)

1046. The Bank submits that this judgment supports their argument that directors' duties apply regardless of the form or capacity in which the director acts. Indeed, they point out that the case was an example of directors being found in breach of such duties whilst approving loans as members of a Credit Committee.

1047. Dr Gerbutov sought to distinguish the case on the basis that it concerned claims against members of a Management Board and not Supervisory Board. He considered that the court's decision was based on the fact that, pursuant to the relevant provisions of the

company's internal regulations, the Management Board's competence extended to controlling and approving transactions (and therefore covered their actions on the Credit Committee). He maintained that the judgment did not speak to claims against members of the Supervisory Board who do not have the same competence.

M.3.2.3 Discussion

1048. I accept Dr Rachkov's evidence that the Shareholders were subject to the duties contained in RCC Article 53 and JSCL Article 71 at all times, including when participating in CC meetings. I do not consider that any of the cases relied on by Dr Gerbutov establish that the duties apply only when performing rights and obligations as members of the Supervisory Board in a strict sense. I do not consider that the case of *Maxell Invest Ltd v Koshevarov* supports his position. The judgment is at best ambiguous and I accept Dr Rachkov's evidence that it may have been decided based on a failure to establish unlawfulness. The other cases relied on by Dr Gerbutov do not take the position any further.

1049. As to the academic commentary by Zhukova U.D and Pavlova K.P, the quotation relied on by Dr Gerbutov focusses primarily on the fact that there could be liability for members of the Supervisory Board for influencing the company's executive body under paragraph 3 of RCC Article 53.1. To the extent the Article suggests members of a Supervisory Board cannot be liable under Article 53(3) for their participation in CC meetings, I accept Dr Rachkov's evidence that this is not the position under Russian law.

1050. My conclusion, based on the evidence of Dr Rachkov, is reinforced by the comments made in *Lipetsk Regional Bank* which support the proposition that directors' duties apply in whatever form the director's will is expressed, including when they are sitting on committees and sub-committees.

1051. In any event, even if the scope of Articles 53 and 71 was as contended for by the Shareholders (contrary to my finding), the Shareholders could in any event be liable for culpable inaction as members of the Supervisory Board based on Dr Rachkov's evidence, which I accept in this regard. If the Shareholders became aware of, or carried out a fraud outside their capacity as a board member, they could be liable for failing to disclose this at board meetings and taking steps to prevent the fraud in their capacity as a board member. In cross examination, Dr Rachkov accepted that the cases below about culpable inaction do not concern liability under Articles 53 and 71. However, I do not consider that there is any reason why the same principle would not apply in that context, and I accept Dr Rachkov's evidence that it would.

M.3.3 Liability for culpable inaction

1052. The experts agree that it is possible under Russian law for the Shareholders to be liable for culpable inaction, as well as action.

1053. JSCL Article 71(2) provides that members of a Supervisory Board who vote against a decision or do not participate in voting are not liable. This is confirmed in Resolution 62 paragraph 7, which provides:

> "No responsibility for losses caused to a legal entity is born by those members of collegial bodies of a legal entity who voted against a decision which resulted in infliction of losses or by those who, acting in a fair manner (Article 1 of the CC

of the Russian Federation), did not participate in voting (item 3 of Article 53 of the CC of the Russian Federation, item 2 of Article 71 of the Law on Joint-stock Companies, item 2 of Article 44 of the Law on Limited Liability Companies)."

1054. Dr Rachkov and Dr Gerbutov agree that for this rule to apply, non-participation in voting must be in good faith. In other words, an individual could be liable for bad faith inaction.

1055. Dr Rachkov gives two examples of Russian courts applying the doctrine of bad faith inaction.

(a) Firstly, in *Farimex Products Inc v Telenor* (Resolution of the Eight Arbitrazh Appeal Court dated 11 January 2009), the court allowed a claim against a company's shareholder for failures by members of the Supervisory Board appointed on the shareholder's behalf. The relevant members of the Supervisory Board failed to vote in favour of a resolution allowing the expansion of the business. Both the first instance and appellate courts found that the shareholders' bad faith consisted in the bad faith inaction of the board members appointed on its behalf.

(b) Secondly, in *Andrey Valeryevich Prokhorov et al v Charow, Scott Sloan* (Resolution of the Eight Arbitrazh Appeal Court dated 2 February 2012), a claim was made against two members of the Supervisory Board for failing to disclose knowledge of the possibility of a strategic partnership between two third party companies. The claim was rejected, but only due to the fact that the claimants jointly comprised less than 1% of the company's voting shares.

1056. Dr Rachkov's evidence (which I accept) was that each of the Shareholders could be liable for inaction if they were aware of the impugned loans transactions and failed to take steps to prevent them being made. In cross examination Dr Rachkov accepted that the Shareholders would have to have been aware of the irregularities or unlawfulness of the transactions (or at least should have learnt of this) to be liable in this manner. However, in the light of my findings as to the Shareholders' knowledge in the present case this requirement would have been unproblematic.

M.3.4 Rebuttable presumptions

1057. The experts agree that, under Russian law, Resolution 62 paragraphs 2 and 3 list circumstances which establish rebuttable presumptions of bad faith and/or unreasonableness. If the circumstances described in paragraphs 2 and 3 are proven by the claimant, the defendant must establish that his acts were nevertheless taken in good faith and/or were reasonable.

1058. There is a dispute as to the proper translation of Resolution 62 paragraphs 2 and 3. I set out below Dr Gerbutov's translation, although nothing in my analysis turns on the difference in translation:

> "2. The director's actions (omissions) are deemed to be proven to have been done in bad faith, in particular, when the director:
>
> 1) **acted in conflict of his personal interests (interests of the director's affiliated parties) and the interests of the legal entity's, including actual interest of the director in the entry into a transaction by the legal entity**,

except where information on the conflict of interest was disclosed in advance and the director's actions were approved in the manner prescribed by law;[27]

2) concealed information from the shareholders of the legal entity on the relevant transaction made by him (in particular, if information on the transaction was not included in reports of the legal entity in violation of law or the articles of association or by-laws of the legal entity) or provided misleading information on the relevant transaction to the shareholders of the legal entity;

3) made a transaction without the approval of relevant bodies of the legal entity required by law or the articles of association;

4) withholds documents concerning the circumstances that led to negative consequences for the legal entity and evades their transfer to the legal entity after the termination of his office;

5) **knew or ought to have known that his actions (omissions), at the time when they were taken, did not correspond with the interests of the legal entity**, e.g. the director made a transaction (voted for its approval) under conditions which are clearly disadvantageous for the legal entity or a transaction with an entity which is knowingly incapable of fulfilling its obligation (fly-by-night company, etc.).

A transaction under disadvantageous conditions means a transaction the price and (or) other terms and conditions of which are materially worse for the legal entity than the price and (or) other terms and conditions on which similar transactions are made in comparable circumstances (e.g. consideration received under the transaction by the legal entity is twice or more than twice lower than the consideration provided by the legal entity to the counterparty). The disadvantageous nature of a transaction is determined at the time of its making; where a transaction is found to be disadvantageous later as a result of breach of obligations arising therefrom, the director shall be liable for the relevant damages if it is proven that the transaction was originally made with the intent not to perform it or perform it improperly. The director shall not be liable if he proves that the transaction made by him, though disadvantageous, was a part of related transactions with a common economic purpose and intended to bring profit to the legal entity. Nor shall he be liable if he proves that the disadvantageous transaction was made to prevent even greater damage to the legal entity's interests. In determining the interests of a legal entity it should, in particular, be taken into account that the primary purpose of a commercial entity is to make profit (article 50(1) of the Russian Civil Code); also in addition, the relevant provisions and decisions of the legal entity (e.g. provisions and decisions setting forth the priority areas of the legal entity's activity, approving its strategies and business plans, etc.) should also be taken into account. A director may not be deemed to have acted to the benefit of the legal entity if he acted to the benefit of one or several shareholders of the legal entity but to the detriment of the legal entity itself.

3. **The unreasonableness of the director's actions (omissions) shall be deemed proven, in particular, if the director**:

1) made a decision without taking into account information known to him and important in the circumstances;

[27] Dr Rachkov's translation of paragraph 2(1) is as follows: "acted in the context of a conflict of his personal interests (interests of the director's affiliated parties) and the legal entity's interests, including where the director had a de facto interest in the legal entity making the relevant transaction, other than where information on the conflict of interests was disclosed in good time and the director's actions were approved in the manner prescribed by the applicable laws"

2) **before making a decision, the director did not take the measures to obtain information necessary and sufficient to make the decision which are standard business practice in such circumstances**, in particular, if it is proven that a reasonable director would postpone, in the circumstances, the decision-making until additional information is obtained;

3) made a transaction without compliance with the internal procedures for making similar transactions usually required or applied at the legal entity (e.g. approval by the legal department, accounting department, etc.).

Arbitrazh courts should determine to what extent the relevant action was or, in the ordinary course of business, should have been within the scope of the director's responsibilities, including with account of the scale of the legal entity's business, the nature of the relevant action, etc."

1059. As to paragraph 2(1) of Resolution 62, the Bank submits that the result of this is that any technicalities as to the meaning of *"affiliate"*, *"beneficiary"* and *"group of companies"* under JSCL Article 81 (which I consider further below) do not arise.

1060. Dr Gerbutov accepted that in this paragraph the concept of conflict of interest is different to the test under JSCL Articles 81 to 84. His evidence was also that it does not follow from a breach of Articles 81-84 that an individual acts in bad faith under JSCL art 71. Importantly in my view, Dr Gerbutov accepted that there would be a conflict of interest under Resolution 62, paragraph 2(1) if a loan was made to a company owned 100% by a director. He did not accept that a director simply being a UBO of a company, or in control of it, would automatically be sufficient. His evidence was that the question turned on whether the director benefited directly or indirectly from the relevant transaction.

1061. The Bank referred me to a case demonstrating how the paragraph 2(1) presumption applies. *Doroga v Semenenko* (Presidium of the Supreme Arbitrazh Court of the Russian Federation, dated 6 March 2012) concerned an allegation that a director had caused a subsidiary to buy shares in a company in which he and his mother had an interest. The court held:

"The Law on Joint-Stock Companies requires the general director of such company to act reasonably in the exercise of his or her rights and in the discharge of his or her duty (paragraph 1 of Article 71). This means that he or she, as the person entrusted by the shareholders with the management of the company's current business, should do what is expected in a similar situation in similar circumstances of a good manager (paragraph 3.1.1 of Chapter 4 of the Corporate Behaviour Code, enclosed to Instruction of the Federal Commission for the Securities Market of 04.04.2002 No. 421/r). As mutually related transactions were entered into involving property owned by the general director of the parent company himself and his mother, in this situation a good manager of the parent company should have acted as a reasonably prudent person and would have to be expected to exercise increased control of all the terms of the contract under which such property was to be acquired by the subsidiary.

…

Consequently, the aforementioned transactions were concluded against the backdrop of a potential conflict of interest, in other words serious doubts that G.P. Semenenko was governed solely by the interests of the main company and subsidiary.

In a similar situation of a likely conflict of interest, the expected behaviour of a hypothetical good general director mentioned in clause 3.3.1 of chapter 4 of the Corporate Governance Code, would be to disclose to shareholders information on the terms of the related transactions.

However, G.P. Semenenko did not do this either at the time of the conclusion of the transactions or during the court proceedings.

The indicated circumstances in turn do not make it possible to apply the presumption of good faith to the defendant and transfer the burden of proof to him: it is namely G.P. Semenenko, acting with a potential conflict of interest who should prove that the acquisition of the property by Putilov Plant in which Kirov Plant held a one hundred per cent participation interest in the charter capital, had been concluded in the interests of these legal entities and not for G.P. Semenenko and his mother to derive a personal financial or other benefit."

1062. I consider that the presumption under paragraph 2(1) whereby the director's actions (omissions) are deemed to be proven to have been done in bad faith does apply in the present case where the Shareholders did, I am satisfied, act in conflict of their personal interests, in relation to the Loans and Transactions addressed in Section R, as they did benefit directly or indirectly from such transactions as ultimate beneficial owners of companies in the offshore network (including but not limited to those Borrowers entering into property projects).

1063. In relation to paragraph 2(2), Dr Gerbutov's evidence was that it applies only to directors who conceal information or provide false information to shareholders with respect to a transaction entered into by the director. As such it does not apply to members of a Supervisory Board. He said he had been unable to find any Russian case applying paragraph 2(2) to a member of the Supervisory Board. This point was not greatly pressed by the Bank, and I do not consider it necessary to explore the point further.

1064. As to paragraph 2(5), the Bank provides what I consider to be a useful illustration of the application of the principle in *Lipetsk Regional Bank v Bobyleva and ors*. In that case the court held:

"The facts established during the investigative actions taken together with the data established by the RF Central Bank during the audit, and also during the actions of the receivership proceedings, attest to the fact that the credit facilities received by the borrowers were patently unrecoverable, while the actual borrowers were insolvent legal entities, which had no property and did not engage in actual business activities.

Pursuant to the clarifications contained in sub-clause 5 of clause 2 of Resolution No. 62, the bad faith nature of the actions (inaction) of the director is deemed proved in particular when the director knew or should have known that his actions (inaction) at the time of the conclusion thereof were at variance with the interests of the legal entity, for example, he concluded a transaction on terms and conditions that were patently disadvantageous for the legal entity or with a person that was patently incapable of performing the obligation ("fly by night" companies, etc.).

A credit institution offering funds to clients in the form of loans assumes a heightened risk of the onset of losses in the event of default by the borrowers on their obligations. When deciding whether to provide a loan, the head of the Bank must establish whether the borrower is capable of servicing the loan and returning it by the deadlines established by the agreement. These facts are established based on the results of a comprehensive analysis of the financial position and activities of the borrower and the reliability of the documents that it submitted."

1065. Dr Gerbutov accepted that the presumption applies where the Shareholders ought to have known (as well as did know) that their actions did not correspond with the interests of the company.

1066. The Bank relies on this presumption particularly in the context of transactions said to be for "balance sheet management" purposes. It submits that the presumption squarely applies where loans were made to what they claim were shell companies with no genuine underlying business and no prospect of repaying the loans. I agree that the presumption applies in such a situation (and indeed that it is applicable in the present case in the circumstances addressed in Section R below).

1067. Dr Gerbutov's view was that whether a particular transaction is against the interests of a company should be looked at in context, including an assessment of any arrangements allowing the loan to be recovered through financing from third parties.

1068. The Bank submits that paragraph 3 of Resolution 62 (unreasonableness deemed proven) is apposite and applicable in circumstances where there is a lack of due diligence in the documentary records and where provisions of the CC Regulations were violated (such as the use of absentee ballots in the absence of urgency). I agree. Such matters are addressed in detail in Section R.

M.3.5 Conclusion on Issue 42

1069. This is essentially the ultimate issue on liability. In the light of the findings I have made throughout my judgment on the Issues arising in relation to the nature of the Loans and Transactions and the Shareholders' knowledge and involvement in them (including but not limited to, those made in relation to Issues 14-18 (the Loans and Transactions), 22 and 23 (Deception of the CBR), 25 and 26 (Balance Sheet Management) and Section R (the particular Loans and Transactions)) the Shareholders were in breach of Article 71 of the JSC Law and Article 53 of the RCC in respect of the Loans and Transactions. It follows that they were also in breach of their Labour Code obligations in like respect.

1070. I address below further issues of Russian law that arise.

M.4 Joint liability

1071. The experts agree that where corporate officials jointly cause loss to their company, joint and several liability can be established in the same way as under RCC Article 1080. In his first expert report Dr Gerbutov referred to a number of cases setting out the test under RCC Article 1080. His evidence, which was accepted by Dr Rachkov, was that in order to establish joint and several liability the Shareholders must carry out agreed and coordinated acts aimed at a common purpose.

1072. Therefore, even if more than one of the Shareholders contributed to causing the same damage, if they did not act in an agreed and coordinated manner, there would be no joint liability. The individual would be liable only to the extent that they independently caused damage. This point is relied upon, in particular, by Mr Belyaev (in circumstances where he participated in only a small number of CC meetings) although it is also made by Mr Yurov and Mr Fetisov.

1073. However, the point does not assist any of the Shareholders on the findings I have made. As has already been addressed in Section G.4 above, and for the reasons there given, I have found that it is to be inferred that the Shareholders, and each of them, knew about the Loans and Transactions (certainly their principal terms and the purposes of the loans) including from discussions with each other, and that (expressly or impliedly) they agreed together that one or more of them would approve each transaction on the CC and thereby caused or procured the entry by the Bank into each Loan and Transaction. The consequence of that is that individual causation is established for each of the Shareholders based on their own act or omission which caused the loss making transaction in breach of duty because they knew the principal terms of the transaction and therefore knew that they were not made in good faith in the Bank's interests or reasonably. This applies whether the claim is a civil claim or a Labour Code claim.

1074. In addition (in relation to a civil claim) there is, under the Russian law, also joint and several liability based on such agreed and coordinated action by the Shareholders aimed at the granting of each of the Loans and Transactions in this case.

M.5 Causation

1075. The experts agree that in a civil claim there must be an immediate and direct causal link between the actions of a director and the damages suffered. There is a dispute between the parties as to the finer details of this principle and how it applies to the facts.

1076. The Shareholders contend that there is no causal link between the losses suffered by the Bank and the actions of the Shareholders sitting on the CC. They claim that the CC was simply an approval process which did not bind or instruct the Bank's management to enter a transaction. Therefore, voting in favour of transactions on the CC did not cause the loss suffered.

1077. The Bank contends that there was a causal link between the actions of the Shareholders on the CC and the losses suffered. They claim that as a matter of the Bank's internal CC Regulations, and as a matter of reality, the management were bound to follow CC resolutions and in any event, there was a sufficient causal link between the voting and the loss.

1078. Causation is addressed in Section N below, but suffice it to say at this point that I am satisfied, based on my findings in Section G.4 that voting in favour of transactions (and indeed the prior agreement between the Shareholders that I have found) did cause the loss suffered.

M.6 The effect of CC Resolutions (Issue 3)

1079. There is a dispute between the parties as to the effect of CC resolutions. Issue 3 of the Agreed Facts and Issues provides as follows:

> "What was the legal effect of a resolution of the Credit Committee approving the entry into a particular transaction and, in particular, did a resolution constitute a mandatory instruction to the Bank's management to enter into a transaction? Was there, as a matter of fact, any further independent consideration of whether or not to enter into a proposed transaction after it had been approved by the Credit Committee and what (if any) relevance does this have?"

1080. I have already foreshadowed the issue when addressing the role of the Credit Committee and the CC Regulations in Section E.1.3 above. In this regard, and as already noted, Article 6.4 of the Bank's internal CC Regulations provides:

> "Implementation of resolutions issued by the Credit Committee is **mandatory** for all structural subdivisions and Bank's staff members participating in the credit transactions".
>
> (emphasis added)

1081. Notwithstanding this provision, the Shareholders contend that:

(1) The effect of Article 6.4 is not to turn CC resolutions into mandatory instructions to the Bank's management.

(2) The CC was only an advisory body, which did not have executive powers or authority in Russian law to manage the Bank's affairs. Its decisions were not binding on the Bank's CEO and reliance on them did not absolve the CEO of liability for entering into transactions.

(3) The CC was only part of the Bank's approval process, which involved the Credit Risk and Administration Department (which gave an initial assessment of the credit risk of a proposed loan); the Asset and Liability Committee (which was responsible for establishing the appropriate level of liquidity, interest rate and currency risk); the Risk, Audit and Compliance Committee (which focused on risk management); and the Treasury and Legal Departments. The CC was not the sole decision-making body of the Bank and did not give the final approval for any transaction (which fell to the credit officer who signed off on the credit documents). Mr Belyaev's evidence was that following CC approval, the Legal Department drew up the formal documentation for each transaction, which was signed off by the team responsible for credit administration and executed by the Bank's CEO and CFO.

1082. The Shareholders submit that their argument is supported by the Bank's own case in the Russian criminal proceedings brought against Mr Romakov and Mr Dikusar, two members of its executive management. The Bank's position was summarised in the judgment of the appellate court:

> "The CC has just approved an application for the issuance of loan, rather than oblige the sole executive body to take an appropriate decision, the CC could not oblige OO Dikusar and EA Romakov to perform obviously illegal decisions or to oblige to make known unlawful acts"

1083. The defendants also rely on Dr Gerbutov's evidence that the CC could not give binding instructions to executive bodies. In cross examination Dr Rachkov accepted that notwithstanding the wording of Article 6.4, the CEO was legally required to make their

own assessment of each transaction and did not have to execute transactions approved by the CC. Dr Rachkov stressed that a CC resolution was a necessary step in the approval process, in the sense that without the approval, the loans could not be made.

1084. The Bank contends:

(1) CC resolutions were mandatory instructions to the Bank's management. This is the proper reading of Article 6.4 of the CC Regulations. The Bank notes, in this regard, that Article 6.4 is not mentioned at all in any of Dr Gerbutov's five expert reports.

(2) Whatever the position might be at other banks with different constitutional documents, the Bank's staff, including the CEO, were obliged to comply with CC resolutions. If the relevant executive being asked to sign the agreement believed that the transaction was dishonest and/or against the Bank's interests then the only honest course was (i) to make that point; and (ii) ultimately refuse to sign, meaning that he/she may have to resign.

(3) In an affidavit prepared to resist a pre-trial freezing injunction, Mr Yurov stated that the CC was: *"the most important body in the approvals process";* and was responsible for giving *"final approval of the loan facilities and credit limits"* which it is said tells the lie to the Shareholders' current argument on the effect of CC resolutions. In cross examination Mr Yurov claimed that the description in his affidavit was not precisely correct. He maintained that the CC was an important part of the approval process, but was not the final approval.

(4) In any event, on the facts, there is no evidence of further independent consideration by any of the Bank's management. The signature on the loan agreement followed as a matter of course from the relevant CC resolution. The overwhelming inference from the evidence is that the Bank's management knew that if a particular loan was approved by one or more of the Shareholders then they had to go along with it, or risk losing their jobs.

(5) Indeed, and as has already been noted, Mr Yurov accepted that for balance sheet management loans, approval was essentially a formality (the transactions having been arranged within the Bank and known to be for the benefit of the off balance sheet network), and no further independent consideration was required after CC approval.

(6) Even if it was possible to carve out the CEO as not bound to follow CC resolutions (because of his/her status under Russian law), as a matter of fact the CEO did not give any independent consideration to the transactions relevant to this case.

1085. Counsel for Mr Belyaev conceded that, even on the assumption that CC resolutions were not formally binding on the Bank's management, if as a matter of fact the evidence was such that CC resolutions effectively amounted to instructions which the Bank's management were required to follow, this would take the Shareholders' position no further. He disputed that the evidence reached this threshold and made the point that, in any case, the executive body signing off the transactions had a legal obligation to consider whether or not they were in the interest of the Bank.

1086. I consider that CC resolutions were mandatory instructions to the Bank's management, and essentially for the reasons given by the Bank, which I accept. In this regard a resolution did constitute a mandatory instruction to the Bank's management to enter into a transaction, and it was understood as such in circumstances where there was not, as a

matter of fact, any further independent consideration of whether or not to enter into a proposed transaction after it had been approved by the Credit Committee.

1087. First, and foremost, I am satisfied that this is the clear meaning of Article 6.4 of the CC Regulations, as indeed recognised by Mr Yurov when he said the CC was responsible for giving *"final approval of the loan facilities and credit facilities".* In this regard, and whatever the position might be at other banks with different constitutional documents, the Bank's staff, including the CEO, were obliged to comply with CC resolutions and I so find. As the Bank submitted, I consider that if the relevant executive being asked to sign the agreement believed that the transaction was dishonest and/or against the Bank's interests then the only honest course was to make that point and ultimately refuse to sign (which might lead to that individual's resignation).

1088. In any event, and as already noted in Section E.1.3, there is no evidence in fact that anyone (including any executive officer such as the CEO) did consider resolutions passed by a Credit Committee and whether they were in the best interests of the Bank, which is consistent with, and supportive of, the construction that a resolution did constitute a mandatory instruction to the Bank's management to enter into a transaction, which is entirely consistent with the express language of Article 6.4.

1089. Certainly Mr Yurov appeared to accept that, as a matter of fact, there was no consideration of resolutions by any executive officer, as it was stated at paragraph 103 of his Written Closing Submissions that, *"since approval was essentially a formality because the Loans and Transactions had been arranged within the Bank and were known to be for the benefit of the off balance sheet network no further independent consideration was required after approval by the Credit Committee".* Whilst this is based on the premise that there was nothing wrong with balance sheet management (and also that what was being done was for the benefit of the Bank rather than Shareholders) each of which I have found to be a false premise, it is a recognition that there was no independent consideration by anyone after approval by the Credit Committee as to whether the loan was in the Bank's best interests.

1090. If there was to be any approval of Credit Committee decisions, Article 6.5 of the 2010 CC Regulations suggests that it would be by the Supervisory Board. Article 6.5 provides (at least per the Bank's translation thereof): *"Resolutions of the Credit Committee are approved by the Board of Directors of the Bank"*, although it was suggested by Mr Yurov in evidence that this was a mis-translation and that, on a proper translation of Article 6.5, it was regulations (rather than resolutions) that were required to be approved by the Supervisory Board. It is in any event common ground that the Supervisory Board did not in fact approve any of the Loans and Transactions that are in issue.

1091. On the facts there is no evidence of further independent consideration by any of the Bank's management. The signature on the loan agreement followed as a matter of course from the relevant CC resolution. The overwhelming inference from the evidence (which I draw) is that the Bank's management knew that if a particular loan was approved by one or more of the Shareholders then they had to go along with it, or risk losing their jobs.

1092. In the above circumstances, and in relation to the first sentence of Issue 3, I am satisfied that a CC resolution did constitute a mandatory instruction to the Bank's management to enter into a transaction, and it was also understood as such.

1093. The Shareholders also submit that their actions on the Credit Committee did not have a sufficient causal link with the loss suffered by the Bank (albeit that this is largely predicated upon CC resolutions not being mandatory). They rely on the following cases in support of their submission:

1094. Dr Gerbutov suggested *Systema v Kozlov and Ors (Resolution of the North-Western Circuit, 21 June 2013*) was an example of a Russian court refusing to find a causal link between non-mandatory approval of a transaction and losses resulting from that transaction. The court held:

> "Furthermore, the courts found that in this case, there is no causal link between the decisions taken by the board of directors and the consequences in the form of the Company's failure to generate profit from its operations because the said decisions did not make it compulsory for the Company's General Director to enter into sale and purchase contracts for the assets. … One should note that the sale of properties belonging to the Company per se did not adversely affect its operations. The Company, as the respondents stated, continued to operate in the same buildings on the basis of lease agreements; the claimant does not dispute this fact."

The Shareholders submit that this case demonstrates that, as a general rule, a non-mandatory approval of a transaction does not cause the loss if that transaction turns out to be harmful. Dr Rachkov did not accept that the case went so far. He considered that the case was decided on the basis that no damage was suffered by the company (because the transaction was carried out at market rates) and this was why the court did not establish a causal link.

1095. In *Bank Sochi v Controlling Persons*, two members of a management board approved damaging transactions in credit committee meetings but were found not liable. The court appeared to make this finding on the basis that decisions of the Credit Committee were not mandatory for persons executing the damaging transactions. Dr Rachkov accepted that, but he considered that the court reached its conclusion because of the non-mandatory nature of the credit committee resolutions in that case which he considered was a distinguishing feature from the present case.

1096. Dr Gerbutov also considered that *Bank Russkii Bashkirsky Dom v Bondorovich and ors* supported his position. I have quoted the relevant findings of the judgment above when discussing the scope of Articles 53 and 71. As with *Bank Sochi v Controlling Persons*, the Bank maintains that the conclusions reached by the court were not due to general principles, but were based on an analysis of the particular constitutional documents of the company in that case.

1097. Ultimately Dr Rachkov accepted that if a CC resolution were construed as being non-mandatory it might, in theory, be difficult to establish a causative link between a resolution and any loss incurred as a result of entering the transaction. However, he considered that the question of causation is fact-driven and turns on the specific facts of each case.

1098. The Bank's contention (which I have found represents the position) is that CC resolutions were mandatory instructions for the Bank's executive. However, the Bank

submits that whether this is so or not a causal link exists. In support of its submission it relies upon the following:-

1099. Resolution 62 paragraph 7 provides:

> "The fact that the director's action that led to negative consequences for the legal entity, including making a transaction, was approved by the collegial bodies of the legal entity or its founders (shareholders) or that the director acted in pursuance of such persons' instructions does not constitute a ground to dismiss a claim seeking to recover damages from the director because the director has an independent obligation to act in the interests of the legal entity in good faith and reasonably (article 53(3) of the Russian Civil Code). However, along with the director, members of the aforementioned collegial bodies shall be jointly and severally liable for the damages caused by the transaction (article 53(3) of the Russian Civil Code, article 71(4) of Federal Law No.208-FZ dated December 26, 1995, "On Joint-stock Companies" (the "JSC Law"), article 44(4) of Federal Law No.14-FZ dated February 08, 1998, "On Limited Liability Companies" (the "LLC Law"))."

1100. The Bank submits that this shows that members of a company's collegial body who approve a transaction executed by the company's executive can be liable for doing so. Therefore, it is possible to establish a causative link between approving a transaction and losses resulting from that transaction.

1101. Dr Gerbutov's evidence was that Resolution 62, paragraph 7 does not exclude the need for a causation analysis and does not displace the principle of Russian law requiring a direct and immediate causal link.

1102. Two Russian cases in which directors were held liable on the basis that they had approved transactions executed by others are *Bank VEFK-Ural v Chechushkova and ors*; and *Lipetsk Regional Bank v Bobyleva and ors*. In both cases, the transactions would not have gone ahead without the relevant approval (in the sense that but-for their approval, the transactions would not have been made).

1103. Dr Gerbutov considered that the analysis in these cases was not clear. He accepted they may amount to the recognition of an exception to the requirement of direct and immediate causative link where but-for causation is established. However, he indicated he would need to see further examples before recognising this as the true position in Russian law. He also suggested that the cases could be rationalised on the basis that the individuals who approved the transactions acted jointly with those executing them. Whilst this is not expressed in either of the judgments, Dr Gerbutov considered that it could justify the court's conclusion without departing from established principles of causation (as Russian law allows a causal link to be established between the acts of joint tortfeasors and loss).

1104. The Bank endorses the view expressed by Dr Rachkov that causation is a fact-sensitive question and relies on Dr Gerbutov's concession that in some circumstances, approving a transaction could be causative of loss.

1105. I do not consider that the Shareholders can escape liability on the basis that when they voted on the CC their decisions did not cause loss to the Bank. The Shareholders' submission is based on a false premise that CC resolutions were advisory only. In this

regard I have found that, whether as a matter of law or of fact, CC resolutions were mandatory for the Bank's executive to follow.

1106. As a matter of law, I consider that Article 6.4 of the CC Regulations made CC resolutions mandatory for the Bank's structural subdivisions and employees. In this regard I accept Dr Rachkov's evidence that *Bank Sochi v Controlling Persons* and *Bank Russkii Bashkirsky Dom v Bondorovich and ors* can be distinguished on this basis.

1107. In any event, whatever the correct interpretation and effect of Article 6.4, and in relation to the second sentence of Issue 3, I am satisfied that, as a matter of fact, there was no independent consideration of the merits of the transactions before they were executed by the Bank. Therefore, CC resolutions were in reality mandatory even if, in law, they did not necessarily have this effect. The evidence shows that in reality CC approval was the most important part of the approval process. Once approval was given for each transaction, its execution followed. There is no evidence of further independent consideration of transactions by anyone at the Bank and I am satisfied that once a CC meeting involving one of the Shareholders approved a transaction, it was executed without question or doubt. I have already noted the concession on behalf of Mr Yurov that in relation to balance sheet management loans, no independent consideration was given, and I am satisfied that the same was true of other loans including project loans. In each case CC approval made execution inevitable.

1108. There is some evidence of Mr Romakov refusing to sign CC resolutions, particularly in relation to one transaction in December 2014, but that is of a refusal to sign a CC resolution (as opposed to an independent consideration of a transaction already approved by the CC). It also was late in the story and was not relevant to the transactions in dispute.

1109. Accordingly, and as to a causative link, I accept Dr Rachkov's evidence that the question is fact specific. There is no principle of Russian law that CC resolutions approving transactions cannot be causative of any loss. This is supported by Resolution 62, paragraph 7 which clearly envisages directors being liable for approving rather than executing transactions. Indeed, Dr Gerbutov accepted that there were circumstances, including where a CC resolution was mandatory, where members of the CC could be liable for losses resulting from harmful transactions.

1110. I consider that, given the legal and factual framework in which the CC operated, the Shareholders cannot escape liability by saying that they did not cause the Bank to enter the transactions. Nor is there any possible suggestion of any break in the chain of causation.

M.7 Quantification of Loss

1111. The general provision on civil law damages is set out in RCC article 15. It is agreed by the experts that this provision covers both actual property loss/damage and lost profit.

1112. As to quantum, the experts agree that the amount of damages must be established with reasonable certainty. This is supported by a number of cases cited by Dr Gerbutov. At the same time, both experts acknowledge that where damages have been suffered but the amount of damages cannot be established with reasonable certainty, this is not a reason to dismiss a claim. In such a case, damages should be awarded based on an assessment of all the circumstances, taking into account the need to impose fair and adequate compensation.

1113. In cross examination, Dr Rachkov accepted that fair and adequate compensation requires full compensation (so that the claimant is put in the position they would have been had the wrong not been committed) but also fair compensation (so that the claimant is not put in a better position). The expert evidence was that similar principles apply in relation to damages under the Labour Code (albeit that lost profits are not recoverable).

1114. The experts agree that there is a duty to mitigate under Russian law and that failing to mitigate is a ground for reducing liability.

M.8 Related-Party Transactions (Issues 43 and 44)

43.When will parties to the Loans and Transactions be regarded as related for the purposes of Article 81 of the JSC Law and/or for the purposes of the Credit Committee Regulations? In particular:

43.1 Can a person be recognised as an affiliate of another on the grounds that its activity could be influenced by that other person in the absence of the specific formal criteria of affiliation listed in the relevant Russian laws?

43.2 Is a person who, through one or several layers of companies, subsequently receives funds derived from a party to the transaction a "beneficiary" of the transaction?

43.3 In what circumstances is an indirect interest and/or an interest derived through a trust capable of giving rise to affiliation?

1115. I have already found that the Shareholders are liable under Article 71 of the JSC Law and/or Article 53 of the RCC, and accordingly it is largely academic as to whether the Shareholders are also liable under Article 84 of the JSC Law. However, as I have heard full argument on the subject I will address it.

1116. JSCL Articles 81 to 84 contain specific obligations relating to interested party transactions. Changes were made to the articles with effect from 1 January 2017, but it is common ground that such changes did not have retrospective effect and so are not presently relevant. The Articles provide, amongst other matters, as follows:-

> "**Article 81. Interest in Company's Conclusion of a Transaction**
>
> The transactions (including a loan, credit, pledge or surety) in which there is an interest of a member of a company's board of directors/supervisory board, the person acting as the company's sole executive body, **including the management organization or manager, a member of the company's collective executive body, the company's shareholder holding, together with its affiliates, 20 percent or more of the company's voting shares or a person entitled to issue instructions binding for the company**, shall be executed by the company in accordance with the requirements of this Chapter.
>
> Such persons shall be deemed interested in the company's conclusion of a transaction if they themselves, or their spouses, parents, children, blood or non-blood brothers or sisters, foster parents, adopted children and/or their affiliates:
>
> - are a party to, beneficiary, intermediary or agent in such transaction;

- own (separately or jointly) 20% or more of shares in another legal entity that is a party, beneficiary, intermediate or representative in the transaction;

- occupy positions in management bodies of a legal entity which is a party, beneficiary, intermediary or representative in the transaction (a management company of such a legal entity);

- there are other situations provided for in the company's charter.

Article 82. Information about Interest in Company's Conclusion of a Transaction

Persons referred to in Article 81 of this Federal Law shall notify the company's board of directors/supervisory board, auditing commission/internal auditor and external auditor about the following:

…

information on those transactions being effected or proposed in which such persons may be deemed to be interested parties.

Article 83. Procedure of Performance of Interested-Party Transaction

…

6. A decision to approve an interested party transaction shall identify the party(ies) to, and the beneficiary(ies) of, such transaction and indicate its price, subject matter and other material terms and conditions.

Article 84. Consequences of Failure to Observe Requirements for Interested-Party Transaction.

…

2. An interested party is liable to a company for the amount of damages it has inflicted to the company. In case several persons are liable to a company, their liability shall be joint and several."

(emphasis added)

1117. The Bank brings claims under JSCL Articles 81 to 84, alleging that the Shareholders failed to comply with the disclosure obligations contained in these Articles.

1118. The experts agree that, as members of the Supervisory Board, the Shareholders were subject to JSCL Articles 81 to 84. They also agree that a transaction with a borrower in this case was required to be approved as an interested party transaction if:

(1) the borrower was an affiliated person of any of the defendants; or any of the defendants and/or their affiliated persons held 20% or more of the shares of the borrower; and/or

(2) any of the Primary Defendants and/or his affiliated persons (other than the borrowers) were themselves parties, beneficiaries, intermediaries or representatives in the transaction.

1119. In practice, this means that there are three possible routes for the Bank to establish the loans were interested party transactions:

(1) The Shareholders or their affiliated persons held 20% or more shares in the borrowers.

(2) The borrowers (who were parties to the transactions) were the Shareholders' affiliated persons.

(3) The Shareholders were themselves beneficiaries of the transactions.

M.8.1 20% shareholding

1120. There is a dispute between the experts as to whether the Shareholders or their affiliates having an indirect shareholding in a party to a transaction is sufficient to engage JSCL Article 81. Dr Rachkov's opinion is that an indirect shareholding is sufficient. Dr Gerbutov maintains that it is not.

1121. Dr Gerbutov relies on two cases in support of his position:

(1) In *Akrin Holding GmbH v RHK* (Resolution of the Ninth Arbitrazh Appeal Court, 24 June 2015) the court was concerned with a director who held 50% of the share capital in a borrower, through a company controlled by him. The court held:

> "Toporkov V.V. does not have any participation in the charter capital of the borrower and does not hold any positions in LLC Sosnovskoe kartofelnoe khozyastvo.
>
> The fact that Toporkov V.V. is a shareholder of LLC Sosnovka which owns a 50% share in the charter capital of the borrower - LLC Sosnovskoe kartofelnoe khozyastvo, cannot constitute the features of interests under the meaning of Article 81 of the JSC Law, since LLC Sosnovka being a legal entity independently acquires rights and hold obligations of a participant in the charter capital of the borrower."

(2) In the context of the equivalent related party provision for limited liability companies, the court in *Oil-Trans-Energo v Leasing Company* (Resolution of the Federal Arbitrazh Court of the North Caucasus Circuit, 14 November 2006) held as follows:

> "The rules for execution of interested parties' transactions are inapplicable in cases when persons interested in a transaction are not the direct owners of shares (fractions of share, pays) of the legal persons participating in the transaction. Therefore, the fact that N.I. Mudretsov owned a share (35%) in the share capital of the company Russko-Izraelskiy Most, which owned a 45% share in the share capital of LLC Elita-Mineral, does not entail the application of the rules for interested parties' transactions. N.I. Mudretsov directly owned only 12,5%, of the shares in the share capital of LLC Oil-Trans-Energo, that also excludes application of these rules.
>
> The claimant was unable to provide sufficient evidence (affiliation or other circumstances) for summation of the shares owned by O.V. Dadashev and N.I. Mudretsov. As a result an argument that the

interested parties owned more than twenty per cent of shares in the charter capital of LLC Oil-Trans-Energo should be dismissed."

1122. Dr Rachkov accepted that in both of these cases the court reached the conclusion that an indirect shareholding is not sufficient to engage JSCL Article 81. He was of the view that they were examples of the Russian courts adopting a formalistic approach in order to achieve a pre-determined or desired outcome.

1123. In support of his position that an indirect 20% shareholding is sufficient for the purposes of Article 81, Dr Rachkov relied on the case of *Arsentyev v PJSC Textil'mash, LLC Mashinostroitel'nyy zavod* (Resolution of the First Arbitrazh Appeal Court, 31 October 2011). However, in cross examination he accepted that it was decided based on conventional principles of affiliation (namely, the group of persons test) and that it did not contradict Dr Gerbutov's view. Dr Rachkov stressed that the court in *Textil'mash* did not expressly reject that an indirect shareholding was sufficient for the purposes of JSCL Article

1124. The Bank submits that Dr Gerbutov's interpretation of JSCL Article 81 is overly formalistic and would allow a cynical director to evade his disclosure obligations by interposing a wholly-owned offshore company into the holding structure. It submits that such an approach would render the disclosure requirements worthless when it came to sophisticated directors with access to offshore structures. The Bank refers to the structure diagrams explored with Dr Gerbutov in cross-examination referring to the fact that in certain circumstances, and on a formalistic analysis, a cynical director would be able to evade his disclosure obligations by interposing an additional wholly owned offshore company in the structures.

1125. There is no doubt that the requirement of a 20% shareholding is formalistic in the extreme, but based on Dr Gerbutov's evidence, which is supported by the authorities referred to by him (and which I do not regard as contradicted by *Textil'Mash*) I am satisfied that an indirect shareholding does not suffice to come within these words. I address below whether there are alternative bases as a result of the use of offshore structures. In this regard an indirect shareholding in a company may still require disclosure if the company is an affiliated person with the shareholder, for example under the group of persons test (which I consider below).

M.8.2 Affiliated persons

1126. Under JSCL Article 93, whether a person is an "affiliated person" is determined by reference to the definition in Article 4 of Russian Federal Law No. 948-I "On Competition and Restriction of Monopolistic Activity in the Market" dated 22 March 1991.

1127. Article 4 provides a general definition of "affiliated persons" as *"natural and legal persons that are capable of influencing the activity of legal and/or natural persons that carry out entrepreneurial activity"*. The Article lists specific situations when a person is considered to be an "affiliated person". In particular affiliated persons of a natural person are:

(1) any company in which the natural person has the right of disposal of over 20% of voting shares (the "20% of voting shares test");

(2) any person that belongs to the same group of persons as the natural person (the "group of persons test").

M.8.2.1 Court's discretion

1128. There is an overarching issue between the experts as to the degree of discretion exercised by courts in relation to the affiliated person and group of persons tests. Dr Rachkov's evidence is that Russian law, and court practice, awards a significant degree of discretion, and that the list of grounds for affiliation is not exhaustive. Dr Gerbutov maintains the rules are strict and that the court must apply the formal criteria in JSCL Article 81.

1129. Dr Rachkov relies on the following in support of his position:

(1) In *Shavkat Sattarov* (Ruling of the Constitutional court of the Russian Federation, 02 November 2011) the Russian Constitutional court rejected a challenge to the constitutionality of JSCL Article 81 on the basis that it did not allow the courts to establish interested party transactions in cases not expressly listed in Article 81. The court held:

> "The resolution of matters of the sufficiency of grounds for classifying a transaction as an interested party transaction if disputes arise is the competence of Arbitrazh Courts, which must not limit themselves only to the formal conditions for applying the norms of law on joint-stock companies and, in case of doubts, must study and evaluate the sum total of circumstances relevant to the correct resolution of the case."
>
> (emphasis added)

In his first report, Dr Rachkov suggested that this permitted the court to investigate whether the Shareholders could in fact influence the activity of the borrowers. However, in cross examination he accepted that the constitutional court had not (and did not have the power to) introduce a *de facto* influence test into Article 81.

(2) In the context of the group of persons test, Dr Rachkov's evidence was that the Russian courts adopt a discretionary common-sense approach. He is of the view that this is supported by *Sattarov v Babina* (Resolution of the Supreme Arbitrazh Court's Presidium, 22 March 2012) where a director and his stepdaughter were found to be affiliated persons, and *BMZ, Gorshkov v Krany i Komponenty* (Crans and Components), *Dmitrienko* (Resolution of the Arbitrazh Court of the North-West District, 13 December 2012) where two individuals who had children together were found to be affiliated persons. When cross-examined he accepted that both these cases were decided by the application of Article 81 and the group of persons test.

(3) In the context of Russian bankruptcy proceedings, the "liability of controlling persons" test applies, which allows courts to hold persons liable who exercise *de facto* control over a bankrupt company's activity and whose actions led to the company's bankruptcy. Dr Rachkov relied on *Maxi-Group v Maximov* (Resolution of the Seventeen Arbitrazh Appeal Court, 27 February 2012) as an example of this. When cross-examined Dr Rachkov accepted that these considerations, and the *Maximov* case, were not directly relevant to the analysis under JSCL Article 81.

1130. Dr Gerbutov contends that the reasoning of the Constitutional court in *Shavkat Sattarov* does not support Dr Rachkov's position. He was of the view that the court rejected the unconstitutionality of JSCL Article 81 on the basis that whilst the criteria in

that Article is exhaustive, additional criteria can be listed in the company's charter where the company and its shareholders so desire. Dr Gerbutov maintained that the constitutional court did not alter or add anything to the criteria for interested party transactions. As to the part of the judgment relied on by Dr Rachkov and cited above, he was of the view that it simply stressed that the courts must take into account all the circumstances of the case in order for it to apply the law under JSCL Article 81 correctly.

1131. As ultimately accepted by Dr Rachkov, I consider that the cases cited by him were nothing more than conventional applications of the wording of Article 81 and the "group of persons" test.

M.8.2.2 Disposal of 20% of voting shares

1132. As to the possibility of establishing affiliation based on the right of disposal of over 20% of voting shares, Dr Gerbutov accepted that neither the 1991 Competition Law itself or any subsequent clarifications by the Supreme Court or Supreme Arbitrazh Court clarifies whether this covers indirect as well as direct shareholdings. However, he relied on *Akonium Establishment v Nomos-Bank and Interleasing* (Resolution of the Federal Arbitrazh Court of the Moscow Circuit, 20 February 2014) where the Federal Arbitrazh court held that a 25% indirect shareholding was not sufficient to establish affiliation. This also appears to be supported by the views of Spirin D.A. in *Reform of Legislation on Legal Entities: Unsuccessful Attempt to Regulation Liability of a Controlling Person*, Zakon, 2014.

1133. Dr Gerbutov accepted that in tax disputes, the same affiliation criteria are interpreted so as to cover indirect shareholdings, as confirmed by *Achimgaz v Tax Inspectorate* (Resolution of the Arbitrazh Court of the Moscow Circuit dated 13 April 2015). Dr Gerbutov's evidence was that this is because several provisions of the Russian Tax Code refer to indirect as well as direct shareholdings (in particular Articles 105 and 269). He considered that this did not mean that a wider approach should also be taken in civil law disputes relating to interested party transactions.

1134. Dr Rachkov did not seriously challenge that a 20% indirect shareholding is not sufficient for the purposes of this aspect of the affiliated person test. Based on the evidence of Dr Gerbutov I am satisfied, and conclude that a person is required to have a direct shareholding in the counterparty to the transaction.

M.8.2.3 Group of persons test

1135. The group of persons test is defined in Article 9 of Federal Law ""On Protection of Competition" dated 26 July 2006. It is a narrower concept than affiliated person and in the case of natural persons depends either on relationships of control or certain close family relationships. Under the group of persons test, several persons can be found to form a single group, so that they are effectively treated as a single entity.

1136. Dr Rachkov summarises the relationships relevant to the group of persons test as follows (these are referred to as "base groups" being based on inter-relation features such as relations of control and other relations):

> "These inter-relation features can be broadly divided into two groups:
>
> (a) Relations of control, which include (i) Ownership of over 50% shares in an entity (or ability to exercise voting by over 50% shares in that entity on the basis

of powers obtained from third persons pursuant, in particular, to a written agreement); (ii) Performance of the functions of a CEO in the entity (iii) **Ability to issue mandatory instructions on the basis of constituent documents of, or the agreement with, the entity**; (iv) Nomination of a CEO in the entity; (v) Nomination of over 50% of members of the board of directors or management board in the entity;

(b) Other relations, which include: (i) Close family relations (spouse, parents/adoptive parents, children/adoptive children, fill- and half-brothers and sisters); (ii) For two legal entities – the fact that same persons occupy more than 50% positions in the boards of directors or management boards of both legal entities."

(emphasis added)

1137. Dr Gerbutov's evidence is that whilst the group of persons test is based on the notion of control, it is necessary to look at the specific requirements contained in Federal law. As outlined above, Dr Rachkov's position is that Russian courts retain discretion beyond the strict confines of the rule.

1138. In cross-examination, Dr Rachkov suggested that the requirement to exercise over 50% of voting shares might be met if a person controlled over 50% of votes at a meeting with sufficient quorum. The Shareholders submit that it is inconceivable that the formalistic group of persons test should be analysed meeting by meeting, according to the number of shareholders present. On this point I agree with the submission of the Shareholders.

1139. As to the requirement to issue mandatory instructions, Dr Rachkov accepted that in a normal case an indirect 30% shareholding would not be sufficient to enable an individual to issue mandatory instructions to that company. However, he did not rule out the possibility of a court making such a finding on the basis that the will of the individual was exercised through a chain of companies.

1140. Dr Gerbutov considers that Russian law has not clearly established how foreign trust arrangements should be qualified for the purpose of the group of persons test. He is of the view that beneficiaries belong to the same group of persons as a company held on trust when those beneficiaries are entitled by the trust agreement to make nominations to the corporate bodies of the company, or to give mandatory instructions to the trustee. In support of this, Dr Gerbutov relies on the views of *Khokhlov E., The Problem of Disclosure of "Final Beneficiaries" in Practice of the Antitrust Authorities, Korporativny Jurist No. 5, 2008* and the case of *Aprel v FAS* (Resolution of the Arbitrazh Court of the Moscow Circuit, 1 December 2015) (in which the court found that in a Russian trust management agreement, under which a trustee was entitled to manage the shares in a company owned by another person, only the owner of the shares was entitled to dispose of the votes upon its sole discretion). Were it relevant, this point could only apply to transactions from 5 April 2013 (in the case of Mr Fetisov) and 5 March 2014 (in the case of Mr Yurov and Mr Belyaev),

1141. It was common ground between the experts that for the group of persons test, the power to issue mandatory instructions can also be derived from contract. Dr Gerbutov ultimately accepted that if the Shareholders' contracts with the corporate service providers entitled them to give binding instructions to the directors of the holding companies, this

would be sufficient to satisfy the group of persons test. His evidence in this regard can be seen from the following:-

… **If there is a possibility for a director to determine the decisions of a company, like of a company in your scenario D, for example, a group of persons test, like the possibility to make binding instructions or appoint executive bodies, it will apply and there will be a group of persons**. So the notional affiliation of a group of persons allow to encompass a lot of such situations. Yes? And I cannot say that any and all structures potentially -- that it's not -- any structure avoiding the necessity or to comply with the notification requirement of Article 81 is not possible but still the group of persons requirements are formulated quite broadly and it includes factual control, et cetera.

Q. So looking at scenario D, in what circumstances would the director and those companies be a group of persons?

A. Well, if we could have a look at the definition of a group of persons and various -- the test changed from time to time but in principle if it has, if I recall correctly, the possibility to appoint the executive bodies and the possibility to give binding instructions, I think, if I recall correctly, are mentioned among the criteria to form a group of persons as well.

Q. Does that mean in scenario D if the director is in reality in control of that structure, it will be regarded as a group of persons?

A. Well, can we, please, open the definition of a group of persons and the criteria I mentioned to them and I can

...

Q. They are very complicated…

A. So, for instance, just a simple example: if, for example, based on the contract it can give binding instructions to that company or if it appointed – if this person appointed the executive body, et cetera, et cetera, so these are the criteria which allow – and all other which would allow to follow the group --

Q. So if the director can appoint the executive body of X, you mean, just looking at scenario D?

A. Even -- yes, of X, yes.

Q. Right. So if the director or possibly others acting together with the director have got control of the executive bodies of X, then they could be regarded as a group of persons and there would be a disclosure obligation? Correct?

A. Well, the control, it's too broad. I mean we should look at the specific criteria, yes, and just general word "control" is not, I think, among these criteria.

Q. What if the directors of X were just Cypriot nominees who had a contract to provide nominee services to the director and they were acting under his instructions?

What do you think of that scenario? Would that be covered?

A. Say it again, please.

Q. Imagine that the directors of X, the official directors of X --

A. Yes.

Q. -- are just Cypriot nominee directors, professional nominee directors, and they have got a contract to provide nominee services and that contract is with the director?

A. Yes.

Q. And possibly with others. Meaning that the director is effectively in control of X pursuant to that contract, would that be covered such that there was a disclosure obligation?

A. **Well, if there is a contract under which a director could give binding instructions to this director of company X, then I think from Article 9 perspective that should be a group of persons."**

(emphasis added)

1142. The Shareholders argue that the Bank has not made good this argument on the facts. In contrast the Bank submits that this principle does apply in the context of the present case and, for example, where the companies concerned are Cypriot shell companies with nominee directors and no genuine independent "executive bodies". As I have addressed and found, the evidence does show that the companies in the offshore network were beneficially owned and controlled by the Shareholders (who I have also found were acting together in procuring the Loans and Transactions). I was not addressed at a granular level of detail in terms of every individual contract and its terms, but there can be no doubt that the whole of the structure of the offshore network was designed so that binding instructions could be given by the Shareholders through the nominee UBOs to the corporate service providers (facilitated by Mr Worsley) so as to control all companies in the offshore network for the benefit of the Shareholders (as also evidenced by the measures in place should an individual nominee UBO go "rogue"). In such circumstances I am satisfied that the Shareholders (who themselves acted together in relation to the Loans and Transactions) are to be treated as a "group of persons" and as such "affiliated persons", and I so find.

1143. This conclusion is, however, academic given my findings in relation to the Shareholders' breaches of Article 53 and 71. I would only add that if, contrary to my above findings, the Shareholders were not to be treated as a "group of persons", Dr Gerbutov himself accepted that manipulation of the rules by a director (for example by adding a holding company so as to remove any disclosure obligations – a fortiori the setting up of a web of offshore companies concealing ultimate beneficial ownership) would be relevant to the question of whether they act in good faith, and self-evidently they would not have been (so bolstering the case under Article 53 and Article 71). In this regard the presumptions in Resolution 62 paragraphs 2(1) and 2(5) would also apply as evidence of the director's bad faith.

M.8.3 Beneficiaries

1144. The final route to liability under JSCL article 81 would be if the Shareholders were "beneficiaries" of the relevant transactions.

1145. It is disputed by the experts whether the notion of beneficiary in JSCL article 81 encompasses persons who through one or several layers of companies receive funds obtained by the party to the transaction. Dr Rachkov claims that it does whereas Dr Gerbutov maintains it does not.

1146. The term "beneficiary" was clarified in two resolutions of the Supreme Arbitrazh Court: Resolution No 40 dated 20 June 2007 ("Resolution 40") and Resolution No 28 dated 16 May 2014 ("Resolution 28").

1147. Resolution 40 provides as follows:

> "a beneficiary in a transaction is deemed a person who is not a party to the transaction but who, as a result of that transaction, may be released from duties to the JSC (in particular, by as a result of giving a debtor consent to transfer its debt the provision of a consent of the debtor to transfer his debt to the company to another person) or a person who directly receives the rights under that transaction (in particular, the beneficiary under an insurance contract, the beneficiary under a bank guarantee, a third party in whose favour a contract is made under Art. 430 RCC)"
>
> (emphasis added)

1148. Dr Gerbutov's evidence is that the list of criteria in Resolution 40 was exhaustive, as confirmed in *Sosnogorskie v ATP* (Resolution of the Federal Arbitrazh Court of the Volga and Vyatka Circuit, 10 May 2012) and *Terupravlenie v Vladimiroblgaz* (Resolution of the Federal Arbitrazh Court of the Volga and Vyatka Circuit, 26 November 2007). Dr Gerbutov relies on comments in *Gudieva A.M. The Notion of a Beneficiary and Grounds for Recognizing Interested Party Transactions Invalid, Korporativny Jurist, 2007, No. 10* suggesting that the Supreme Arbitrazh Court intentionally refrained from using an extensive interpretation of the term "beneficiary" as a person obtaining any, including economic, benefit from a transaction.

1149. In cross examination Dr Rachkov accepted that under Resolution 40 a shareholder was not considered to be a beneficiary unless as a result of the transaction he was released from duties or directly received rights. His evidence is that one of the purposes of Resolution 40 was to clarify that a shareholder would not in every case be a beneficiary simply because the company acquired property as a result of a transaction.

1150. Resolution 28 altered the test by expanding the notion of beneficiary. In so far as relevant Resolution 28 provides:

> "The beneficiary in the transaction is recognised to be a person that is not a party to the transaction, who may as a result of its conclusion be released from obligations to the company or a third party or receives rights under the transaction (in particular, the beneficiary under insurance and trust management contracts, the beneficiary under a bank guarantee, a third party in whose favour the agreement is concluded in a/c with Art. 430 RCC) or otherwise derives a property benefit, for example by having received the status of a participant in the company's option program, or is the debtor under the obligation, as a security for

the performance of which the company is provided with a surety or is pledged property …"

(emphasis added)

1151. Dr Gerbutov's evidence is that "property benefit" under Resolution 28 applies only to direct benefits related to the transaction. He suggested that the notion of a beneficiary is a specific and narrow concept and that a direct or indirect shareholder does not, without more, amount to a beneficiary.

1152. Dr Rachkov maintained that where a shareholder obtains a pecuniary benefit by holding shares in a company which is made more valuable as a result of a transaction, this could engage JSCL Article 81. He was of the view that Resolution 28 is not an exhaustive list of criteria, but accepted it would be difficult (although not hopeless) for an induvial to argue that they were a beneficiary if they did not fall strictly within the wording of the resolution. Dr Rachkov maintained that if a loan were extended to a company, the prospects and value of the company could increase with the result that the shareholders would enjoy practical and pecuniary benefits sufficient to engage JSCL Article 81. However, he conceded that in the case of a simple loan to a company where a shareholder is not released from any obligations and does not gain any direct benefits, they would be unlikely to be considered a beneficiary.

1153. Overall, I accept that the notion of beneficiary for the purposes of JSCL Article 81 is narrow and does not extend to shareholders unless one of the specific grounds in Resolution 28 applies. I am reinforced in this view by the fact that JSCL Article 81 specifically recognises a 20% shareholding as a separate ground for interested party transactions. I also accept that if all shareholders were recognised as beneficiaries, to comply with JSCL Article 83, all shareholders would need to be listed in corporate resolutions approving an interested party transaction. I accept Dr Gerbutov's evidence that this would be an unworkable practice.

1154. In the above circumstances I am satisfied that the Shareholders did not fall within the specific (and very narrow) definition of beneficiary in Resolutions 40 and 28. In this regard (and for the purpose of the narrow notion of beneficiary under consideration) I am satisfied that the Shareholders were not released from any obligations, did not receive rights and did not otherwise derive a property benefit in connection with any of the transactions (in the very narrow sense contemplated). Whilst this does mean that the Shareholders would not fall within the definition of a "beneficiary" for this purpose, the absurd consequences identified by the Bank (for example a director procuring a US$50 million loan to a shell company owned and controlled by him and then using that US$50 million to settle his own personal debts) are, I am satisfied, well catered for by other principles including the "group of persons" test (in the context of Article 81 to 84) and the obligation under Articles 53 and 77 including to act in good faith, and the associated presumptions.

M.8.4 Conclusion on JSCL articles 81-84

1155. In relation to Issue 43, and for the reasons given above, the loans to the borrowers were related party transactions as the Shareholders were affiliates under the "group of persons" test. In such circumstances, and in answer to Issue 44, each of the Loans and

Transactions was a related party transaction for the purposes of the Credit Committee Regulations.

1156. It was common ground (paragraph 35 of the Agreed Facts and Issues) that if a proposed transaction is an interested party transaction in the required sense, Article 82 of the JSC Law requires notification to the company's supervisory board, audit commission/internal auditor and external auditor. In relation to Issue 44.1 and Articles 81 to 84, the Shareholders did not make the disclosure required by Article 82 in respect of each relevant transaction (and, indeed, I do not understand any of the Shareholders to have suggested otherwise – the defences focussing on the applicability, rather than the discharge, of the disclosure required, in relation to Articles 81 to 84). In this regard, and by way of example, notwithstanding that Article 82 requires disclosure of a director's interest in the transaction to the company's external auditor, it was the unchallenged evidence of Mr Zavadsky that none of the loans at issue (including those to Willow River/RCP) were accounted for as related party lending in the Bank's IFRS accounts.

1157. Equally, in circumstances where it is common ground that the obligations of disclosure in relation to interested party transactions under the Credit Committee Regulations mirror the JSC Law, Issue 44.2 is to be answered that the Shareholders did not comply with the provisions of the Credit Committee Regulations in relation to disclosure (quite apart from the other breaches of the Credit Committee Regulations that I have found).

1158. Further, in relation to Issue 18A, Article 8.6 provides that if any member of the CC *"has an interest in the adopted resolution, such interested party must leave the meeting while the matter is being debated and he or she cannot participate in the voting"* and an interested party is also prevented from voting by absentee ballot (Article 12.4). Thus, in circumstances where the definition of "related-party transaction" is a mirror of Article 81, there were further breaches of the Credit Committee Regulations in this regard (quite apart from the fact that the requirements for voting by absentee ballot were generally not met).

1159. I should add that breaches of the Credit Committee Regulations are also relevant to the labour claim as the Shareholders undertook in their employment contracts to comply with the Bank's internal regulations.

M.9 The Labour Law Claims

M.9.1 Common Breaches in relation to Civil Claims and Labour Law Claims

1160. In circumstances where I have found that the Bank is entitled to bring civil claims against the Shareholders under the RCC and JSC Law, the labour law claims are academic. However, it is common ground that the obligations established by Article 53(3) of the RCC, the new Article 53(3) and Articles 71(1) and 81-84 of the JSC also apply to the Shareholders as labour law obligations (Agreed Facts and Issues paragraph 29 and paragraph 11 of the Joint Memorandum). Accordingly the breaches of those Articles that I have found in the context of the civil law claims are equally breaches of the Shareholders' labour obligations. I address below discrete issues applying to the labour law claims (and separately in Section O in relation to time bar).

M.9.2 Issue 45

Did the Shareholders act in breach of the express terms of their employment contracts and/or Article 21 of the Labour Code (including by acting in breach of the Bank's Charter and/or the CC Regulations?

1161. Again given the other breaches identified both in relation to the civil claim (and if necessary the labour law claim) it is likely to be academic as to whether the Shareholders were also in breach of particular aspects of Article 21 of the Labour Code which lists the main labour duties of employees and includes a duty to perform the labour duties provided for in the contract in good faith and to comply with the internal labour regulations. These essentially overlap with issues already addressed in relation to Article 53(3) of the RCC, the new Article 53(3) and Articles 71(1) and 81-84 of the JSC. However, for the avoidance of doubt, the answer to Issue 45 is "yes" by virtue of the Shareholders' failures to act in good faith (as I have found), their failure to act "exclusively" in the interests of the Bank, and their various breaches of the CC Regulations that have been identified including the approval of loans by absentee ballot when the requirements for such a ballot were not met, allowing loans to be approved without the necessary due diligence materials required by the Regulations, and failing to attend CC meetings. In relation to the Bank Charter, the Shareholders also failed to comply with their obligations as Supervisory Board directors in numerous respects including in failing to write off debts in good faith, failing to establish and/or implement effective internal controls and approved the Bank's audited accounts knowing them to be false.

1162. I should add that Mr Belyaev takes a pleading point that Article 21 claims do not appear in the Claim Form against him, though it has been pleaded out in the Re-Amended Particulars of Claim (with issue being taken in the Defence as to its unpleaded status) and in due course fully argued. In such circumstances I would have been minded to grant permission to amend if necessary as I can see no prejudice, and the issues arising overlap to a very great extent with the issues undoubtably pleaded that arise in relation to Articles 53 and 71.

M.9.3 Issue 46 Unlawfulness under the general law

Did the Shareholders act unlawfully under the general law in

46.1 The making of loans to service bad debts owed to the Bank by other companies was a breach of and/or caused the Bank to be in breach of CBR Regulation 254-P because, in particular, the making of such loans was intended to have and had the result that the Bank's publicly stated accounts were misleading in that bad debts that should have been recorded on the Bank's balance sheet were concealed;

1163. I am satisfied that the requirements of CBR Regulation 254-P were not followed based on my findings as to balance sheet management and the misleading of the CBR, and indeed this would be so even on the Shareholders' case as to the purpose of the balance sheet management (to remove bad debts from the balance sheet which would involve the falsification of accounts and the misleading of the CBR). The Bank failed to report loans properly for the purpose of CBR Regulation 254-P, and the Bank would have been in breach of the N6 ratio if loans had been properly reported (as addressed in Sections I.2 and I.7 above). I am satisfied that the Shareholders were complicit in this and acted unlawfully in this regard. This resulted in breaches of the obligations established by Article 53(3) of the RCC, the new Article 53(3) and Articles 71(1) and 81-84 of the JSC which also apply to the Shareholders as labour law obligations (see Section M.9.1 above), and as such the Shareholders breached their labour law obligations in that regard.

46.2 The Shareholders ensured or procured that false information was submitted by the Bank to the CBR on the special forms which the Bank was required to submit, in breach of CBR Instruction 2332-U, in order to avoid the CBR taking action to prevent any

further recycling of funds through offshore loans and falsification of the Bank's balance sheet;

1164. As addressed in Section I.4 I am satisfied that the Shareholders did procure that false information was submitted to the CBR in order to avoid the CBR taking the actions alleged (which resulted in a breach of their obligations under the RCC and JSC and thus also their labour law obligations). In such circumstances Issue 46.2 is academic, but the Bank's case at trial has not identified "special forms" or any separate breach of CBR Instruction 2332-U procured by the Shareholders, and so this specific allegation has not been made out.

46.3 As a result of the "balance sheet management", the Bank's capital adequacy ratio was calculated on a false basis contrary to CBR Instruction 139-I;

1165. This point is addressed under Issue 23 above. I am satisfied that the Bank's capital adequacy ratio was (repeatedly throughout the period of time under consideration) calculated on a false basis contrary to CBR Instruction 139-I, to the knowledge of the Shareholders.

46.4 The Shareholders falsified accounts and deceived the CBR contrary to Article 172.1 of the Criminal Code (as amended on 21 July 2014); and/or

1166. I have found in Section I.5 above that the Shareholders did procure the falsification of accounts and in Section I.4 that they did mislead the CBR. However, I had only very limited evidence from Dr Rachkov as to possible criminal offences, and my understanding is that Article 172.1 of the Criminal Code only entered into force in July 2014, and there would not appear to have been any false accounting or reporting after that date, so this specific allegation has not been made out. Dr Rachkov suggested that prior to the adoption of Article 172.1 of the RF Criminal Code (i.e. before 2 August 2014), a director's actions related to the falsification of the company's accounts could have been punished in accordance with Article 201 of the RF Criminal Code, however, the matter was not explored in any detail, and I do not consider that the Bank has established, to the requisite standard, that a criminal offence was committed.

46.5 The Shareholders committed an abuse of authority contrary to Article 201 of the Criminal Code because they falsified the Bank's accounts for personal gain in that it artificially inflated the perceived value of the Shareholders' shares and/or allowed them to continue to receive salaries and bonuses from the Bank?

1167. Again I only had limited evidence before me in relation to Article 201. Dr Rachkov's evidence was that according to the notes to Article 201 of the RF Criminal Code, the sole executive body, a collective executive body, members of the board of directors, as well as persons performing organizational or business administrative functions in the company, are referred to as "persons performing managerial functions". His evidence was that the objective part of the crime provided for by Article 201 of the RF Criminal Code is the use of managerial functions (by actions or inactions) against the legitimate interests of this company that caused considerable harm to rights and legitimate interests of citizens or companies or to interests of the society of the state protected by law. The subjective part of the crime is direct or indirect intent, where the aim is to retrieve benefits and advantages for himself or other persons or to cause harm to other persons. Whilst I am in no doubt that the Shareholders were involved in the falsification of the Bank's accounts, and that they gained financially as a result through the continued existence of the Bank, the ingredients of the offence, and their application to the facts was not explored before me

in any detail, and I do not consider that the Bank has established, to the requisite standard, that a criminal offence was committed in this regard.

N. CAUSATION AND QUANTUM ISSUES (ISSUES 51 to 57A)

N.1 Would the Loans have been made any way (Issue 51)?

51. To the extent that there were breaches of rules requiring particular procedures to be followed, disclosure to be made and/or approvals to be obtained: (i) is it legally relevant whether the Loans would have been made even if the relevant procedures *etc.* had been followed, and (ii) would the Loans have been made even if those procedures had been followed? In particular, would the CC and/or Supervisory Board have been able lawfully to approve transactions that were:

51.1 designed to hide facts, which would have led the CBR to cause a takeover of the Bank by the DIA;

51.2 not reported to the CBR, which would cause money to leave the Bank and into the control of 'controlling persons' thereby reducing the Bank reserves below that required by law; and/or

51.3 which amounted to a fraud on the Bank's depositors by the falsification of the Bank's publicly available accounts,

and is it the case that the transactions were in fact of that nature?

1168. Whilst this Issue is directed at breaches of the rules and procedures in relation to disclosure of interest and the need to obtain approvals and whether the loans would have been made in such circumstances if approval had been sought, I consider that the legally relevant question is whether the relevant losses claimed were caused by such breaches of duty of the Shareholders as I find to have occurred. However, to the extent relevant, I am satisfied that had the loans been considered by honest and disinterested members of the Credit Committee and/or Supervisory Board directors acting in accordance with their duties and in the best interests of the Bank, the loans simply could not, and would not, have been made as (variously) there was no proper due diligence, and if there had been it would have been obvious that the loans were not in the best interests of the Bank and that it was unreasonable to make the loans to the Borrowers (as addressed in Section R), in addition loans made for "balance sheet management" purposes (in the sense addressed in Sections G.3.1 and G.3.2) were by their very nature not in the best interest of the Bank as I have found, and loans for the benefit of the Shareholders were equally not in the best interests of the Bank as I have also found.

1169. In this regard, in relation to "balance sheet management" the loans could not and would not have been made given the inherent features of the same which involved concealment of lending off balance sheet, the deception of the CBR and the associated falsification of accounts – for all these reasons such loans could not and would not have been made. It perhaps goes without saying but it is obvious that the CC and/or Supervisory Board could not lawfully approve transactions that would cause the Bank to be in breach of the CBR regulations and involve the commission of an offence, in the light of my findings in relation to balance sheet management.

1170. It is not necessary to address issues 51.1 to 51.3 separately at this point. To the extent relevant, and so far as the Bank is entitled to raise the same, such matters have already been addressed in Section I.2.

N.2 Causation and the Quantum of the Bank's Loss (Issues 52 to 55)

52. If the Shareholders were in breach of duty, what financial loss has the Bank proven was directly (immediately) caused to the Bank by such breaches of duty? In particular has the Bank suffered loss in an amount representing the difference between (i) the amount of the outstanding principal owed by the Borrowers and (ii) the value of collateral and other assets held or recovered in respect of such debts (as the Bank contends)?

1171. Issue 52 is the central issue as to the amount of the Bank's loss and how it is to be calculated. Issues 53 to 55 historically sought to address the Shareholders' case in response. In the event the Shareholders' case developed substantially (and the Bank says in particular respects impermissibly) in written and oral closings and accordingly I address below, as appropriate, the parties' respective cases as they existed by the end of the oral closing submissions, and make my consequent findings on loss.

N.2.1 The Sums Claimed

1172. By the time of the agreement of the Agreed Facts and Issues, the Bank claims as its alleged loss the total principal sums outstanding (as between the Bank and the Borrowers) in respect of the Loans and Transactions as at 31 December 2015. I do not understand there to be any dispute as to such amounts (as figures) though whether this is the recoverable loss in respect of the Shareholders' breaches of duty is very much in dispute. In this regard paragraphs 48 and 49 of the Agreed Facts and Issues provide as follows:-

> "48. It is agreed that the total principal sums outstanding (as between the Bank and the Borrowers) in respect of the Loans and Transactions as at 31 December 2015 (excluding the Erinskay and Baymore derivative transactions) are as set out in the table in the Accounting Joint Memorandum at **{C3/6A/5}**, but the rows entitled "Costs incurred under the investment contracts" and "Other receivables" no longer form part of the sums claimed by the Bank.
>
> 49. The Bank does not pursue any claim in respect of:
>
> 49.1 the derivatives entered into between the Bank and Erinskay, Baymore and Belenfield;
>
> 49.2 the investment contracts; and
>
> 49.3 the interest and penalties said to be due to the Bank from the Borrowers."

1173. Under cover of a letter from the Bank's solicitors dated 7 November 2018 the Bank provided a schedule (the "7 November Schedule") showing a breakdown of the total principal figures that were agreed in the accounting experts' Joint Memorandum. The extra three rows at the bottom of the schedule showed the totals excluding the StroyEcologia and Stivilon investment contracts, the Belenfield derivative transactions, and the minor loans to various entities in the Yaposha group.

1174. As addressed below, the Shareholders dispute that the outstanding principal represents the Bank's loss. Aside from a discrete submission, addressed in due course below, that such an approach disregards payments under the loan, in particular payments of interest, which it is said would not have been made had there been no loan, the Shareholders raise two different, but connected, issues of principle on loss:-

(1) First they submit that the "balance sheet management" loans (or at least some of them) did not in themselves cause a loss, as opposed to facilitate the deferral of the recognition of prior loss (the "Deferred Loss point").

(2) Second, they submit that the Bank should give credit, or its losses fall to be reduced, because the proceeds of some of the loans were used to service and/or repay other loans made by the Bank (the "Circular Credit point").

1175. The Shareholders' case on such matters (spear-headed by Mr Yurov in his written and oral Closing Submissions) has evolved over time, and the Circular Credit point has been expanded and developed (the Bank says to an impermissible extent) to the point of submitting (at paragraphs 327 to 328 of Mr Yurov's Closing Submissions) that *"the overwhelming proportion of the money that goes into the off balance sheet structure returns to the Bank or is spent on the Bank's projects. If the Bank were to be compensated based only on the principal sums outstanding it would undoubtedly be massively over compensated"*.

1176. For its part the Bank submits that:-

(1) The Deferred Loss point is wrong in principle, and in any event is either largely inapplicable to the facts of the Shareholders' own cases or hopeless on the evidence.

(2) The Circular Credit point requires the Shareholders to prove facts that they have either not attempted to establish or not succeeded in establishing, and in any event the point cannot apply to any repayment of a loan that was itself, but for such repayment, the result of the Shareholders' breach of duty.

N.2.2 The assessment of damages under Russian law

1177. The experts agree on the principles by which loss is to be assessed under Russian law, as set out in paragraph 15 of the Joint Memorandum (they are expressed by reference to Article 53 of the Civil Code and the JSC Law, but it is not in dispute that the same principles apply to all the claims):

> "(2) the amount of damages has to be established with reasonable certainty. However, when the amount of damages cannot be established with reasonable certainty (although it is clear that certain losses were suffered), the damages claim cannot be dismissed on that basis. In such a case, the amount of damages awarded by the court is to be determined by the court given all the circumstances of the case and proceeding from the principles that the compensation should be fair and adequate.
>
> (3) the causal link between the behaviour of the director and the damages suffered by the company must be immediate (direct).

(4) the claimant has a duty to mitigate its damages and a violation of that duty is a ground to reduce liability of the defendant."

1178. In relation to a scenario where the amount of damages cannot be established with reasonable certainty but it is clear that certain losses were suffered, and the amount of damages awarded are to be determined by the court given all the circumstances of the case and proceeding from the principles that compensation should be fair and adequate, some further assistance is provided by Dr Rachkov's evidence when cross-examined:-

> Q. ... And the purpose of the award of damages is to put the claimant in the position it would have been in if the wrong had not been committed. Is that right?
>
> A. Yes.
>
> Q. And sometimes that harm can be measured precisely, in which case you award that precise amount. Is that so?
>
> A. Yes.
>
> Q. And sometimes it cannot be measured precisely, in which case you have to proceed on the basis of fair and adequate compensation, as you and Dr Gerbutov agree?
>
> A. Yes.
>
> Q. In relation to fair and adequate compensation, adequate compensation, I take it, means, as far as possible, **full compensation to put the claimant in the position they would have been in if the wrong had not been committed.** Is that right?
>
> A. **Apparently so**.
>
> Q. **And fair compensation means, I take it, not excessive compensation**; in other words, you are not trying to put the claimant in a better position than they would have been in if the wrong had not been committed?
>
> A. **Yes, it makes sense**."
>
> (emphasis added)

1179. Accordingly, what is to be awarded is full compensation to put the claimant in the position they would have been in if the wrong had not been committed, whilst the compensation must be fair compensation.

N.2.3 The prima facie loss position

1180. In relation to each loan made in breach of duty (i.e. where the Shareholders, in breach of duty cause the Bank to make a loan to an entity (the "Entity") – as applies to the Loans in the present case, as I have found), the Bank's prima facie loss is, I am satisfied and find, the amount of the loan that is unrepaid after falling due, less any relevant recovery from the Entity as a result of the loan (such as by the exercise of rights to set-off positive bank balances, enforcement of pledged collateral or the execution of a judgment against its assets). As identified above, the principal sums outstanding are set out in the 7 November Schedule, whilst the recoveries are set out in Schedule 1 to Mr Allen's first report (C1/2/46). Such sums prima facie represent, I am satisfied, full compensation to put the Bank in the position they would have been in if the wrong had not been committed. It is the Shareholders' breaches of duty that caused such Loans to be made, and the Bank's loss is prima facie the principal sums outstanding less recoveries made.

1181. It is the Bank's prima facie loss, and this is the prima facie measure of the damages, because it is necessary to consider whether the points made on behalf of the Shareholders

lead to the conclusion that some other measure of loss represents full (but not excessive) compensation to the Bank, as the Shareholders submit but the Bank denies.

N.2.4 The burden of proof

1182. The Bank having prima facie established its loss one would expect that the burden of proof would shift to the Shareholders to establish any case by way of rebuttal in terms of benefits to be credited and the like. That is, I am satisfied, the position as a matter of English law (certainly in terms of the evidential burden, if not the legal burden) and the contrary was not suggested on behalf of the Shareholders, and equally it was not suggested by any party that the position was any different as a matter of Russian law.

1183. Thus, in *Midco Holdings Ltd v Piper* [2004] EWCA Civ 476, Tuckey LJ (with whom Sir Martin Nourse and Peter Gibson LJ agreed) stated at [23-24]):

> "23. Is it for the defendant to prove that Midco received a benefit or for Midco to prove that it did not? Mr Huckle submits that the burden was on Midco as it had to prove its loss and it could not do so without giving credit for any benefit which it had received. He relies on the general rule stated at the beginning of Chapter 44 (page 1593) in the 17th Edition of *McGregor on Damages* which says:
>
> > "The claimant has the burden of proving both the fact and the amount of damage before he can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a given allegation forms an essential part of a person's case the proof of such allegation falls on him."
>
> 24. I do not accept Mr Huckle's submission. *McGregor* goes on to refer to exceptions to the general rule. Paragraph 44–003 says:
>
> > "Other circumstances allied to mitigation where the onus should rest on the defendant used to appear in claims under the Fatal Accidents Act for the benefit of a deceased's dependants. In such cases the prima facie measure of damages is the value of the dependency. This, however, formerly fell to be reduced by reason of benefits resulting to the dependants from the death in order that only the net pecuniary loss was ordered as damages. Translated into terms of onus of proof, the dependants had to prove the value of the dependency which was lost to them, but after this the onus was upon the defendant to cut down this prima facie measure by proof of the receipt by the dependants of benefits resulting from the death which went to reduce the damages. This division of the onus of proof in such cases was adopted by Parker LJ in his judgment in *Mead v Clarke Chapman* [1956] 1 WLR 76 at 84."
>
> In that case Parker LJ said:
>
> > "Once a person … is shown to be a person who has suffered a loss of dependency, then the onus shifts. It is then for the defendants to show,

if they can, that on the facts of the case the dependency originally lost has been reduced or has ceased entirely."

This principle is not confined to fatal accident cases. In this case the defendant was asserting that Midco had received a benefit. Midco's case was that it had not received any such benefit. In a situation like this, wherever the legal onus may lie, the evidential onus shifts to the party who is making the assertion — in this case the defendant."

1184. The principle was recognised and applied by Hamblen J (as he then was) in *Cheltenham BC v Laird* [2009] EWHC 1253 (QB) at [561]:-

"561. Where a defendant in a deceit claim, or in a negligence claim, contends that the claimant must give credit against its losses for financial benefits which are alleged to have resulted from the tort, the evidential burden rests on the defendant to show that the claimant has received the benefit: *Midco Holdings Ltd v Piper* [2004] EWCA Civ 476 per Tuckey LJ at paras 22-6. In order to establish that the claimant received a benefit it is necessary to show that the same or equivalent benefit would not have otherwise have been obtained, and I reject Mrs Laird's contention that there is a shifting evidential burden in relation to that issue."

1185. Whilst in many case questions of burden of proof are academic, in the present case the burden of proof is centre stage, as the Bank submits that the Shareholders have failed to prove that which they assert in terms of alleged benefits and associated matters. If the Bank is correct in that regard, then the Shareholders have failed to prove that there are credits to be given, with the result that the Bank is entitled to recover the prima facie loss.

N.2.5 The Deferred Loss point

1186. The Deferred Loss point featured strongly in the Shareholders' written Opening Submissions, but was somewhat upstaged in closing by the considerably developed Circular Credit point. Nevertheless, it remains of relevance, including in the context of the Bank's rebuttal of both points, as the points are connected.

1187. The Deferred Loss point has a basic factual premise as posited by the Shareholders in their written Opening Submissions:-

(1) Paragraph 138 of Mr Yurov's Opening Submissions supposes that "*the Bank is owed US$1,000 by borrower X, a third party, but that the debt is a bad one*", and

(2) Paragraph 211 of Mr Fetisov's Skeleton supposes that "*the Bank has a non-performing loan to Borrower A of US$10 million as a result of the financial crisis*".

1188. Thus, the underlying factual premise (that must then be applied and proved on the facts) is that there is an existing bad debt (i.e. one of which no repayment will be made) which is then refinanced by the Bank. However, the Deferred Loss not only stumbles, but falls and fails factually at this point, and the Shareholders have not proved the same. Indeed it is contrary to aspects of their own evidence. As already addressed in Section G.1 above in relation to Issue 14 (and whether assets were "taken over" after the financial crisis), the only Borrowers or projects that could be said even arguably to fall within such

category that were re-financed by Bank as a result of the financial crisis are Stivilon and StroyEcologiya. I have already quoted in Section G.1 Mr Fetisov's acceptance of this when cross-examined, but will repeat that evidence at this point for ease of reference:-

> Q….these were mainly assets seized by the Bank during the crisis. That's wrong, isn't it, as far as RCP and Willow River are concerned? Do you agree?
> A. Yes, I agree.
> Q. And --
> A. It's also wrong with regards to timber company Siberia.
> Q. Well, I'm going to go through the list. It's wrong in relation to Yaposha, isn't it, because that had nothing to do with the crisis, even on your case?
> A. Correct, yes. It was investment, yes.
> Q. It's also wrong, isn't it, in relation to the buildings, the commercial real estate in Moscow?
> A. Yes.
> Q. And it's also wrong, as you say, in relation to Priangarskiy and Business Group and SiberianKD?
> A. Correct.
> Q. Which leaves only, I think, from the ones we're concerned with on that list, Stivilon and Stroyecologiya?
> A. And the leasing company.
> Q. Yes, but I'm not asking you about the leasing company."

1189. That is the end of Shareholders' argument in relation to loans that financed or refinanced Yaposha, Business Group/Priangarskiy, and Oldehove and Crylani (the real estate developments), and logically also any loans that financed or refinanced any other companies or projects that are not the subject of this claim (such as the leasing or factoring company, IFC; or the Svetly Gorod housing development, each of which was referred to in Mr Worsley's list of assets given to SMP).

1190. But the evidential position in relation to Stivilon and StroyEcologiya is no better, the Shareholders having failed to establish the amount of the Bank's outstanding lending to those projects at the relevant time, the fact that the loans in issue in this case refinanced that debt, and the actual value of that debt at the point at which it was so refinanced. This last point is reinforced by the fact that it is not appropriate to infer that the debt had no value (it may be obvious but even following a default the Bank's loss on the lending will depend on the prospect for future recovery and the value and enforceability of available collateral, and what reserving is necessary and made). Mr Yurov's own evidence was that the value of the Stivilon debt could not be assessed as zero and a default on a loan did not mean an "*immediate loss*". Thus, for example, he stated (in relation to Stivilon):-

> "again -- I have to share this, my understanding -- and I'm sure that I'm right here because default on the loan doesn't mean a loss, doesn't mean immediate loss, because there are any -- there might be quite different reasons why company defaulted on the interest rate payment. It

doesn't 100 per cent mean that the company is insolvent.
It might be something else."

1191. I do not consider that the Shareholders have demonstrated with specific regard to a particular entity that there was an existing loan that had gone bad (as opposed to general assertions that amount to no more than mere assertion or speculation) that loans had gone bad during the financial crisis (which does not suffice). Even had that been established it would also be necessary for the Shareholders to establish that a particular loan about which the Bank complains went to refinance an existing loss (and to the extent that it did so). That is necessary as otherwise it could not be asserted that a later loan did not cause a loss but merely deferred an existing loss (i.e. the Deferred Loss point). But I do not consider that the Shareholders have demonstrated that either.

1192. However, and quite apart from the inability of the Shareholders to prove the necessary elements of such a plea there is an additional, and even more fundamental difficulty, and that is that such an approach is wrong principle in the context of lending which was itself (as I have found) not in the best interests of the Bank, involved the commission of offences, and was in fact in bad faith, with the Shareholders breaching their duties to the Bank in procuring such loans.

1193. As the Bank points out, the Shareholders' argument involves the acceptance of the proposition that a fraudster could steal from the Bank to repay his own indebtedness and then claim that the Bank has suffered no loss as a result of his theft – such an argument is obviously (and demonstrably) wrong as can be illustrated by adapting the Shareholders' own examples. In this regard, assume that that the Bank has a non-performing loan to Borrower A of £1,000; and that A is an individual who is entirely and irretrievably unable to pay, so that the Bank has provisioned the loan as to 100%. On the Shareholders' premises, this represents an actual, incurred loss to the Bank of £1,000. Now assume that A successfully deceives the Bank into handing over to him £1,000 in cash, which A uses (as he planned all along) to settle his original debt. When the Bank discovers the fraud and sues him, A's defence (like the Shareholders' in this case) is that the Bank has suffered no loss because it had already lost £1,000; and its loss remains the same after the fraud. That cannot be right. The position would be no different if the fraudster was a different individual, B, who dishonestly obtained the money and passed it to A (whether as a conspirator or a benevolent bystander) so that he could repay his debt.

1194. It is not right as it looks only at the Bank's net financial position, ignores the fact that the earlier loan has in fact been repaid and fails to analyse whether the fraudulent conduct in fact caused the loss with which the Bank is left. The fallacy and sleight-of-hand is that what is obscured is the fact that when wrongfully obtained money is used to repay the initial loan, the original loan loss is not "deferred", it is extinguished. What subsists, is the loss caused by the fraud not the original lending. This loss (even if in the same amount) is a different loss caused by a different event and in many cases (as in the example that involves B as well as A) caused by, and recoverable from, someone else.

1195. English law sets itself against such arguments (there being no suggestion that Russian law differs from English law in this regard) – see *Komercni Banka v Stone & Rolls* [2003] 1 Lloyd's Rep 383. In that case, which concerned a letter of credit fraud, a bank had been deceived into paying out on a series of letters of credit to a purported seller, Stone & Rolls,

for which it was not reimbursed by the buyer, BCL. It was alleged and established in a "tracing" exercise that some of the fraudulently-obtained proceeds of later LCs were passed from Stone & Rolls to BCL and used to reimburse the bank in respect of earlier LCs. Toulson J (as he then was) stated as follows at [170]-[173]:

> "170. Suppose for the sake of argument that SR Prague was a branch office of the defendant company [i.e. the seller], and that it used money derived from the proceeds of a later LC to reimburse the bank in respect of an earlier LC issued in its favour. The Shareholders rightly do not seek to argue that SR's use of the money in that way could properly be said to be a benefit to the bank which could be brought into account when calculating damages for SR's fraud in relation to the later LC. Otherwise, as Mr Doctor observed in his closing submissions, a customer owing money to a bank which he could not repay could solve his problem by fraud and using it to pay his prior liability.
>
> 171. Consider next the position if the fraudster decides to use the proceeds of his fraud to discharge a liability owed to the bank by a third party. I reject the argument that he would be entitled to have that matter taken into account as a relevant benefit to the bank when calculating the loss resulting from his fraud. As before, his use of the funds would be the result of his independent choice how to use the opportunity created by his fraud. **Just as it would be wrong that a customer who could not repay his overdraft should be able to pay off the overdraft with funds obtained from the bank by deceit, and then defeat the bank's claim for deceit by saying that there had been no loss from his deceit (since the money obtained from it had been used to repay a debt that he could not have otherwise have paid), so also it would be wrong that a similar result should be achieved by a customer and an accomplice - as would be the case if the accomplice were able to obtain money from the bank by fraud, use it to discharge the customer's indebtedness and then defeat the bank's action in deceit by the plea that there had been no loss**.
>
> 172. Consider also a variation of this example, which in the present case would not be hard to imagine. Suppose that SR was not BCL's only accomplice, and that proceeds of LCs issued in favour of SR were used to reimburse the bank (in whole or in part) for matured LCs issued on BCL's application in favour of another accomplice, X, and vice versa. The fact of such reimbursement would of itself eliminate or reduce the bank's loss in respect of the reimbursed LC. On the defendants' argument, although neither SR nor X could raise as a defence that funds obtained by its fraudulent behaviour had been applied to reimburse the bank in respect of an LC issued in favour of itself, each could do so if the funds were applied to reimburse the bank in respect of an LC issued in favour of the other, with the consequence that to that extent the liabilities of both would be cancelled. I can see no justice in such a result.
>
> 173. From the defendants' viewpoint there is certainly an element of fortuity in that if the proceeds of payments by SR to BCL were used to repay earlier LCs issued in favour of SR, SR would cease to owe a liability to the bank in respect of those earlier LCs; but if they were used to repay other LCs, SR would gain no benefit. However, that is not something about which SR is entitled to complain. A fraudster who pays proceeds of his fraud to an accomplice takes his chance what happens to them."
>
> (emphasis added)

1196. The observations of Toulson J at [176] are also apposite, and have particular resonance, in the context of the Shareholders' arguments in this area in the present case:-

> "176. Finally, I referred earlier to the difficulty of knowing where to draw the line if a broader approach were adopted. I believe that to embark on a trial to determine whether, and if so to what extent, sums received by SR from discounted LCs resulted in the discharge of liabilities of DCL, or connected companies, to the bank would be like entering a jungle without a route map. During this trial a spotlight was shone on certain aspects of the unsatisfactory affairs of Mr Stojevic's and Mr Alon's companies. Transparency was not their characteristic. To try to fathom the extent to which the use of the proceeds of the discounted LCs led to the reduction of liabilities by DCL or connected companies to the bank would be an exercise of a different magnitude, because it would involve examining inter-company dealings in relation to LCs issued in favour of beneficiaries other than SR — and that is what I describe as entering a jungle. In referring to the lack of a route map, I have in mind the difficulty which I foresee in attempting to discern where in the jungle the exercise should begin and end. Take the defendants' two examples of payments to SR Prague in August 1999. They focus on certain events in a wider web of dealings. It is not obvious why those events, and not other surrounding dealings between the various parties, should be taken into account as being not too remote or why the "first in, first out" approach at the suggested dates should be taken for determining the amount of the bank's loss. If I had been in doubt where the line of remoteness should be drawn, such considerations would have strengthened my inclination towards a narrower rather than a broader approach."

N.2.6 The Circular Credit point

1197. The Circular Credit point is a related, but different point to the Shareholders' Deferred Loss point. It focusses not on whether an impugned loan (to Borrower A) was entered into to finance an existing loss, but rather whether the proceeds of the impugned loan (to Borrower A) can be shown to have been returned to the Bank, for example as the payment of interest or principal in respect of another loan such as to Borrower B, the Shareholders submitting that this is a benefit to the Bank for which credit should be given in respect of its claim for loss caused by the impugned loan.

1198. In his written Closing Submissions the Circular Credit point assumed centre stage and Mr Yurov submitted that, *"on any view the overwhelming proportion of the money that goes into the off balance sheet structure returns to the Bank or is spent on the Bank's projects. If the Bank were to be compensated based only on the principal sums outstanding, it would undoubtably be massively over-compensated*".

1199. The Shareholders' submissions in this regard were developed at paragraphs 323 to 327 of Mr Yurov's Closing Submissions. They refer to Mr Davidson's analysis of the lending to some, but not all, of the Borrowers in his Third Report. Overall, he covers the bulk of the Ruble lending, and about half of the dollar lending. Mr Allen did not seek to replicate that analysis, but he considered it and summarised his conclusions in his Issue 3 Report. It is pointed out that Mr Davidson was not cross-examined substantially on it, and it was not suggested to him that his conclusions were wrong in any material point so (it is said) his conclusions are uncontradicted. It is also said that Mr Allen has also to some degree covered the same ground in his Issue 2 Report, since in the process of tracing from

possible benefits to the Shareholders *to* the relevant Loans and Transactions that are the subject of the case he has effectively carried out a partial analysis of the use to which money was put.

1200. Before addressing the detail of those reports, two general points were made on behalf of Mr Yurov. First, that the experts agree that *none* of the money deriving from the Loans and Transactions can be traced directly into the hands of the Shareholders albeit that a very small amount of it (less than 1 percent of the total traced by Mr Davidson) can be traced "forwards" to two uses which benefited them – the purchase of Merrill Lynch's shares (USD 1 million) and the Kolyada litigation (USD 1 million). This was undoubtedly money that "left the system" and may have benefitted Mr Yurov (List of Agreed Facts and Issues para 10). Those sums apart, even Mr Allen does not suggest that money can be traced "forward" from a Loan to a benefit. The other "benefits" he traces involve *refinancing* of sums which had been lent by transactions which are *not* the subject of this claim to the Shareholders. The second general point to bear in mind is that Mr Davidson excluded from his analysis the loans to Mourija, Stroyecologiya, Business Group, Belenfield, Edenbury, Black Coast and Yaposha. However it is said that much is known about these companies, and the only Loans about which there is a real evidential vacuum are the Yaposha loans.

1201. Based on Mr Davidson's exercise, the Shareholders make the following submissions as set out at paragraph 326(a)-(h) of Mr Yurov's Closing Submissions:-

> "326…
>
> (a) USD 152 million out of USD 721 million returns more or less directly to the Bank as repayments of principal or interest.
>
> (b) USD 316 million out of USD 721 million is used for what Mr Allen describes as 'Balance Sheet Management', that is to say it is used to refinance other lending, including EWUB.
>
> (c) Taking those figures together, then, USD 468 million out of USD 721 million traced is used to service or refinance loans made by the Bank. That amounts to around 65 percent of the total.
>
> (d) A further USD 72 million is described by Mr Allen as an unreconciled difference. For reasons explored with Mr Allen, it is likely that most of that sum is the result of the trading losses made by Erinskay and Baymore (those losses, the experts agree, were about USD 62 million at Mr Allen's exchange rates). Mr Allen did not apportion them in that way because of the possibility that Erinskay and Baymore had derived their trading portfolio from other sources of money. But if they had no sources of money other than the Bank, that caution is unnecessary, as Mr Allen accepted {Day25/72:2-7} – and of course that is the position on both parties' case.
>
> (e) USD 101 million is traced by Mr Allen either to the Borrowers or to other related companies (such as TIB Investments and Tactio) and not further. As Mr Allen's report shows, however {C3/6/39} a large part of this amount can be traced either to TIBI from Oldehove and Crylani (so that the most likely explanation of it is that it was used, as Mr Allen himself concludes, to refinance the EWUB scheme) or

to bank subsidiaries such as Gofra. Only a small part (USD 4 million) goes to Kuri Hills, and is therefore probably to be treated as part of the costs of the offshore network).

(f) USD 12 million was used by Biznessaktiv and Pravo I Bizness to acquire a loan portfolio from the Bank. Mr Yurov's evidence (on which he was not cross-examined) is that Pravo I Bizness was an 'in house vehicle used by the Bank to collect retail loans' (Yurov WS 1 ¶98 {B2/15/23}) and Biznessaktiv evidently served a similar function. Since both were buying loans from the Bank, it is reasonable to conclude that the money returned there.

(g) About USD 22 million was used for end uses related to investment projects (such as payments of contractors for the Gelendzhik project).

(h) About USD 14-18 million (amounting therefore to about 2.5 percent of the total) was used in the operating expenses of the balance sheet management scheme and offshore network."

1202. It is then submitted that "*in general terms*" disregarding the small "*unreconciled difference*" after taking account of the Baymore and Erinskay trading losses, the overall position is roughly as follows (the percentage figures in brackets represent the percentage of the total excluding repayments of principal and interest, and unreconciled differences, but including the Erinskay and Baymore trading losses on the basis (say the Shareholders) that they are not really "*unreconciled*".

	Most favourable to Ds	Most favourable to Bank
Returned to the bank as interest or principal	21	21
Refinancing and balance sheet management	59 (76%)	44 (56%)
Lost in trading	9 (16%)	9 (16%)
Used in projects	3 (4%)	3 (4%)
Expenses of the structure	2 (3%)	2 (3%)
Benefit of shareholders	1 (<1%)	4 (5%)
Uncertain	4 (0)	17 (16%)

1203. It is this exercise that leads the Shareholders to submit that the overwhelming proportion of the money that goes into the off balance sheet structure (allegedly) returns to the Bank or is spent on Bank projects.

1204. It is then alleged in relation to the "*unanalysed companies*" as follows at paragraph 329 of Mr Yurov's Closing Submissions (as expanded upon in Mr Yurov's Schedules in relation to individual Borrowers):-

"329. …

(a) The Belenfield Loan is known to have been used for the Bank's purposes in making a loan to Baltilka Bank. As set out in sched. K below most of that money has been recovered.

(b) There is positive evidence that a large proportion of the Black Coast lending was used to refinance the EWUB scheme. Mr Allen's own conclusion is that around RUB 4 billion of the Black Coast lending (through Bank Winter) was so used: see {C1/2/225-227}.

(c) The uses of the Mourija US dollar loan is also known. Mr Allen traces it returning to the Bank (he says to refinance EWUB as to USD 4 million or so {C1/2/224} and as to the balance to refinance lending connected to the Kolyada share purchase {C1/2/131}. He is probably wrong about that; but the alternative and better view is that the part Mr Allen attributes to the Kolyada share purchase in fact went to refinance the EWUB scheme. So for present purposes the distinction makes no difference: {Day25/115:20} – {Day25/116:15}.

(d) It is quite clear that at least half of the Stroyecologiya loan was used to repay another SPV, Oil Group which had acquired a participation interest in the relevant CLNs (see {Day25/160:25} – {Day25/161:17} where at the end of a necessarily tedious analysis of the documents Mr Allen agreed that this was the 'only logical way' of looking at the relevant transactions. It is likely that substantially the whole of that loan went to refinance the principal and the interest paid by companies in the offshore network to the Bank since the original debtor stopped paying in late 2008.

(e) In the case of Edenbury, the evidence supports the view that on a balance of probabilities the relevant bonds were sold and used to buy newly issued shares, so that the money returned to the Bank as share capital.

(f) That leaves only relatively small amounts unaccounted for, mostly in the Yaposha companies, which are likely to have been a mixture of loans used to support working capital in what was a working group of companies with a real business in which the Bank was an investor, and loans made to enable existing debt to be reserviced."

1205. This leads on to the denouement of the Shareholders' submissions on credit for alleged benefits and the calculation of the Bank's losses in paragraph 330 of Mr Yurov's Closing Submissions where it is submitted:-

"How, then, in arriving at an assessment of what is 'fair and adequate' compensation in the circumstances of this case should the Court proceed? The answer, it is submitted, is that precision is impossible, and that what is called for is 'fair and adequate' compensation. The Court should take an approach which fairly reflects the known facts, holding the scales evenly between both parties. Having arrived at an overall figure which takes account of the outstanding balances and collateral, the Court should award only that part of the figure that has truly been lost. That amount, it is suggested, reasonably lies at somewhere between less than 1 percent (the benefits that flowed to

the shareholders) and 3 percent of the total (those benefits, plus the costs of the structure)."

1206. As identified in due course, no proper notice was given of the points made by Mr Yurov on the Shareholders' behalf that lead to the suggestion that the amount truly lost was only 1-3% (and such case was not pleaded out), but even more fundamentally, and in any event I am satisfied that the Circular Credit point is ultimately misconceived in principle, and in any event cannot be, and has not been, made out on the facts.

1207. As to the former (and by way of illustration as to why, says the Bank, the point is bad in principle) the Bank adapts the same Shareholders' examples as were used in the context of the Deferred Loss point. Assume the Bank lends Borrower A US$10 million at 10% p.a. interest for 3 years (Loan A), whilst in breach of duty, the Shareholders cause the Bank to lend US$10 million to Borrower B (Loan B), and US$1 million of the proceeds of Loan B are proven by the Shareholders to have been used to service a year's interest on Loan A and Borrower B is bankrupt and none of Loan B is ever repaid. On the Shareholders' case the Shareholders are entitled to a credit of US$1 million against the Bank's claim for loss of US$10 million in respect of Loan B (i.e. its claim is limited to US$9 million).

1208. The answer, I am satisfied, is that it is not, and for the reasons given by the Bank. The payment of Borrower A's interest by Borrower B is prima facie a benefit to Borrower A, not to the Bank. In order to begin to argue that it is a benefit to the Bank, the Shareholders would have to establish on the facts that the interest would not have been paid by Borrower A, but if the Shareholders could do so, this would turn the scenario into an example of the Deferred Loss point, with the same analysis and, I am satisfied, the same outcome as identified above. The position would be the same if Loan B were used to repay some or all of the principal of Loan A. That would benefit Borrower A, rather than the Bank, unless or to the extent that the Shareholders established that the Bank would not otherwise have received any such repayment from Borrower A. In that case, however, this would be another example of the Deferred Loss point, with the same consequences.

1209. I am also satisfied that that analysis applies *a fortiori* (as the Bank submits) if Loan A were a loan that was also caused by the Shareholders' breach of duty. So, for example, if both Borrower A and Borrower B were "balance sheet management" vehicles, such that the Shareholders would (all other things being equal) be liable in respect of both loans if they were never repaid, it could never be a benefit to the Bank, for the purposes of giving credit in its claim in respect of Loan B, that part of Loan B was shown by the Shareholders to have been used to repay Loan A. The only effect of such a repayment would be to reduce the Shareholders' liability in respect of Loan A (which would be a benefit to the Shareholders, not the Bank). It might extinguish that liability if Loan A were thereby fully repaid. But I am satisfied that it would not give rise to any arguable benefit to the Bank for which it would have to give credit in respect of Loan B, all of which would remain lost.

1210. The above is a simple example. From a factual perspective it would require the Shareholders to establish on the evidence both the fact that, and the extent to which, the proceeds of an impugned loan (Loan B) were used to service or repay Loan A and the fact that, and the extent to which, Loan A would otherwise not have been serviced or repaid.

The Shareholders have, indeed, attempted to do the former (at least to an extent) through Mr Davidson's analysis of certain of the Borrowers however the Shareholders have not established the same on the facts. Part of the problem facing the Shareholders in this regard is that in the real world of what actually happened, the actual facts rapidly become extremely complicated with multiple transfers across multiple companies and for multiple purposes often within a very short period of time (but on occasions a number of weeks) – which is hardly surprising given the whole aim and purpose of the offshore network.

1211. However even had the Shareholders been able to demonstrate in each case what actually happened to the money from start to finish, and through every entity in the chain (which they have not been able to do), the approach would still be wrong in principle and for the reasons the Bank identified which I have addressed above. In this regard (1) the overwhelming likelihood is that each of the loans taken out (and on this hypothesis repaid by another loan) was taken out in breach of the Shareholders' duties (whether as balance sheet management loans, or loans which were (but were not declared as) for the benefit of the Shareholders through the network of offshore companies), and (2) each of the loan As was for the benefit of the Shareholders rather than the Bank, and it cannot be demonstrated, and has not been demonstrated that each of the loan As could not have been repaid but for loan B.

1212. If one stands back, it can readily be seen that the Shareholders' submission that the loans were circular and that the Bank has only suffered a loss of between less than 1 percent (the benefits that it says flowed to the Shareholders) and 3 percent of the total (those benefits, plus the costs of the structure) cannot possibly be right given that the money left the Bank pursuant to loans that the Shareholders caused to be made in breach of duty, and whatever the underlying things they went to re-finance, these loans have not been repaid and therefore that breach of duty caused that loss. The Bank submits, rightly in my view, that the end position is that the loans clearly were **not** circular, because the loans were cash payments, and the principal on them (around US$750 million) has not been repaid. The Shareholders have not demonstrated that as a matter of principle or as a matter of fact there are benefits to the Bank which should be credited against the losses.

1213. Nor have Shareholders demonstrated that the Bank had any particular loss, still less a US$750 million loss, at the start with the money cycling in a closed loop, in circumstances where the Shareholders' attempted to, but failed to, demonstrate that the balance sheet management was all about covering up previous bad debts and inevitable losses. The evidence is in fact to the contrary, as already addressed, with the only candidates before the Court being Stivilon and StroyEcologia and such case was not made out factually even in relation to them. The reality, I am satisfied, is that there was leakage on a massive scale with monies not coming back to the Bank, and when the music stopped, the Bank faced a loss of circa US$750 million on the loans that had been made in breach of duty, which I am satisfied represents its loss recoverable from the Shareholders.

1214. The leakage not only related to benefits to Shareholders (money that on any view leaves the Bank never to return), and also the costs of the offshore structure (money which again on any view left the Bank and never returned) but also further vast sums which on any view did **not** return to the Bank **itself**. Indeed, that can even be seen from the Shareholders' summary of its case and the sheer size of the figures under the headings "*Returned to the Bank as interest or principal*" (which on examination are not to the Bank itself but to other legal entities whether companies in the offshore network or subsidiaries

of the Bank) and "*Refinancing and balance sheet management*" which again do not result in money coming back to the Bank itself (this is addressed further below under "Category 3").

1215. There is a further fundamental point. In every case where Mr Yurov says that money has passed from one entity back to (say) a Bank subsidiary or even the Bank itself, that money is being passed under a contract, on the Shareholders' case pursuant to which the recipient gave valuable consideration for its receipt. So, for example, where money is coming back as a payment of interest directly to the Bank from another borrower, that receipt of interest is something that the Bank was entitled to under the promise made by the borrower owing the interest. When the Bank received it, it was clearly a collateral matter to the breach of duty and the loan that was caused by the breach of duty from which the funds were ultimately sourced. As such it is not something that is to be taken into account.

1216. In this regard both parties refer to the principle identified by the Supreme Court in *Titua International v De Villers Surveyors Ltd* [2017] UKSC 77, [2017] 1 WLR 4627 per Lord Sumption at [12]:

> "The general rule is that where the claimant has received some benefit attributable to the events which caused his loss, it must be taken into account in assessing damages, unless it is collateral. In *Swynson Ltd v Lowick Rose LLP [2017] 2 WLR 1161*, para 11, it was held that as a general rule **"collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss**." Leaving aside purely benevolent benefits, **the paradigm cases are benefits under distinct agreements for which the claimant has given consideration independent of the relevant legal relationship with the defendant,** for example insurance receipts or disability benefits under contributory pension schemes. These are not necessarily the only circumstances in which a benefit arising from a breach of duty will be treated as collateral, for there may be analogous cases which do not exactly fit into the traditional categories. But they are a valuable guide to the kind of benefits that may properly be left out of account on this basis'".
>
> (emphasis added)

Whilst this is an English authority not a Russian one, both the Shareholders and the Bank accepts that the principle is a matter of common sense, and consistent with the Russian law rules. The Shareholders emphasise the underlined passage, the Bank that which is both underlined and in bold.

1217. The short answer in the present case is, I am satisfied, that all the examples given by the Shareholders are in fact *"benefits under distinct agreements which the claimant has given consideration independent of the relevant legal relationship with the defendant"* .

1218. Thus there are two key points:-

(1) There is and can be no benefit at all to the Bank in the receipt by a legal entity other than the Bank, and

(2) Even where money goes to the Bank, it would be necessary for the Shareholders to prove that this was not pursuant to a contract for which the Bank had given consideration to the transferor, and it is clear that consideration was given in each case. Indeed however artificial any movements of money were, they were all (even on the Shareholders' case) governed by contracts between the respective parties.

1219. The particular points that the Bank makes against particular aspects of Mr Yurov's Closing Submissions on quantum in the various Borrower Schedules are divided up into 4 Categories in a table deployed by the Bank in its oral closing (the "Points of Loss" Document) to which Mr Yurov replied in a further table (the "Loss Reply Document").

1220. It is convenient first to deal with Category (3) as that directly relates to point (1) made above. Category (3) which is where funds are transferred to a separate entity – not even the Bank itself, yet which Mr Yurov submits reduces, or in most cases, eliminates the Bank's loss. The simple answer is that it does not. It is not a receipt by the Bank. It is a receipt by a separate legal entity. A benefit to another entity is not a benefit to the Bank. This is true of all the entries in the Table under Category (3) i.e. those in relation to Erinskay and Baymore, LBCS, Mourija, StroyEcologiya and SiberianKD. But even if the benefit had been to the Bank (which it was not), the benefit would have been pursuant to a contract and as such collateral – and the reality is that there would be, and were, a whole series of such contracts operated for a myriad of reasons including the assignment of debts, netting agreements, the purchase of shares and the like. Payments pursuant to such contracts are clearly collateral.

1221. Mr Yurov's riposte in his Loss Reply Document is to submit that the funds received by these entities be they subsidiaries or parts of the Bank "*for all practical reality*" or "*under the Bank's control*" could be used as the Bank directed either by being transferred to the Bank itself (as it is said the Bank could cause its subsidiaries and other controlled companies to do) or used for other purposes as the Bank chose and as such *"Those payments are to be treated [as] funds returning to the Bank for which credit must be given"*. However such characterisation ignores the fundamental principle of the separate legal identity of each entity, and no legal justification exists for treating those payments "*as funds returning to the Bank*" quite apart from (1) ignoring point (2) that they were being paid pursuant to separate contracts for which valuable consideration was given. I would also add that it is dubious whether it can even be asserted that they were under the Bank's control as opposed to the Shareholders' control given the findings I have made in relation to the lack of distinction between Bank Companies and Shareholder Companies, and the position of the Shareholders and their ultimate beneficial interests.

1222. It is convenient next to deal with Category (4) as this relates to point (2) above – collateral benefits. Category (4) are funds or assets said to be returned to the Bank but in fact transferred under a separate transaction. These are collateral matters irrelevant to any issue of loss / quantum – see *Tiuta* supra, per Lord Sumption at [12]. I am satisfied that this true of all the matters identified in the Points of Loss document table entries in respect of Erinskay and Baymore, LBCS, Mourija, LLC5, Stivilon, StroyEcologiya, Business Group, SiberianKD, Wave. Oldehove & Crylani and Yaposha (and also for the further reasons set out in the "Comment" section of Category (4)).

1223. Mr Yurov's response in his Loss Reply Document is simply to assert that the Bank misstates the rule on collateral benefits and the decision in *Tiuta* and it is said that when

the principle is properly applied, these sums are all benefits arising out of the transaction and the "*circumstances giving rise to the loss*". However, I am satisfied that it is the Shareholders who misapply the rule as to collateral benefits, as the payments are self-evidently not benefits arising out of the transaction and the circumstances giving rise to the loss. They are all payments from the transferor to an entity pursuant to a contractual promise to pay the money that has nothing at all to do with (for example) the Erinskay and Baymore loans (certainly not that has been proven), and the statement of Lord Sumption at [12] in *Tiuta* is in point.

1224. Category (1) is characterised by the Bank as unpleaded points that should have been (but were not) considered as part of Expert Issue 1 ("*the amount outstanding from the Borrowers identified in Schedules A to Q in respect of the pleaded transactions; the value of recoveries and the value of collateral and/or future recoveries*"). Mr Allen's figures for recoveries are set out in the table at C1/2/46. It is pointed out that in his Issue 1 Report Mr Davidson put forward no competing figures in relation to the value of actual or anticipated recoveries. I am satisfied that the points identified under Category 1 were not properly pleaded, the Bank had no proper advance notice of the specific matters relied upon, and (where relevant) were not supported by expert evidence. As such it was not open for the Shareholders to raise such matters in their written closings. Some of these examples (for example the first two, namely in respect of Erinskay and Baymore and LLC5) also fall within Category (4). I consider that the Bank is correct in the points it makes under "Comment" in respect of the various Borrowers and the relevant paragraphs of Mr Yurov's Closing Submissions.

1225. Mr Yurov's response in his Loss Reply document involves asserting that the principle that the Bank should give credit for property acquired a result of the transaction is a matter of the basic compensatory rule under Russian law, and that therefore if the Bank has received property as a result of the transaction the value of the property must be taken into account in order to assess the Bank's loss – and it is said that this is pleaded at paragraph 31.5 of the Defence, and property in this category (the bonds and real estate) acquired by the Bank is said to be just as much a recovery as would be a cash payment. It is also said that this is not something which needs to be pleaded as a defence, because it is part of the calculation of the Bank's loss in the first place.

1226. Mr Yurov's response does not bear analysis. The Bank's loss is prima facie the amount outstanding under each loan. It is then for the Shareholders to plead and prove any positive case as to credits to be given. In any event the purpose of a pleading is to give advance notice of the case a party must face, and to ensure that evidence is adduced both factual and, if relevant, expert evidence. I am satisfied that the Shareholders did not make any proper or sufficient plea in relation to the matters the subject matter of Category (1), nor give sufficient notice of the points made in closing. This is not an arid pleading point. The result is that the matters were not fully explored in evidence or fully addressed by the experts. In such circumstances it is not appropriate for the Court to seek to assess values on the limited material as to values set out in Mr Yurov's Borrower specific Schedules to his Closing even had the points been properly pleaded, which they were not.

1227. Category (2) which is categorised as unpleaded points that should have been (but were not) considered as part of Expert Issue 3 ("*how the funds paid by Trust Bank to the Borrowers identified in Schedules A to Q of the APOC in respect of the pleaded transactions were used, including (in particular) the extent to which those funds were*

(directly or indirectly) returned to or used for the benefit of the Bank"). It is pointed out that Mr Davidson did not carry out any "tracing exercise" in respect of Mourija, StroyEcologiya, Business Group, Belenfield, Edenbury or Black Coast, and as such the Shareholders did not tender any evidence that the funds advanced to those Borrowers were "*(directly or indirectly) returned to the Bank or used for the benefit of the Bank*" – yet in closing Mr Yurov seeks to prove matters by documents and submissions relating to four of these (Edenbury, Black Coast, LBCS (2nd loan) and Stivilon). It is also pointed out that in relation to Stivilon the tracing theory that Mr Yurov advances contradicts the evidence of both experts who are in agreement on the subject.

1228. In contrast it is submitted in Mr Yurov's Loss Reply Document that each of the points made about these entities is open on the expert evidence and that where there are gaps in the evidence the Court should draw inferences. Once again as with the matters in Category (1) I consider that if the Shareholders had wished to advance the various matters now advanced they should have been properly pleaded and then expressly addressed by both the Experts in relation to Issue 3. It is inherently unsatisfactory for Mr Yurov to seek to pick and choose bits of evidence that it happens was given, when the matters were not fully or properly explored by the experts – which is unsurprising given that the points now sought to be raised were not properly pleaded out. I consider the Bank was right to categorise Edenbury as a particularly egregious example in this regard and for the reasons it gives but I am satisfied that the points made by the Bank in the "Comment" section in relation to each Borrower are well made.

1229. Edenbury is a particularly egregious example as the experts never explored whether monies lent to Edenbury flowed through various companies including Maxfield and then passing those monies to Eligmur and from Eligmur to Maxfield again and then to Edenbury and from Edenbury back to Maxfield and then from Maxfield to Granbay and Granbay to Senworth and Senworth to Barnsten and so on – none of the experts attempted to show or establish what was actually happening through the documents and the bank statements and the underlying agreements that are described as netting agreements and loans and contributions to share capital. Yet this point is said to carry a US$90 million credit. If a litigant was allowed to pursue such points in closing that had not been properly foreshadowed on the pleadings and expressly addressed by both experts this would be trial by ambush of the worst sort. I do not consider that such matters are properly pleaded and as such they cannot properly be pursued in closing. In any event I am simply not in a position to reach the conclusions that Mr Yurov invites me to make, as I do not have sufficient evidence safely to reach such conclusions. That being the case the Shareholders have failed to prove such matters. In any event the general points already identified above (such as in relation to consideration being given for every contract in the alleged chain) would still apply.

N.2.7 Credit in respect of interest

1230. A further new point taken by Mr Yurov at paragraphs 304 and 305 of his Written Closing is to submit that credit should be given in respect of interest and other payments received on loans. It is submitted that the question of the position of the Bank if a loan had not been made cannot simply be answered by considering only the principal outstanding in December 2015, because it is said that this disregards payments made under the loan, in particular payments of interest, which it is said would not have been made if there had been no loan.

1231. Mr Yurov takes the Oldehove loan as an example, which bore interest at 9.667 percent. The original advance was made on 22 December 2008, for RUB 3.19 billion. It increased to RUB 4.225 billion on 18 March 2009 (the additional portion bearing interest at 9 percent), and was reduced to RUB 3.35 billion on 30 July 2010 (the reduction being from the notes that paid the slightly higher interest rate). If, for simplicity, one assumes simply an interest rate of 9 percent, that means that by 22 December 2014, interest payments on the loan had amounted to about RUB 1.94 billion. It is said that the Bank therefore paid out a total of RUB 4.225 billion, but it has received payments of principal (RUB 0.9 billion) and interest (RUB 1.94 billion) because of the loan. It is said that to award damages on the basis of the loss of the outstanding principal, without taking into account the payment of interest, would overcompensate the Bank, so that the actual loss is RUB 1.4 billion.

1232. The first objection by the Bank to this plea is that it has not been pleaded and cannot be raised at this stage not least as it would necessitate a substantial factual investigation as to the amount of interest that was paid and how it would change over time, and had it been raised would have been addressed by the experts. None of this has been done, and this is not a split trial of liability and quantum with points of principle being dealt with first and quantum later. Any matters of quantum should have been pleaded and proved at this trial. I consider that there is force in these submissions. I simply do not have before me the requisite evidence in the form of loan documentation as varied from time to time and evidence of sums received and associated calculations. The position would be made even more complex as the sums received by way of interest may in fact be from another (wrongfully obtained) loan from the Bank so that interest received on the Oldehove loan would not be a benefit to the Bank at all. Additionally, had Mr Yurov been right about his Circular Credit point (which he is not for the reasons given) he also could hardly say monies were used to pay interest and that they also returned to the Bank.

1233. Aside from such matters, which mean that it is far too late to raise such a plea in closing, there are also objections to the submission itself. First the Bank was, after all in the business of lending and had many customers (both savers and borrowers). If this money had not been lent to Oldehove it could have been lent to others on no less interest-bearing terms (and indeed potentially to borrowers that were a better credit risk) either at the same rate (if the imputed loans were on commercial terms) or at a higher rate (if, as the Bank alleges, they were not). Mr Yurov submits that such a position is not open to the Bank on the facts. It is said that the Bank's case is that it did not have the capital to make loans at all, and it is said that nor is there any evidence that it did in fact use its assets profitably in the relevant period. It is also said that if a claim had to be made under the Labour Code, lost profit is not recoverable. These are very high level submissions that ignore the fact that very considerable sums were being deposited into the Bank by savers, and had money not been consumed in the offshore network and dissipated (including to the Shareholders) it could indeed have been lent on commercial terms. It is also not a claim for lost profit it is an alleged credit to be given. Yet further, an alternative way of looking at the interest receipts is that they were just a good proxy for the true loss to the Bank of the time value of money on its principal loss i.e. even if it were otherwise appropriate to credit off such sums there would be an entitlement to pre-judgment interest in an equivalent amount to that which it is said ought to be credited.

1234. In the above circumstances the point is not open to the Shareholders, but even if it had been the Shareholders would not have been entitled to the credit sought, and for the reasons I have given.

N.2.8 Conclusion on Loss

1235. In relation to each loan made in breach of duty (i.e. where the Shareholders, in breach of duty, caused the Bank to make a loan to an entity (the "Entity") – as applies to the Loans in the present case, as I have found), and for the reasons I have given, the Bank's loss is, I am satisfied and find, the amount of the loan that is unrepaid after falling due, less any relevant recovery from the Entity as a result of the loan (such as by the exercise of rights to set-off positive bank balances, enforcement of pledged collateral or the execution of a judgment against its assets). As identified above, the principal sums outstanding are set out in the 7 November Schedule, whilst the recoveries are set out in Schedule 1 to Mr Allen's first report. Such sums represent, I am satisfied, full compensation to put the Bank in the position they would have been in if the wrong had not been committed. It is the Shareholders' breaches of duty that caused such Loans to be made, and the Bank's loss is the principal sums outstanding less recoveries made for the reasons I have given.

N.2.9 Correspondence post-trial

1236. In July 2019 solicitors for both Mr Yurov (Gresham Legal Limited) and Mr Fetisov (Byrne & Partners) wrote to the Court drawing attention to proceedings recently brought by Otkritie FC Bank, on the instructions of the Russian Central Bank, in the Arbitration Court of Moscow, in which it was claiming approximately US$4.57 billion against its former owners and senior officers. It was asserted that the proceedings had the potential to significantly inform matters in issue in these proceedings, *"including the circumstances surrounding the Trust's request for rehabilitation, the calculation of the bailout request, the date on which key individuals became aware of the of-balance sheet structure, the use of bail-out monies and the extent of the Trust's losses"* (the "Alleged Issues") and seeking disclosure of the Russian Claim Form in the proceedings. Steptoe & Johnson UK LLP on behalf of the Bank responded pointing out that the Russian Claim Form sought recovery of damages equating to losses incurred by the CBR in respect of monies that it injected into Bank Otkritie in the period between September 2017 and August 2018, several years after the events in issue in this action. It was said the Claim Form referred exclusively to the management and operation of Bank Otkritie (which is not party to this action) and that there was no reference to the Bank or to any of the impugned loans the subject matter of this action. It was also noted that Byrne & Partners' letter had not identified a single issue in the Agreed Facts and Issues that it was said the Russian proceedings might confirm. Steptoe & Johnson confirmed that they had reviewed the Russian Claim Form and confirmed that it was irrelevant to any issue in the action and so did not fall for disclosure by the Bank pursuant to its continuing duty of disclosure.

1237. On 15 July 2019 I wrote to the parties noting my understanding that Steptoe & Johnson were confirming (subject to their denial as to the relevance of the rehabilitation of Bank Otkritie) that the Russian Claim Form does not meet the test for standard disclosure in relation to the Alleged Issues, but sought confirmation of the same. Steptoe & Johnson confirmed the same day that, "*The Russian claim form does meet the test for standard disclosure*".

1238. However, matters did not rest there, as on 6 September 2019 Mr Yurov's solicitors Gresham Legal again wrote to the Court stating that Mr Yurov had now obtained the Russian Claim Form which was enclosed. It was again asserted that it was relevant to the issues in the case, albeit that once again no attempt was made to tie such assertion to the Agreed Facts and Issues. The letter also drew attention to the fact that they had recently become aware that Trust Bank and Otkritie Financial Corporation PJSC ("Otkritie FC") were pursuing a claim against Boris Mints and other members of the Mints family in the Commercial Court (the "Mints Proceedings") in which allegations of dishonesty are made against representatives of Trust Bank and Otkritie Bank including Mr Vadim Belyaev and Mr Evgeny Dankevich of Bank Otkritie. It was submitted that I should be cautious in relation to the evidence adduced for and on behalf of the Bank in circumstances where the majority of the Claimant's witnesses were current or former employees (some of them, such as Mr Popkov and Ms Dolenko, senior employees) of Otkritie Holding JSC and/or Otkritie Bank. In a letter from Byrne and Partners reference was made to the fact that in many cases the Court was being asked to accept the credit given by Otkritie for Bank assets taken onto its own balance sheet, under the ultimate direction of the same individuals and it was submitted that the allegations of dishonesty made by Otkritie against its own senior management reinforced Mr Fetisov's submissions at trial that the Court should not treat Otkritie's dealings with Bank assets as a true, fair or independent valuation of those assets.

1239. In its letter Steptoe & Johnson pointed out that what it had said about the Russian proceedings was entirely consistent with the terms of the Russian Claim Form and it addressed the further points raised and reiterated that the Russian Claim Form had no bearing on the matters for consideration by the Court. It also pointed out that the Mints Proceedings concerned two transactions that took place in August 2017, and that they did not have any relevance to the issues in play in the litigation (reference was also made to the judgment of Jacobs J dated 29 July 2019 in those proceedings in which he dismissed an application to set aside a US$572 million freezing order that had been granted on the application of Bank Otkritie and the Bank – *NBT v Mints* [2019] EWHC 2061). It also pointed out that neither Mr Popkov nor Ms Dolenko are even referred to in the Russian proceedings or the Mints Proceedings.

1240. That, however, was not the end of the correspondence as on 21 October 2019 Gresham Legal wrote a yet further letter to the Court which referred to it being reported in the Russian media on Thursday 17 October that the Bank had filed a further claim in the Arbitration Court of Moscow against Otkritie Holding JSC ("Otkritie Holdings") and Otkritie Capital and in which the Bank accuses those defendants of stripping assets worth approximately RUR 18 billion (approximately US$300 million). It was said that the new owners of the Bank were alleging dishonest conduct against its former owners and the owners of the Otkritie entities which it was said were the individuals who instigated this action against Messrs Yurov, Belyaev and Fetisov, and it was suggested that the matters raised in the letter were *"highly relevant to the reliability of the witnesses and the evidence adduced by Trust Bank".* This was followed up by a yet further letter the same day referring to Russian press reports that the Bank was seeking to have its claims against its former shareholder Otkritie Holding recognised by the Arbitration Court of Moscow through an initial bankruptcy procedure in order to protect its position as a creditor. It was said that the Bank had asserted that it was owed over RUR 450 billion (c. US$7 billion) by Otkritie Holding, in respect of unpaid loans and bonds issued to it. The indebtedness

to the Bank was said to account for approximately 80% of Otkritie Holding's entire debt. It was submitted that the reliability of the Bank's evidence and witnesses generally, and specifically the Bank's account of the facts and circumstances surrounding its takeover by Otkritie Holding in 2015, and its allegations as to its loss, were put into issue.

1241. Steptoe & Johnson's response of 23 October pointed out that the letters had not identified any relevant issues within the 174 Agreed Issues, that were said to arise from the new claims in Russia. It was also noted (following a review of it) that the claim issued on 17 October 2019 was not relevant to any of the issues in the action, and made no reference to (1) the former shareholders, (2) any of the borrowers or loans referred to in the pleadings, (3) the bail-out funds or (4) the 2014 rehabilitation. The letter also referred to the evidence that was given at trial by Mr Popkov and Ms Dolenko.

1242. I have considered all the correspondence that has been made to me, the Russian Claim Form, the information in relation to the Mints Proceedings and the information in relation to the further claim made on 17 October 2019. I do not consider that this calls into question the disclosure given by the Bank, or reveals anything impacting upon the issues for determination before me, whether in relation to particular witnesses or the calculation of the Bank's loss, which I am satisfied is to be calculated as I have found. As for the witnesses themselves, I have considered the evidence of the Bank's witnesses on their own merits and in the light of the documentation before me, and have expressed my views on such evidence in Section C.2, and made my findings in relation to their evidence, as relevant, throughout my judgment.

O. LIMITATION OF LIABILITY (ISSUE 60)

O.1 Limitation of Liability – Civil Claims

1243. Paragraph 58 and 59 of the Agreed Facts and Issues provide as follows:-

> "58. It is agreed that according to Article 401(1) of the RCC, an agreement governed by civil (as opposed to labour) law which purports to eliminate or to limit liability in advance for the intentional violation of an obligation is void. Accordingly, if and insofar as the claim can be brought under the RCC/JSC Law without reference to the Labour Code, the limitation of liability provisions in the 2010 and 2013 Employment Contracts would be void in the event that they purported to apply to intentional wrongdoing.
>
> 59. It is agreed that (i) unless otherwise provided for in the Labour Code or other federal laws, an employee's material liability for the harm caused to the employer is limited to the employee's average monthly salary but that (ii) there is "full financial liability" under Article 243 of the Labour Code where an employee has intentionally caused harm."

1244. Paragraph 60 then sets out three issues in relation to claims under the Labour Code as follows:

> "Insofar as the Bank is only entitled to bring claims against the Shareholders under the Labour Code:
>
> 60.1. Does the limitation of liability provision in the 2010 and 2013 Employment Contracts {D1/196/5} apply, as a matter of construction, to intentional wrongdoing?
>
> 60.2. Did the Shareholders intentionally cause harm to the Bank within the meaning of Article 243 of the Labour Code?
>
> 60.3. Can "full financial liability" under Article 243 of the Labour Code be limited by a contractual clause in the employee's contract of employment?"

1245. It appeared, therefore, to be accepted by the Shareholders that limitation of liability only arose in relation to claims under the Labour Code (given the terms of Issue 58, and the definition of the remaining issues under Issue 60). However, it became apparent, at the time of the Written Closing Submissions, that this was not so, and it was suggested that limitation applied to civil claims as it was stated at paragraph 355(c) of Mr Yurov's Closing Submissions that, "*As a matter of construction, the limitation of liability provision in the 2010 and 2013 employment contracts applies to intentional wrongdoing".*

1246. In this regard Article 71(2) of the Civil Code provides:

> "(2) Members of the company's board of directors/supervisory board, the company's sole executive body (director/general director), its temporary sole executive body and members of the company's collective executive body (management council/directorate), as well as the managing organization or manager, **are liable to the company for any damages incurred by the company as a result of their**

culpable actions or inactions, unless other grounds for and scope of liability are established by federal law."

(emphasis added)

1247. In *Fiona Trust* Andrew Smith J concluded that a director could not, by contract, limit his liability under Article 71, stating, at [130]-[131]:

"130. The measure of compensation for liability under article 71 is stated in article 15 of the Civil Code, which I have already set out. The argument of Mr. Skarga and Mr. Izmaylov is that they are entitled to rely upon their contracts of employment to limit liability because article 15 specifically permits this, and that their contracts of employment should be interpreted as excluding liability for loss of profits because the wording of clause 6 of Mr. Skarga's contract and the comparable provision of Mr. Izmaylov's contract reflect that of article 188 of the 1971 Labour Code and of article 238 of the new Labour Code.

131. I am unable to accept this argument. First, as I have said, Mr. Skarga and Mr. Izmaylov rely upon it to restrict their liability for intentional wrongdoing or dishonesty directed against Sovcomflot or NSC, and the relevant provisions of their employment contracts are not to be interpreted as applying in these circumstances. Secondly, article 15 does not, in its general application, allow a contractual provision to exclude liability for intentional breach of contract because article 401(4) of the Civil Code provides that "An agreement concluded in advance for eliminating or limiting liability for the intentional violation of an obligation is void". Although Professor Maggs considered that this applies only to contracts governed by the Civil Code and not to the employment contracts, which are governed by the Labour Codes, this does not mean that article 15 is to be understood to allow contractual exclusions or limitations of liability where there is intentional wrongdoing. **Thirdly, I accept the evidence of Professor Sergeev that under article 71 of the Civil Code liability can be excluded only by reference to another law and not by reference to a contractual provision.** Since article 71 is a more specific provision and specific norms take precedence over the general ones, liability under article 277 cannot be excluded contractually. Accordingly, while the measure of compensation under article 71 generally is determined by reference to article 15 and article 15 generally allows contractual exclusions of liability, this is displaced by article 71 's more specific and narrower regime."

(emphasis added)

1248. The Bank did not give notice that it intended to rely upon this passage (for the purpose of the Civil Evidence Act), although the Bank points out that it was not appreciated, until closing, that the point was live. In any event it said that I should myself reach the same conclusion, and for the same reason. In this regard Dr Rachkov addressed the issue at paragraph 225 of his supplemental report:-

"5. I have read the judgment in Fiona Trust that suggests that a director cannot by contract limit his liability under Article 71 of the JSC Law (see [2010] EWHC 3199, paragraph 131). **Article 71 does not expressly prohibit clauses purporting to limit liability, however, I agree in principle with the finding**

> **<u>of the Judge.</u>** The real reason is because a contract between a member of the supervisory board and the company has no effect because a supervisory board member is appointed by the general meeting of the company and not by a contract with the company itself, as explained above (see paras 32, 37, 38, 47, 50 et seq. above)."

1249. It is clear therefore, that Dr Rachkov agrees in principle with the finding of Andrew Smith J although he also gives a further reason. Dr Rachkov was not cross-examined about this aspect of his evidence and his agreement with the finding of Andrew Smith J that a director cannot by contract limit his liability under Article 71. If, as has occurred, a submission was going to be made along the lines of that at paragraph 355(c) of Mr Yurov's Closing Submissions, I consider that Dr Rachkov should have been cross-examined in relation to this evidence, and absent cross-examination his evidence stands unchallenged. In any event, and quite apart from Dr Rachkov's evidence, I am satisfied, based on the language of Article 71, that members of a supervisory board etc are liable to the company as a result of their culpable actions or inactions unless other grounds for and scope of liability are established in federal law, with the result that it is not possible under Russian law to exclude liability for intentional wrongdoing, in the context of a civil claim, by contract, and I so find.

1250. Ultimately, however, the point is academic, as I am in any event satisfied that Mr Yurov and the other Shareholders intentionally violated their duties, which it is common ground would prevent the contractual limitation of liability clauses from applying (Issue 58 and paragraph 370 of Mr Yurov's Closing Submissions).

<u>O.2 Did the Shareholders intentionally cause harm to the Bank within the meaning of Article 243 of the Labour Code? (Issue 60.2)</u>

1251. Issue 60 raises three issues in relation to limitation (Issues 60.1 to 60.3). However, logically the first issue is Issue 60.2, as Issues 60.1 and 60.3 concern contractual limitations of liability if Issue 60.2 is answered in the affirmative.

1252. Article 242 of the Labour Code defines *"full material liability"* as the obligation to *"compensate the damage caused at the full scale"*. Unless subject to full material liability, a claim against an employee in respect of his labour law obligations is limited to that employee's average monthly wages by Article 241. The circumstances in which full material liability applies are set out in Article 243. In the present case the relevant trigger for the application of full material liability is said to be (3) *"intentional inflicting the damage"*.

1253. The parties' agreement in relation to "intentional harm" is set out at paragraph 38 of the List of Agreed Facts and Issues in the following terms:-

> "The requirement of "intentional" harm under Article 243 of the Labour Code is satisfied where (i) the employee deliberately commits actions aimed at inflicting direct harm to the employer and (ii) either knew that such consequences would occur and desired their occurrence or was indifferent to whether or not they would actually occur. It is agreed that, absent reckless indifference, the mere fact that an employee

(objectively) should have known that harm would be suffered as a result of his actions does not suffice to constitute intentional harm."

1254. It became apparent that this agreement did not fully encapsulate what amounts to "intentional harm" and each of the experts was cross-examined in relation to it. What was common ground is that the requirement is focussed upon the causing of harm. It was also common ground that the intent can be direct or indirect, and that direct intent exists where a person knows that harm will occur. The area of debate related to indirect harm.

1255. Dr Rachkov's evidence was that direct intent applies in a case where a harmful consequence is desired and indirect intent applies where the defendant does not want the negative consequence to occur but is indifferent on whether or not it occurs:-

> "So the inspiration on what intent is, is taken by those who apply Labour Code from the criminal law and under the criminal law there is a fault which may exist in two forms. One form is intent, the other form is negligence and intent can be direct or indirect one, as I explained in the case to which I referred in my first report. In that particular situation, the person should have known because she was smart enough and professional enough to understand what the consequences are but, in fact, the direct or indirect intent are distinguished in the doctrine or in the court practice in a bit different way, so the difference is that in case of indirect intent or you may call is recklessness, the tortfeasor does not want the negative consequence to occur but is indifferent on whether or not they occur. So this is what I meant by "should have known". I don't think you should put too much emphasis on this."

1256. Dr Gerbutov's evidence was that indirect intent exists where a person knows that harm will occur, does not positively want it to occur, but is indifferent to whether it might do so. This formulation in fact results from a translation of a passage in the Russian decision of *Fintrust* (Moscow City Court Appeal Hearing 28 March 2017 Case No. 8542/17) (a Labour Code case), as follows:-

> "The labour legislation does not contain the definition of intent. However, proceeding from the common understanding of the legislation, intent of the employee in causing harm to the property of the employer shall be understood to mean that the employee deliberately committed actions aimed at infliction of direct actual harm to the employer, **knew that such consequences will occur and desired their occurrence or was indifferent to whether or not they will actually occur**."

1257. Dr Rachkov made his own suggested translation (Day 28/14 and following), but agreed that the translation was in substance correct. This formulation is, at least at first blush, somewhat problematic given it envisages "knowledge" of harm but "indifferent as to whether [harm] might incur" and it is difficult to reconcile knowledge that something will happen with indifference to whether it will happen.

1258. Ultimately the interpretation advanced by Mr Willan on behalf of Mr Fetisov (which I understood also to represent the position of the other Shareholders) was as follows:-

> "So direct intent is revenging, you actually just want to

hurt the person. **Indirect intent, in my submission, is where you don't have that positive desire to hurt them but you know it's going to happen**. Take, for instance, the employee who goes on strike, he may love his employer, he may think he is the best employer he's ever worked for but he has to aim to hurt him in order to get what he actually wants, which is an increase in his pay. He doesn't want it to happen. He would much prefer the employer just gave in and gave him more pay. So he is aiming at causing direct harm. **He knows it will occur but he is indifferent to it. He says: so what, I don't want it but it has to happen.** That in my submission, is the difference between direct and indirect intent. And what, in my submission, does not suffice, as Mr Pillow would try and have it, is to say there is knowledge of a risk of harm and the employee doesn't address his mind to it or just doesn't care about it.

That may well be gross negligence, you are deliberately running a risk, you are knowingly running a risk but it's not, in my submission, intent. The experts agree it has got to be aimed or directed at and whatever you say about the knowledge (inaudible), you are not aiming -- your actions aren't aimed or directed at causing harm if you simply recognise they may do it but you don't really care. They are not aimed at it, they are just recognising that it may happen." (emphasis added)

1259. As Mr Willan also submitted:

"the intention lies in aiming or directing at the causing of harm and the difference between direct or indirect is whether the employee positively wants the employer to be harmed -- that's direct intent **-- or knows that it will happen and just doesn't care. That's the striking employee, indirect intent**." (emphasis added)

1260. For his part, Mr Pillow on behalf of the Bank submits that indirect intent is where:-

"**you have an active state of mind that recognises the risk of harm but you don't care whether it will happen**. You know the stone you are throwing at someone's car is liable to smash their window. You don't want it to but you just don't care less. That is the only way we submit you can make sense of those words… If it matters.

… I think my learned friend's position is that you have to know that harm will occur -- you have to know in my example that the company will not be able to pay back the loan, not desiring that outcome but then being indifferent as to whether that outcome eventuates. That's what he says, I think. Or they say. That, we

say, is logically not possible."

1261. Mr Pillow also submitted:-

> "So you have to start with something less than knowledge of harm occurring will occur and we say the question is do you know that there is a risk, a not unfanciful risk, obviously, of harm flowing from your deliberate decision to do something and you are recklessly indifferent in the relevant sense if you don't care whether that consequence that you appreciate is a risk will eventuate. That, we say, is the only sensible way to interpret these words.
> ….
> The objective that we submit is being sought in this part of the law is to identify a state of mind less than knowledge of harm that is desired but more than negligence or gross negligence. And the idea clearly imports a state of mind that is subjective that there is a risk of damage or likelihood of damage or some level of damage us envisaged and the question is do you address your mind to it or not, are you recklessly indifferent to it."

1262. Both parties sought to test matters by examples. Indeed Mr Pillow submitted that the only way to grapple with it, because of the linguistic problem, is to think of an example close to the facts of this case and work through how it must work.

1263. I explored various examples with Mr Willan during the course of his oral closing submissions on behalf of Mr Fetisov and Mr Willan had his own examples including the "striking employee" quoted above. In this regard Mr Willan also put matters as follows:-

> "It's a psychological test, I think it was put in the evidence. You've got to be aiming to bring it about, either because you want it, revenging, **or because, if you like, it's something that has to be brought about as a result of what you are trying to do, the striking employee, the indirect intent.**
> My Lord, I did say that the one area that was slightly more or deserves more consideration in my submission is where the shareholders have taken personal benefits.
> …
> Because **I can see an argument that if you intend to take money out of the Bank**, fresh money out of the Bank, **to expend it on your own personal interests**, then you are -- maybe indirect intent, **but you are harming the Bank because you are taking the Bank's money and you are taking it for yourself**; the Bank is worse off and you are better off, certainly if there is no intention to repay it. " (emphasis added)

1264. I consider these are important examples, as they show that (1) if you know something is going to result in harm but you are indifferent to that, that is intentional causing of harm, as is the situation (2) if you take a Bank asset to expend it in your own personal interests. Furthermore in relation to (2), and although Mr Willan illustrated this by reference to the Kolyada litigation, the repayment of the Merrill Lynch Credit Suisse facility and the Merrill Lynch buy back in 2013, he also (rightly) accepted as follows:-

> "If you conclude that he knew he
> wasn't entitled to it and just took it, then plainly --
> MR JUSTICE BRYAN: He did intend to harm the Bank.
> MR WILLAN: Yes, that must follow. It's indirect intent and
> **that must equally go to the other transactions if you conclude that they did not happen as we say they happened and they were simply taking money from the Bank, then they will fall into that category.**" (emphasis added)

Whilst this was said in the context of the specific benefits under consideration the same reasoning ought to apply if the Shareholders took assets belonging to the Bank, and treated them as their own assets.

1265. I do not consider that Dr Gerbutov's evidence (based on the translated language in *Fintrust*) makes sense – if you know that harm will result, in other words your state of mind is that harm will flow from your conduct, you cannot be indifferent as to whether it might occur, because you know it will occur. *Fintrust* itself regards as relevant a situation where someone is "indifferent to whether or not they [i.e. consequences] **will actually occur"** and the words "whether or not" contemplate that the consequences may not follow. Accordingly, had it been relevant (and as appears below it is not), I accept Dr Rachkov's evidence that under Russian law indirect intent exists where the person does not want the negative consequence to occur but is indifferent as to whether they will occur. This recognises both a recognition of the possibility of harm, and an indifference as to whether that harm occurs, which I am satisfied is the requisite subjective intent for indirect harm in Russian law.

1266. The point is, however, academic, because I am satisfied that based on the formulation advocated by Mr Willan on behalf of the Shareholders indirect intent is established (the position would be *a fortiori* applying the test I have identified).

1267. Thus (and although Mr Willan was reluctant to accept the example for obvious reasons), I am satisfied that "balance sheet management" caused harm to the Bank (and that the Shareholders knew that) not least because what was being done was an administrative offence and not in the best interests of the Bank (as I have found). That offence is committed and harm suffered as soon as balance sheet management is carried out. The commission of an administrative offence is harm, and that harm has already occurred, and does not depend on the Bank getting "caught". Equally the Shareholders knew the commission of the offence was going to occur but were indifferent to it. They did not want the Bank to commit an administrative offence, but it had to happen – just as in the "striking employee" example. I also consider that "balance sheet management" itself inflicts harm on the Bank in additional senses: first because exposing the Bank to the risk of licence revocation is itself harm (contrary to Mr Willan's submission), secondly

because falsifying accounts results in the Bank suffering harm (again whether or not such falsification is discovered), thirdly evading the N1 and N6 standards results in the Bank suffering harm (again the risk of licence revocation) and fourthly the Bank is harmed by the very fact of "balance sheet management" as it causes the Bank financial losses as I have found (having rejected, amongst other matters, the "circularity" argument), and the Shareholders knew each of these aspects of harm but were indifferent to them.

1268. There is also a further separate basis on which intent has been established – as I have found the Shareholders took assets out of the Bank, and through the myriad of companies in the offshore network transferred such assets into companies controlled by them (and ultimately even into their own family trusts). As recognised by Mr Willan, this is harming the Bank because the Shareholders were taking the Bank's assets and treating them as their own, with the Bank being worse off and the Shareholders being better off. Furthermore, putting such assets into personal family trusts is also inconsistent with any contemporaneous intention to return such assets.

1269. In the above circumstances I am satisfied, and find in relation to Issue 60.2, that the Shareholders intentionally caused harm to the Bank within the meaning of Article 243 of the Labour Code, and full material liability applies.

O.3 Does the limitation of liability provision in the 2010 and 2013 Employment Contracts apply, as a matter of construction, to intentional wrongdoing (Issue 60.1) and can "full financial liability" under Article 243 of the Labour Code be limited by a contractual clause in the employee's contract of employment (Issue 60.3)?

1270. The 2010 and 2013 Employment Contracts contained a limitation provision in these terms:-

> "In accordance with this Agreement, the maximum financial liability of the Executive Manager shall be restricted to the total amount of the Salary and bonuses paid to the Executive Manager throughout the course of the Term on the terms and conditions specified in clauses 6.1-6.3 of this Agreement."

1271. If this term applied to intentional wrongdoing the Bank's claims in respect of Labour Code wrongs committed after the relevant date in January 2010 would be limited to that amount (which would not affect liability in respect of earlier Loan and Transactions).

1272. Article 401(4) of the Civil Code expressly provides that an "[a]greement concluded in advance for eliminating or limiting liability for the intentional violation of an obligation is void." There is no equivalent express provision of the Labour Code.

1273. In relation to the Labour Code Article 232 provides:

> "The labour contract and other written agreements attached to it can specify the material liability of the parties to the contract. In doing so, the employer's contractual responsibility to a worker may be no less, and an employee's responsibility to an employer no more than is provided by this Code or other federal laws"

1274. Article 243 of the Labour Code provides, *"The full financial liability is imposed on an employee in the following cases…3) cases of intentional causing of damage to the employer"*, whilst Article 242 provides that, *"Full financial liability of the employee is understood to be his liability to compensate caused direct actual damage at full scale"*.

1275. Dr Rachkov's evidence is that it is a fundamental principle of Russian law that a person cannot benefit from their own wrongdoing and that Article 243 of the Labour Code confirms full liability for intentional wrongdoing, whereas Dr Gerbutov accepts that it is a fundamental principle of Russian Civil Law that intentional loss must be compensated in full, but he believes it is not a fundamental principle of Russian labour law. It might be thought surprising if there was not a principle under Russian law that a person cannot benefit from their own wrongdoing – that is certainly consistent with Article 401(4) of the Civil Code and Article 243 of the Labour Code which addresses full financial liability in cases of intentionally causing damage to an employer.

1276. Ultimately, and as is recognised at paragraph 451 of Mr Belyaev's Closing Submissions, the issue involves a consideration of the interaction between Articles 232 and 243 of the Labour Code. In this regard Dr Rachkov's evidence was as follows:-

> "I think Article 232 is a more general rule and Article 242 and further down, including 243, are exceptions from this rule, ie lex specialis, ie in case there is a reference of the one party to the litigation to Article 232 and the other party refers to Article 242 and 243, these later articles shall prevail because they are more specific. They deal with full materiality. The idea of Article 232 is to protect the employee from the situations where, for instance, he can be pressurised by the employer for having committed some -- or having caused some damage and then he may, I don't know, get bankrupt or be expelled from the company under such pressure, whereas Article 242 and further down are based on the idea that whenever harm is caused, it must be compensated in full, which is a principle taken from the Roman law."

1277. In contrast Dr Gerbutov maintains that a labour contract may limit the statutory liability of the employee towards the employer including for intentional acts on the basis that there is no (express) prohibition of that. Thus in evidence he said, amongst other matters, as follows:-

> "Q. Is there a general principle of the civil law that someone can't profit from their own intentional wrongdoing?
> A. Yes, there is such a principle in civil law. It's correct.
> Q. But you say under the labour law, in the circumstances we are talking about, the employee can profit from his own intentional wrongdoing because he can steal a year's wages and limit his liability to two weeks' wages.

A. Well, I think in very obvious situations the court may try -- I mean, in extremely unfair situation, the court may apply the prohibition of abuse of right concept to such situations but, in my view, the mere fact that the limitation clause provides for very small compensation, yes, and this compensation clearly is less than the damage caused, this mere fact should not be considered as a sufficient ground to apply to disregard the limitation clause.
Q. Isn't it obvious that what Article 243 of the Labour Code is doing is setting out particular instances of morally blameworthy infliction of harm and what it's saying is if any of those things happen, there is to be full material liability and that must prevail over any contractual liability clause. Don't you agree?
A. No, I don't agree"

1278. It was common ground that the point does not appear to have been addressed in any authorities. Dr Gerbutov referred to views expressed in certain articles but I do not consider they are a reliable guide as to the actual position under Russian law. Ultimately the thrust of the reasoning of Dr Gerbutov was that there was no express prohibition of limitation of liability in the Labour Code (as was common ground), and so Article 232 should be applied.

1279. It is clear that Dr Gerbutov felt uncomfortable with the view he was expressing (as the above extract shows) – and it would mean that an employee could steal billions of roubles from his employer and still limit his liability for such intentional wrongdoing to his wages (subject only to any argument on abuse of right) – which the Bank submits is an absurdity. It is submitted by the Shareholders, however, that *"one must follow the legal logic where it takes one"*.

1280. I consider the legal logic takes one, in accordance with the evidence of Dr Rachkov, which I accept, to the fact that Article 232 is a general provision that does not expressly deal with intentional causing of harm, whereas Article 243 is a specific provision expressly dealing with, amongst other matters, intentional causing of damage where there is to be full financial liability, so that Article 243 prevails and there is to be full financial liability in such a situation (and in consequence it prevails over Article 232 and there can be no limitation of liability in that situation).

1281. In this regard I prefer the evidence of Dr Rachkov which is consistent with the specific prevailing over the general and the actual language of Article 243, whereas I do not consider that Dr Gerbutov ever fully grappled with the inter-relationship between Articles 232 and 243 and their respective subject matter. Accordingly, I find that Article 232 does not extend to the intentional causing of damage in respect of which there is to be full financial liability.

1282. This conclusion is also one that can be reached simply having regard to the language and subject matter of the respective Articles, and is consistent with what one might expect in any legal system – namely that there is to be full financial liability for

deliberate/dishonest/criminal wrongdoing of the kind addressed by Article 243 of the Labour Code, and that a provision in relation to limitation of liability such as Article 232 does not extend to such a situation – not least because any other construction would lead to absurd consequences.

1283. In the above circumstances, I find that the limitation of liability provision in the 2010 and 2013 Employment Contracts does not apply as a matter of construction to intentional wrongdoing (Issue 60.1) and that Article 243 provides for full financial liability in relation to intentional causing of damage. In consequence, in relation to Issue 60.3. full financial liability under Article 243 cannot be limited by a contractual clause in the employee's contract – the specific of Article 243 prevails over the generality of Article 232.

P. TIME BAR (ISSUES 64-67)

P.1 Common Ground

1284. It is common ground that the limitation period for claims under the RCC and JSC Law (if such claims are not required to be brought under the Labour Code) is 3 years and the claims against the Shareholders are not time-barred if a 3-year limitation period applies (List of Agreed Facts and Issues para 61).

1285. It is further common ground that Article 392 of the Labour Code establishes a limitation period of 1 year for individual labour disputes and that (1) time starts running under the Labour Code from the moment that the harm is revealed to the employer; and (2) a missed one-year limitation period can be restored if there were valid reasons for missing it namely exceptional circumstances not dependent on the will of the employer and beyond the employer's control that prevented it from bringing a claim (List of Agreed Facts and Issues para 63).

P.2 Does the 1-year limitation period in the Labour Code apply to the Bank's claims against the Shareholders? (Issue 64)

1286. The one year limitation period in the Labour Code does not apply to the Bank's claims against the Shareholders as I have found, in Section M.2.5.3 and M.2.5.4, that the Bank is entitled to bring civil law claims against the Shareholders irrespective of whether they were employees and that it would be entitled to bring such claims in the Arbitrazh courts. Such civil claims are subject to a 3-year limitation period, and as identified at Section M.2.5.1 above it is the practice of the Arbitraz courts to apply the 3-year limitation period to civil claims against directors who are also employees. It is common ground that the claims against the Shareholders are not time-barred if a 3-year limitation period applies. Accordingly, all of the remaining factual and legal issues in relation limitation are academic. I will, however, address such issues for completeness in circumstances where I heard full argument on such matters.

P.3 Relevant Date for Commencement of the Labour Code Claims

What is the relevant date for the commencement of the Labour Code Claims? In particular is it 12 February 2016, 8 April 2016, 12 July 2016, or some other date and if so what date ? (Issue 66)

1287. It is convenient to address first the question arising under Issue 66, namely what is the relevant date for the commencement of the Labour Code claims. The original Claim Form was issued on 12 February 2016. However, as originally issued, the Claim Form did not include claims under the Labour Code. On 8 April 2016, the Bank issued separate proceedings under the Labour Code ("the Second Claim Form"). Pursuant to CPR 17.1 the second Claim Form was amended to include claims for breaches of Articles 232, 233, 238 and 244 of the Labour Code ("the Amended Second Claim Form"). On 14 October 2016, the parties reached an agreement, recorded in a consent Order of Knowles J, the effect of which was that the Bank had permission to amend the Claim Form in the main action so as to add the Labour Code claims in the main action, and that such amendment was made on the agreed basis that, insofar as the Labour Code claims did not arise out of

the same or substantially the same facts as the claims already contained in the Claim Form, then they would be deemed to have been commenced on 8 April 2016

1288. It is common ground that the effect of that agreement is that in so far as the Labour Code claims arise out of the same or substantially the same facts as the original claim, they will be treated as having been brought on 12 February 2016. If and in so far as they do not arise out of the same or substantially the same facts, they will not.

1289. It is also common ground that the agreement was premised on, and adopted the language of, CPR 17.4, an approach that is commonly adopted in major litigation where it is most convenient to defer what may well be complex fact sensitive questions of limitation to trial.

1290. It is now established that CPR 17.4 applies to new claims added by way of amendment where it is arguable that the limitation period has expired under the Rome I or II Regulation (see the Court of Appeal case of *PJSC Tatneft v. Bogolyubov* [2017] EWCA Civ 1581).

1291. The principal question is accordingly whether the claims added to the Amended Main Claim Form arise out the same, or substantially the same, facts as the claims already pleaded in the original claim form.

1292. The correct test when assessing whether a new claim arises out of the *"same or substantially the same facts"* is well established and was stated *in Goode v Martin* [2002] 1 WLR 1828. Further guidance has since been given in *Ballinger v Mercer Ltd* [2014] EWCA Civ 996 at [33] onwards. In *Ballinger* Tomlinson LJ approved Colman J's approach to the question in *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549, 558 where he said,

> "Whether one factual basis is 'substantially the same' as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to **investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim**."
>
> (emphasis added)

1293. The Bank refers to the case of *Berezovsky v Abramovich* [2011] EWCA Civ 153, in which counsel for the claimant subjected the pleadings to a minute analysis and argued that by reason of amended pleadings inter alia regarding the manner of a trust arising, and changing from an English law claim to a Russian law claim, and the altered manner of the valuation of the loss, the alleged facts amounted to a new cause of action and a new claim. Such arguments did not find favour with the Court of Appeal, Longmore LJ stating at [59] *"I am not persuaded by these rather over-elaborate arguments"*.

1294. The Bank submits that it is clear that the Labour Code claims arise out of the same, or substantially the same, facts as the existing claims, and indeed, that the essence of the

Labour Code claims is that the conduct already alleged in the existing claims gives rise to liability under the Labour Code (with both sets of claims being based on precisely the same fraud and set of impugned transactions). It is said that the Labour Code claims involve no new factual investigation of any kind and the Shareholders suffer no practical prejudice in having to deal with them at the same time as the existing claims (see *Ballinger v. Mercer Ltd* [2014] 1 WLR 3597 at [33]-[38]).

1295. For their part it was submitted by the Shareholders that the Labour law claims did not arise out of the same, or substantially the same, facts as the existing claims, it being said that the differences between the Labour Code claims and the original claims lay in three areas (a) the Labour Code claims depending upon the existence of a contract of employment between the Banks and the Shareholder, (b) The Labour Code claims depending on the terms of Russian law governing labour relations (which are a matter of fact so far as this Court is concerned), and (c) the Labour Code claims, as pleaded include reference to various matters including the alleged falsification of accounts and relationship with the CBR and criminal offences under Russian law and even if sufficiently pleaded they are not pleaded in relation to the original claim brought under the Civil Code and JSC Law.

1296. Whilst debated at length in the written Closing Submissions, and initially pursued in oral closing submissions by Mr Penny, ultimately Mr Penny realistically and rightly conceded that the claims under paragraphs 94A.1 to 94A.4 of the Particulars of Claim (which included breaches of clauses of the employment contracts by attending the Credit Committee and acting otherwise than in good faith) arose out of the same facts and matters as originally pleaded, which is clearly the case, and the fact that there is an employment contract does not change that. I am satisfied that this is so, and more generally that the essence of the Labour Code claims is indeed that the conduct already alleged in the existing claims gives rise to liability under the Labour Code with both sets of claims being based on precisely the same fraud and set of impugned transactions, quite apart from the fact that, as recorded at Issue 29 of the Agreed Facts and Issues, the obligations established by Article 53(3) of the RCC and Articles 71(1) and 81-84 of the JSC Law applied to the Shareholders whether as director's duties or as labour law obligations, without distinction.

1297. Furthermore, even in relation to allegations of falsification of accounts and deceiving the CBR, the underlying facts in relation to such matters are not *"significantly removed from the facts originally pleaded"* (contrary to Mr Yurov's submissions) and are all concerned with balance sheet management and the recycling of funds through offshore loans which were very much in play in the original claim (as Mr Penny also realistically accepted in his oral closing). If this is tested by the purpose of the requirement (as identified by Colman J in *BP plc v Aon*) the Shareholders were not thereby placed in a position whereby they would be obliged after the expiry of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which they could reasonably be assumed to have investigated for the purpose of defending the unamended claims. On the contrary, those facts are all intrinsically linked, and indeed contemporaneously addressed together in, for example, the June 2015 memorandum and its focus on balance sheet management (the very focus of the original claim).

1298. Accordingly, I am satisfied and find that the relevant date for the commencement of the Labour Code claims is 12 February 2016 by reference to the doctrine of relating back

(as well as the express terms of the Knowles J Order which in any event reflects the position under CPR Part 17.4). Were that not the case then the Knowles J Order establishes a backstop whereby they would be deemed to be commenced on 8 April 2016. This is in any event the effect of the Second Claim Form on 8 April 2016 (which, amongst other matters, introduced a claim under Article 243 of the Labour Code which provides for full material liability of an employee for intentional wrongdoing). Finally, and for completeness (if relevant) I am satisfied that the further amendments made on 12 July 2016 (the Amended Second Claim Form) to add all possible relevant articles of the Labour Code did not add new claims but, even if they did, such claims were not themselves time barred when added (and so there would have been no reason to disallow them).

1299. In consequence if (contrary to my findings) a one year limitation period were to apply to the labour law claims, then consequent on my further findings, it would be necessary to demonstrate that the harm was revealed to the Bank more than a year before 12 February 2016 i.e. no later than 12 February 2015 in order for the labour law claims to be time barred on this hypothesis (as opposed to a three year time limit as I have found). This is not a propitious start to any such defence given that the Bank only collapsed on 22 December 2014.

P.4 Had the harm been revealed to the Bank for the purposes of Article 392 of the Labour Code more than one year before the relevant date of commencement? (Issue 65)

P.4.1 Was the alleged harm known to the senior management of the Bank, including members of the Management Board, prior to the Bank entering administration? If so, what, if any, legal relevance does that fact have? (Issue 65.1)

1300. The question arises as to what is meant by "harm" being "revealed", and when, as a matter of fact, harm was revealed.

1301. In this regard it is clear that there must be knowledge on the part of the employer that damage had been suffered for harm to have been revealed, as was expressly acknowledged and relied on, on behalf of Mr Belyaev in oral closing. This was also confirmed by Dr Gerbutov during the course of his cross-examination:-

> "Q. … you need to know
> there has been a loss for time to start running, so time
> can't start running before you know there has been
> a loss?
> A. Sure."

1302. This is also consistent with the expert evidence on Russian law from which it is clear that not only must there be knowledge that damage has been suffered (as that is part of whether "harm has been revealed" (as accepted in paragraph 385(c) of Mr Yurov's Closing Submissions)) but also whether wrongful damage has been revealed, "harm" in this context meaning *iniuria* and not merely *damnum*. As Dr Gerbutov put it:-

> "... what the bank needs to know is the fact that the damage was caused under the Labour Code and the damage -- I mean, the very fact of the loan, the very fact that the loan was issued

is not – I mean, the knowledge of the damage for sure but the **knowledge** that the **unrecoverable loan** was issued and the -- I mean, some understanding that this was **attributed to the management acts.** ..." (emphasis added).

1303. Thus, in order for time to start running:

(1) the Bank needs to know that the financial harm in the form of the loss has actually occurred and been "revealed" in the sense that is has become known to the Bank, and

(2) that the Bank had in its possession sufficient facts so as to reveal that such harm has been suffered as a result of a breach of duty by the Shareholders.

1304. In relation to each of these matters, there is a prior question as to whose knowledge is the relevant knowledge in relation to the Bank. In this regard the evidence before me is that Russian law focuses on the knowledge of the new management in claims for wrongdoing by former directors of employees. In relation to the civil law this is addressed in paragraph 10 of Resolution 62:-

"Where the relevant claim seeking to recover damages is filed by the legal entity itself, the limitations period shall begin to run from the time when the legal entity (represented, for example, by the new director) became actually able to become aware of the relevant violation or when the controlling member entitled to terminate the director's powers (except where such controlling member is affiliated with the director) became or should have become aware of the violation, rather than from the time when the violation was committed."

1305. This recognises that when an entity is under the control of the wrongdoers (here the Shareholders) at the time of the wrongdoing, no claim is going to be brought until after there is a change in management.

1306. The expert evidence (supported by Russian legal authorities) is that the labour law operates in the same way and for the same reason. Thus Dr Gerbutov stated at paragraph 344 of his third report as follows:-

"As explained in *OOO v I*…, the limitation period regarding a claim for damages of a company over the harm caused to it by its executive bodies starts to run when the new executive body or an independent shareholder learns about the harm since before that moment the company has no possibility to bring a claim for damages."

1307. Thus, is was stated in the *OOO v I*

"In his cassation appeal, I.'s attorney states that LLC missed the limitation period for filing a claim with the court for recovery from his client of damages caused by I. to the company by receiving salary in an increased amount not authorized by the law and the organizational documents of the company for the period from August 2008 to December 2009, because the company was aware of the amount of salary received by him in the disputed period on the days it was received for the corresponding month, and the company filed the claims with the court after the expiration of the one-year period provided by part 2 of article 392 of the Labour Code of the RF.

> The judicial panel is not persuaded by these arguments in the cassation appeal for the following reasons.
>
> Based on these facts and considering the conflict of interest between LLC and its executive body- the director - who was I. in this period of time, the limitation period for filing claims with the court for recovery of losses from I. **began to run on the date when the other shareholder of the company, M., or the company itself, represented by the new director, became aware of the infringement of its rights**, and not on the days when I., as the director of the company, received salary in an increased amount not authorized by the law and the organizational documents of the company, because the company itself, in the period until 25 May 2010, did not have the ability to bypass I. and file these claims with the court to protect its rights to compensation for the losses caused by l.'s actions, and no evidence was presented in the case that the other shareholder of the company, M., knew before 25 May 2010 of the amounts of salary being received by I. in this period of time."
>
> (emphasis added)

1308. This is also consistent with Dr Rachkov's view, as expressed at paragraph 244 of his first report, that

> "…the one year period shall be calculated from the date when **the Bank's new management**, following an internal investigation, started without undue delay, discovered that the Shareholders caused damage to the Bank (i.e. not simply learnt about the fact of the "hole" in the Bank's balance sheet, but had sufficient details of the wrongdoing to start a claim)."

This recognises that it is for the new management to investigate matters (there is an issue as to whether time only starts to run from a completion of an investigation, which is a separate point addressed in due course below).

1309. In paragraph 345 of Dr Gerbutov's third report he suggested that time would start to run when the members of the "then" executive bodies of the company knew about the harm caused by the members of the board of directors *"unless they were conspiring with such members of the board of directors to bring about the claim"*. However Dr Gerbutov cites no authority for this additional viewpoint, and I am satisfied that the position in Russian law is that time runs when the new management of the Bank learned of the harm at least in a case such as the present where, on the evidence, it is clear that the Shareholders were in control of the Bank at all material times prior to the new management coming in (as is also supported by the evidence of Dr Rachkov, which I accept, that it would be unrealistic to suppose that a claim would be brought by the CEO where the wrong was being done by influential members of the supervisory board).

1310. Thus, in relation to any knowledge of senior management of the Bank prior to the Bank entering administration this would not have been of relevance (Issue 65.1) as it is the knowledge of the new management that is relevant for the reasons identified above. In any event (had it been relevant) there is no evidence to corroborate the assertions made by the Shareholders as to what members of the Executive Board knew at any given time in circumstances where none of the former members of the Bank's Executive Board gave

evidence before me, and I do not accept the unsupported assertions of the Shareholders (who have proved themselves not to be honest witnesses) in this regard.

P.4.2 Harm – Irrecoverable Loans

1311. I have already addressed that it is necessary to know that there has been a loss for time to start running, so that time cannot start running before there is knowledge that there has been a loss (as was Dr Gerbutov's evidence). However, that raises the further question as to what is mean by knowledge of a loss. In this regard, and as matter of logic, there must actually have been a loss, and not merely the possibility of a loss before time for the making of a claim can commence (were it otherwise time could expire, or be close to expiring, even before there was an actual loss leading not only to uncertainty but also injustice). I am satisfied, based on the expert evidence before me, that what is indeed required is knowledge that there is an irrecoverable loan before the new management can be said to have knowledge of harm. In this regard Dr Gerbutov's evidence (which I accept) was to such effect:-

> " Q. Time can't start to run before the new management knows that those are in fact irrecoverable loans. Do you agree with that?
> A. Yes.
> Q. Because otherwise it doesn't know that it has suffered the loss. It's as simple as that really, isn't it?
> A. Well, in principle, yes."

1312. This is, in of itself, fatal to the Shareholders' arguments on limitation if, contrary to my findings, the relevant date for limitation were one year prior to the date of the original claim form – i.e. 12 February 2015. This is because losses cannot have been irrecoverable until the borrowers were both in default and it had become clear that repayment would not be made. The contracts provide that if a demand is sent the sums become due the following day. Of course, it would then be known that the sum due had not been paid. It would not necessarily be known immediately that it would never be repaid (i.e. was an irrecoverable loan). That could potentially not be known for some time depending on the facts relating to the particular borrower.

1313. In this regard, it is clear from the Russian authorities that reliable information about the impossibility of recovery is needed before time can run – see the *VEFK Bank* and *Orlovsky* cases. In the *VEFK Bank* case it was stated:

> "…the limitation period should be calculated not from the time of violation but from the time when the legal entity receives a real opportunity to learn about the violation. The bankruptcy manager learnt about the violation of the rights of the debtor and its creditors as a result of actions of the Bank's Management Board members, who approved the decision to acquire the rights of claim and issue loans that caused losses, **not before receiving reliable information about the impossibility to recover the funds** and make them part of the bankruptcy estate." (emphasis added)

1314. To like effect in the *Orlovsky* case it was stated:

"the beginning of the limitation period is the date when the bankruptcy administrator found out or should have found out that the loan issued by the respondent and the transferred debt are **obviously unrecoverable**" (emphasis added).

1315. In the present case it was only on 20 February 2015 (i.e. less than 1 year before proceedings were commenced) that the Bank sent demands for repayment in respect of the loans to Erinskay, Baymore, LBCS, Mourija, SiberianKD, Belenfield and Wave. As for the other Borrowers, almost all of them defaulted later:

(1) LLC5: default in March 2015; demand on 2 April 2015.
(2) Stivilon: default in March 2015; demand on 22 October 2015.
(3) Priangarskiy: default in December 2014; demand on 21 May and 5 October 2015.
(4) Business Group: default in March 2015; demand on 20 October 2015.
(5) Black Coast / Bank Winter: termination instruction on 26 February 2015.
(6) Oldehove: default in July 2015; demand on 24 September 2015.
(7) Crylani: default in July 2015; demand on 11 December 2015.
(8) Yaposha: default in January 2015; demand on 20 May 2015.

1316. Accordingly, in almost all cases, knowledge of the harm would, on any view, be less than one year prior to the issue of the original Claim Form (the applicable date as I have found), and in most cases be less than one year were any later date be applicable (contrary to my findings).

1317. Mr Willan argued on behalf of Mr Fetisov that the relevant test cannot be *"has it actually not been repaid"* giving a hypothetical example of a loan not repayable until 2030 with no interest payable until then, submitting that it cannot be said it was not known there was a "problem" until 2030, *"so the answer is when they get sufficient knowledge to believe that is the case"*. This submission, so far as knowledge of harm is concerned, is not, however consistent with the expert evidence or the Russian authorities addressed above. Harm must actually have occurred and there must be reliable information about the impossibility of recovery before time can run. That is not the same as reserving (even at 100%), because it is not known at such a time that a loss has actually been suffered. If it sufficed to know that there was a "problem" with recovery this could lead to uncertainty as to when time started to run, there would be a potential for injustice (if time expired before an actual loss crystallised) and it is difficult to see what interest would be served by time running at a prior stage.

1318. In any event, the answer to Mr Willan's hypothetical example is that a time might come when the debt was obviously irrecoverable – for example if the borrower went into liquidation (a similar example was put to Mr Rachkov by Mr Penny in cross-examination, Mr Rachkov agreeing that, *"Once the employer learned that the loan became **irrecoverable, that's the moment when he learnt about damage** which potentially was caused to him by the employee's actions")*. It was also clear on the expert evidence that it would not amount to harm being revealed if (as a hypothetical scenario) a lender is told that the borrower is a shell company with no assets and is not going to make any further payments, Mr Rachkov confirming that it would not be sufficient simply to be told that – there would have to be some undoubted facts, and results of investigations, as *"the mere fact that the borrower may go bankrupt does not mean that no recovery is possible as such. So it's all very fact driven"*. As Mr Rachkov said, and as I accept, the lender would have to have some solid factual basis for the conclusion that a loss has been suffered.

1319. I would only add that if it sufficed that borrowers had particular characteristics (for example "technical companies" or borrowers without apparent businesses) as opposed to a requirement of knowledge of the irrecoverability of a loan for the purpose of harm, this would give rise to a considerable risk of injustice (if time ran before any loss had crystallised), and it also does not necessarily follow from the nature of a company that the loans would not be repaid (indeed throughout the time period under consideration many such loans were being repaid, as indeed were loans associated with Shareholder projects, albeit that many loans were also extended repeatedly).

1320. Ultimately, I was not greatly assisted by the various hypothetical scenarios put to the experts (which were generally met with the experts saying much would depend on the particular facts). As recognised in Mr Yurov's Closing Submissions at paragraph 385(f) *"the experts are right to say that encapsulated presentations of simple factual scenarios risk being misleading".*

1321. What emerged clearly from the expert evidence, however, and which I accept, was that in order for time to start running the Bank needs to know that the financial harm in the form of the loss has actually occurred and been "revealed" in the sense that is has become known to the Bank, which will not occur until it is known that a loan is irrecoverable, and that the Bank had in its possession sufficient facts so as to reveal that such harm has been suffered as a result of a breach of duty by the Shareholders. As addressed above such knowledge of harm has not been made in terms of the timing of knowledge of loss and when it was known the loans were irrecoverable. The question of knowledge of breach of duty by the Shareholders is addressed in due course in Section P4.4 below in the context of Issue 65.2. Suffice it to note, however, at this point, that, upon examination, this has not been made out either.

P.4.3. Harm as a result of a breach of duty

1322. It is common ground that it does not suffice that there is an irrecoverable loan (as there could be many reasons for that including, for example, the state of the market) – there must also be knowledge that there has been wrongful damage, as already noted, and as Dr Gerbutov stated in evidence as quoted above, due to the fault of the Shareholders. Accordingly, so far as the Bank's claims against the Shareholders are concerned, before time could start running it would also be necessary that the Bank's new management had in its possession sufficient facts so as to reveal that such harm had been suffered as a result of breach of duty by the Shareholders.

1323. In this regard, and as is apparent from Section F.2 above, between 2010 and 2014 the Shareholders, with the assistance of Mr Worsley, had created an opaque web of offshore companies, including with the use of "fake" UBOs which entirely concealed the fact that the companies were all Shareholder Companies and that ultimate beneficial owners were the Shareholders themselves, and the fact that a time came when the companies were even transferred into the Shareholders' respective family trusts, involving multiple breaches of duty on the Shareholders' behalf. However, I am satisfied that it was not until Mr Worsley's documents were obtained in late November/December 2015 that the opaque web offshore companies could be penetrated and the Shareholders' breaches of duty in such respects known – before that there was much suspicion but no hard facts as to such ultimate beneficial ownership. Even had that not been the case, and had Mr Worsley's documents not been required before such knowledge was acquired, it is notable that it was

not until around 25 February 2015 that Mr Worsley even met with top Otkritie executives including Mr Popkov, and indeed it had only been on 13 February 2015 that the Shareholders had met with Mr Popkov, Mr Aganbegyan and Mr Vadim Belyaev, and engaged in correspondence in later February 2015 – all less than 12 months before the first claim form on 12 February 2016).

1324. This is again fatal to any labour law one year time bar defence in relation to such breaches of duty (had the limitation period been one year), as such knowledge came less than one year before any relevant proceedings were commenced. However, as the question of any knowledge acquired before such date was explored in evidence with the witnesses, and relied upon in closing by the Shareholders, it will be addressed for completeness.

P.4.4 Issue 65.2 and the knowledge of the temporary administration

1325. Before turning to consider what knowledge was or ought to have been acquired by the temporary administration, and when, a preliminary point to note is that there is an inherent tension between the Shareholders' defences that not only does the evidence against them not disclose any fraud (and such claim should not have been brought) but that it does not disclose any wrongdoing at all – and the suggestion that knowledge of harm as a result of (fraudulent) wrongdoing by the Shareholders would have been obvious to anyone coming into the Bank at the end of 2014. Such tension is not unusual, but it does mean that care needs to be taken to ensure that matters are viewed without the benefit of hindsight, that care needs to be taken as to any inferences to be drawn, and that care needs to be taken as to whether fraud ought to have been apparent.

1326. As was said by Elias LJ in *Kazakhstan Kagazy Plc v. Arip* [2014] 1 CLC 451 at [59]-[61]:

> "59 I see much force in these submissions. However, in my view there are three factors in particular which powerfully support the Respondent's argument that we should not interfere with the judge's conclusions on this point. First, it is inherently unattractive for the Appellant to submit that the fraud should have been manifestly obvious and yet at the same time to assert that he has a complete defence to the allegation (albeit that he has not condescended to reveal it even in bare outline). Indeed, there is a logical difficulty in submitting that a claimant ought to have been aware of wrongdoing even though there was none. The contention has to be that in so far as KK had grounds for alleging fraud (albeit mistakenly), they were present, and manifestly so, by August 2010 at the latest.
>
> 60 I recognise that Mr Arip is not obliged to reveal his defence at this stage even where – perhaps particularly where – serious fraud has been alleged, and his failure to do so cannot be held against him: see *Behbehani v Salem* [1989] 1 WLR 723 ,735 per Woolf LJ, as he then was. But the court is in my view permitted to have regard to the fact that the Appellant is asserting that what should have been an obvious inference from the facts would in fact have been an entirely mistaken one. It inevitably casts doubt on how compelling that inference must have been.
>
> 61 Second, an allegation of fraud should not be made without cogent evidence. This is not simply a professional obligation of lawyers; nobody should allege

dishonesty lightly. The court should not readily conclude that fraud ought to have been apparent unless it is satisfied that the evidence would plainly justify the allegation. That is always a high hurdle, and the ability of the court confidently to reach that conclusion is compounded when the determination has to be made at the interlocutory stage on the basis of disputed facts and inferences."

(emphasis added)

1327. In this regard it was also noted in the judgment of Longmore J (citing with approval the judgment of HHJ Mackie QC) at [21] that:-

> … This evidence has yet to be tested but it resonates with the experience of many fraud cases where, once suspicions are aroused, it is difficult or impossible to know who and what to believe and what can be taken at face value. As solicitors investigating such matters know there can be an understandable confusion and paralysis once suspicion of major fraud emerges. It is trite to point out that fraud often looks obvious only after it has been discovered and that it then often points suspicion at a wide variety of potential culprits.

1328. I consider such sentiments are apposite in the present case. It is apparent that the initial position was (understandably) one of some confusion with the administrators neither getting clear answers as to what was going on (with euphemisms being used such as the "unofficial perimeter of the Bank") and nor were they in a position to know who or what to believe and what to take at face value. It is readily apparent from the evidence that it inevitably took considerable time to investigate matters. In this regard, and as already noted, it was some time before there was a meeting with Mr Worsley in February and it was not until November/December 2015 that the necessary documentation was obtained from Mr Worsley which revealed the true position (albeit, ironically, the Shareholders dispute what that documentation shows and whether it gives rise to any wrongdoing on their part).

1329. A good contemporary snapshot of the situation the administrators faced in late December 2014 is provided by the email of Mr Drozdov of 28 December 2014 to Mr Yurov in which he said it as he no doubt saw it:

> "**It's just that they are all in the dark**, they are worried, they are asking us awkward questions at the interrogations, both the DIA and CB guys, they are laying out everything as it was."

(emphasis added)

1330. As Mr Popkov said when giving evidence:-

> "A. At that point in time, **we had lots of definitions that our colleagues fed into us, including this, calling the -- non-official perimeter of the Trust. They also said family office, the assets of the family office. They said the assets of Cyprus office.** They also called them something from a company which is affiliated with the Bank or a company affiliated with the shareholders,

the company controlled by the shareholders, or controlled by the Bank. So here I used one of the terms that the employees were mentioning.

…

all of the plethora of companies were called different names by different people and **we only found out what was actually there, what the names were, by the end of 2015**.

(emphasis added)

1331. As Mr Popkov also stated, it took time to analyse all the information and what is more it was not clear whether companies would be able to pay at the time (which goes to reinforce the points already made about the need for knowledge that debts are irrecoverable for there to be knowledge of harm, quite apart from the need to know that there had been wrongdoing, and wrongdoing on the part of the Shareholders):-

"A. That was my opinion, which was based on -- on what the employees of the trust told me. By that time we did not analyse all the transactions, we did not understand where the money went. Baymore, et cetera. Of course it took some time. **A quick analysis was always based on the hearsay of the employees of the trust but it takes time to analyse all the information**. Can you imagine? Four days in December and five to six days in January. It was impossible to analyse all of that information. That table was based on the words of the employees.

Q. Well, you knew, didn't you, that there was lots of money which had gone in the form of loans or other transactions from the Bank to other companies that were in this outside the perimeter structure. You knew that?

A. We saw that there were loans which were not being serviced and indeed there was a lot of deficit in relation to the assets. **Where exactly the money went, how it went, what transaction they were, whether they will be able to pay -- cover the loans or not, we had no idea. We had no clarity.** We assumed that the words of the employees of the trust were true and it would be more than likely that we would not get any money in relation to Baymore. But we verified it much, much later. It was impossible to do it in ten/15 working days. It's impossible to do a thorough proper analysis in 10/15 working days to make such a serious statement."

(emphasis added)

1332. The understandable reticence to take at face value what was being said, and the need to investigate it is also apparent from the evidence of Ms Dolenko:-

> "Q. But the employees of the Bank had told you that the borrowers in issue in these proceedings formed part of that non-official perimeter, hadn't they?
> A. **The Bank employees could have said anything to us; they could have told us that these companies are money laundering companies or they are financing terrorism. It doesn't mean that we have to note that down and believe it. We took the information and we went to study it**."
>
> (emphasis added)

1333. Equally understandably there was a feeling in the immediate aftermath of the administrators coming in that Bank staff could not be trusted and again that it would be necessary to investigate matters (which would take time). As Mr Popkov said in relation to Mr Iskandyrov:-

> "A. And apart from other things, we did not quite trust Mr Iskandyrov at that point in time. We could not just take his word for it and we discussed for that meeting that we wanted bank statements, that we need to carry out a proper tracing exercise in order to confirm this assumption, this statement, about benefits being there or not. Marat was saying some things to us but that was his recollection, whether true or not. We did not know that at that point in time."

1334. There was also the fact that the recollection of employees was also impeded by the deliberate destruction of electronic media. As Mr Popkov explained:-

> "A. Marat Iskandyrov confirmed that he knew a lot of things but, unfortunately, his mail was wiped out. His computer was wiped clean and further we discussed, I think, at that meeting that Mr Iskandyrov, in order to jog his memory, would need documents, would need access to accounts and to information and then indeed he would be able to help us."

1335. I have already addressed aspects of the evidence in relation to the destruction of Bank electronic data in the context of considering Mr Yurov and his evidence. This is most relevant to Issue 67 (as addressed below), but also forms part of the context of the difficulties that the new administration was having in relation to investigating matters when assessing whether, despite such wholesale destruction of electronic data immediately before the commencement of the investigation (and no doubt to impede or thwart such investigation) the DIA had prior to 12 February 2015 (or indeed any relevant subsequent date) sufficient knowledge of the fraud, the harm suffered and the wrongdoing of the Shareholders (even leaving aside the findings already made above about the lack of knowledge of irrecoverable loss and lack of the knowledge of the particular wrongdoing of the Shareholders (only gained following access to Mr Worsley's documentation).

1336. It will be recalled that on the morning that the temporary administrators arrived to take over management of the Bank on 22 December 2014, and before the temporary administrators arrived at the Bank's premises, Mr Worsley sent Mr Yurov a text which read, *"Do u want to ask Tatyana to clean your computer or to remove it…??"* and Mr Yurov replied "OK", the only possible meaning of this word is that he was agreeing to such (inappropriate) conduct. I have already addressed in Section C.3.1 why I am satisfied that Mr Yurov was not telling the truth when he denied that he agreed to Ms Sidorova cleaning is computer or wiping it. It is equally clear that this was actioned. Again it will be recalled that Mr Popkov's evidence at paragraph 14 of his statement (about which he was not challenged in cross-examination) was that :-

> "On 27 December 2018, I prepared a draft outline of the key ongoing issues that I sent to Ms Dolenko. Action points included, amongst other things, the rehabilitation plan, balance sheet risks, loans, financial market conditions, potential staff changes in the Bank as well as next steps on assessing "problem assets". **The situation at that time was a complete mess**. I advised Ms Dolenko that steps needed to be taken to preserve the Bank's IT systems but we later established through the Bank's internal security team and from speaking to senior management of the Bank that **shortly before the collapse of the Bank the email accounts of most of the Bank's senior management had been deleted and some personal computers and servers had been completely wiped using special software, making our job much more difficult."**
>
> (emphasis added)

1337. The Bank's Second Disclosure Statement of 27 October 2017 provided further information as to what was found:-

> "5. As explained in Steptoe's letter of 30 January 2017 and at paragraphs 44-49 of the Ninth Witness Statement of Neil Dooley ("Dooley 9"), after the rehabilitation of the Bank and the temporary administration in December 2014, the Bank's IT specialists (led by Andrey Babiy, an independent IT contractor) established that data from the Bank's email servers had been deliberately deleted shortly prior to the Bank's rehabilitation. In particular, emails held on the accounts of the First to Third Defendants (the "Primary Defendants") and other senior executives (including Mr Iskandyrov, Ms Balkan, Ms Sidorova, Mr Pospelov, Mr Postnov, Mr Popov, Mr Vartsibasov, Ms Karalkina, Mr Kazakov, Mr Kuznetsov) had been systematically deleted.[28]
>
> 6. In addition to the deletion of emails from the Bank's servers, **the Bank established that immediately prior to the temporary administration, the desktop office computers of the Primary Defendants had also been wiped clean and held no recoverable data. The Bank sent the relevant machines to an external IT forensic laboratory for further analysis, but the Bank was informed that the desktops *had been professionally cleaned and that deleted data could not be restored."***
>
> (emphasis added)

[28] Note that, whilst described as senior executives, this list in fact includes the Shareholders' secretaries' emails (Ms Balkan, Ms Sidorova and Ms Karalkina).

1338. In tandem with the evidence as to such wholesale wrongful deletion of data it is also relevant that all the documentation in relation to the offshore network had been moved out of the Bank (at Columba in Moscow and later in Cyprus) and so such documentation was not available to the administrators. Yet further the evidence is that the Columba documents were themselves destroyed, as is apparent from a contemporary email from Mr Drozdov to Mr Yurov on 28 December 2014, *"Today Ben gave the order to destroy all the hard drives at Columba."*

1339. Tellingly, the contemporary documentary evidence is that the Shareholders were still hiding the requisite documentation and the very ownership structure as late as July 2015 and this can only be on the basis that Otkritie and the administrators remained ignorant that the "nominee UBOs" were not the real owners on the company and that the actual beneficial owners were the Shareholders via their own discretionary family trusts. This in itself tells the lie to the suggestion that the administrators had knowledge of the same at any earlier time, and further supports the conclusion that it was not until a later date (in fact after November 2015, and the Bank's settlement with Mr Worsley, that the Bank acquired information in relation to the family trusts. Indeed, the requisite documentation in relation to the Shareholders' Isle of Man trusts was only sent by Mr Worsley to Mr Popkov on 18 December 2015.

1340. On 22 June 2015, the temporary administration had come to an end and Ms Dolenko was appointed as Chairman of the Bank's Management Board (effectively the CEO), and at this point Otkritie acquired 99.99% of the Bank's share capital. The following day Mr Popkov became a member of the Bank's Supervisory Board and was employed as an advisor to the CEO of the Bank. The contemporary correspondence soon thereafter in July shows that Mr Worsley and Shareholders were still undecided as to whether even to disclose the Shareholders' beneficial ownership to the Bank (evidencing that the administrators did not then have such knowledge otherwise such discussions would be neither necessary nor would such discussions make any sense). In this regard:-

(1) On 9 July 2015 Mr Worsley wrote to Mr Yurov in these terms:-

> "About the nominees at Vassiliades:
>
> When and if the Due Diligence (DD) starts, we will need to declare who owns the companies.
> If we keep the nominees:
> …
> If we declare the trusts as UBOs (IE true situation):
> …
> Overall then, I see the second route - declaring the trusts as the UBOs, as the best solution, as the trusts are then in the picture as protection.
>
> We cannot get around the fact that the loans were made.
>
> I await your advice."
>
> (emphasis added)

Mr Belyaev and Mr Fetisov were privy to such correspondence the email being forward to them on 9 July 2015.

(2) All the Shareholders were emailed by Mr Worsley on 14 July 2015 (forwarding exchanges he had had with Mr Yurov's Russian lawyers), and it is clear the Shareholders remained undecided as to what to do (again showing that the Bank had not, at this point, acquired knowledge as to the true position):-

> "See below.
>
> The key to the question is whether it helps or not to have the trusts disclosed in Russia, and then balance with whether or not the nominees will remain viable.
> …
> We need to review a question.
>
> The offshore companies are owned via a nominee structure.
>
> There are offshore Isle of Man trusts, and below them, various foreign people (the Nominees) who have signed bare deeds of trust up to the Isle of Man discretionary trusts.
>
> The Nominees then own other offshore companies, and below that there are the Cypriot companies that took loans from NBT.
> …
> Otkrite want to do due diligence on the Cypriot companies which they want to buy.
> …
> Questions/Dilemas:
>
> i) If we sign papers during the due diligence, confirming again that the Nominees are UB0s, perhaps we would be simply digging the hole even deeper (as the English saying goes)?
>
> ii) On one hand with the Nominees, it looks more suspicious perhaps? IE that NBT lent to outside parties?
>
> iii) Yet if we disclose the Isle of Man Trusts, then it will be clear that NBT lent to YBF related companies. On one side that makes things look less suspicious, and on the other hand opens YBF to related party dealings issues.
> …
> It is a quandary - On one hand if we disclose the trusts, we are clear, and compliant in Cyprus, and offshore, and also it is clear that the loans stayed inside the "NBT Family".
>
> On the other hand, it opens YBF to related party dealings.
>
> Factor:
>
> With the upcoming due diligence, and the state of the nominees, will we be able to hide the trusts for much longer anyway? I doubt it."

(3) Following a discussion with him the previous night Mr Worsley emailed Mr Yurov

on 28 July 2015 in the following terns which again evidences their contemporary belief as to the Bank's continued ignorance of the true ownership structure:-

> "I think the main issue we need to think about is how we deal with Otkrite. It's a detailed issue, and not for decision in one email. So the notes below are 'thoughts' more than anything (yesterday when you said about breaking communication with them, I asked what it as based on, and you said feelings, not facts).
>
> What do we know:
>
> They want 11 of the 24 companies.
>
> They 'say' they want to also trace the money (as we do too).
>
> They do not know about the trusts, so any delays are blamed on yourself, myself and Fetisov/Belyaev.
>
> We have not told them officially about the nominees. This means that a core part of their 'story' that money was stolen looks 'real' to the prosecutors.
>
> EPAMMischcon have not answered about disclosing the trusts".
>
> (emphasis added)

(4) This was followed, the next day (29 July 2015), with another email of Mr Worsley to Mr Yurov (copying in a partner at the solicitors Mishcon who were representing Mr Yurov). It is clear that Mr Yurov was treating seriously what Mr Worsley was saying as he did not deny the contents to Mr Worsley and he forwarded the email the next day to Mr Belyaev (who was accordingly also aware of such matters). Mr Worsley's email provided:-

> "iv) As you saw, NBT are now suing Black Coast. That puts me directly in the firing line, as they see me as the 'owner'. I cannot continue like that.
>
> v) As I have said several times, but as has been not dealt with, we need to look at how to disclose the nominees as nominees.
>
> vi) We need to face the fact that it is better to have a charge of playing with the balance sheet, than… theft charges. Do you agree (you did verbally some time ago)??
> …
>
> Here is my advice and point of view:
>
> 1) We deal with point (vii) above. If there is a danger to you, in disclosing the nominees, you need to work out a defence based on the balance sheet play, so as to avoid a conspiracy charge. This defence is your personal business, but if I come in to play at all (at all) as a witness, I do need to know what the defence will be."

(emphasis added)

(5) Well into August Mr Yurov was himself saying that nothing should be said to Otkritie (said to be on advice from his lawyers), stating in an email to Mr Worsley on 29 August 2015: "*please, do not provide any information regarding any aspects of cooperation between myself and yourself (as nominee, instructor and protector of trusts, director of companies etc) without my written instructions*".

1341. This is all consistent with the Bank not having the requisite knowledge of harm caused by wrongdoing by the Shareholders until after receipt, and consideration, of the Worsley documentation is also consistent with the fact that when the Bank made an application on 20 May 2015 to be recognised as a victim in the Russian criminal proceedings, its application referred to an "unidentified" set out perpetrators it being noted that the *"grounds for initiating the criminal proceedings were determined by materials' from the interval audit in respect to an <u>unidentified</u> set of perpetrators."*

1342. In the light of the above matters, the fact that harm (in the form of irrecoverable loans) was not established until much later, and wrongdoing by Shareholders even later after receipt of Mr Worsley's documents, the Shareholders' submission that the DIA and the new Otkritie management had knowledge of the harm and wrongdoing on or before 12 February 2015 (or indeed 8 April 2015) (as addressed at paragraphs 388 and following of Mr Yurov's Closing Submissions), stands to be rejected. The matters there identified do not grapple with the fact that the Bank neither knew of the harm, nor of the wrongdoing by Shareholders (as addressed above), to start time running until well after 12 February 2015 (and in the case of wrongdoing by the Shareholders) until November/December 2015 at the earliest.

1343. In this regard I am also satisfied that it is Ms Dolenko's knowledge, that is the relevant knowledge for limitation purposes. She was the person who headed the Otkritie team within the Bank, conducted due diligence and assisted the DIA following its appointment as temporary administrator on 22 December 2014 and her evidence, which I accept, was that she did not have knowledge of such matters at any relevant time for limitation purposes.

1344. Indeed, even when it comes to events less than 12 months before the action was commenced (i.e. after 12 February 2015), and so irrelevant for limitation purposes on the findings I have made, she still did not have the requisite knowledge. Thus, she was not told by Mr Popkov that at the meeting on 13 February 2015 the Shareholders had offered to transfer any offshore companies, nor was she told about that meeting by anyone else and indeed did not know about what that meeting was about even at the time of her cross-examination. Nor was she aware of the 26 May 2015 meeting in Cyprus between Mr Popkov, Mr Yurov and others. Indeed she had not even heard of Columba, and whilst she had heard of Mr Worsley around the first quarter of 2015, she did not know that Mr Popkov was in direct contact with Mr Worsley.

1345. Her evidence in her first witness statement, which was unchallenged, and which I accept, was that, *"Neither the issue of actions of the Shareholders themselves, nor the issue whether any efforts have been made to contact the Shareholders to discuss the current situation, has ever been discussed with me. That subject was not part of my responsibilities."* Equally I consider that the Shareholders' reliance on discussions with

Mr Vadim Belyaev does not assist in terms of her knowledge for as she stated in evidence, *"At no time was I aware of any discussions between Vadim Belyaev and the Shareholders concerning the rehabilitation of the Bank and financial offers allegedly made to the Shareholders."*

1346. Notwithstanding attacks on her evidence in Closing Submissions (which I consider were unmerited), in cross-examination central aspects of her evidence, ultimately went unchallenged, and which I accept as representing the position. In addition to the passages quoted above, there were the following exchanges:-

> "MR WILLAN: Ms Dolenko, put the document aside entirely. Don't worry about the document. Were you ever told that the shareholders were willing to transfer companies back to Trust Bank?
>
> A. No.
>
> Q. Were you ever told that the shareholders were willing to transfer assets of the borrowers in these proceedings back to Trust Bank?
>
> A. No.
>
> Q. Ms Dolenko, are you aware of any reason why, if such discussions had taken place, representatives of Otkritie would have chosen not to share that with you as head of the administration?
>
> A. No, I don't know."
>
> and
>
> "Q. Ms Dolenko, just leave aside the messages for a moment. You were told, weren't you, that the shareholders, that Mr Yurov had indicated a willingness to transfer off balance sheet assets back to the Bank's balance sheet? Is that right?
> A. Nobody said anything of the sort to me. I have no idea what they are talking about in this correspondence. I do apologise."

1347. Nor do I consider that there is anything in the chronology of events between December 2014 and February 2015 which supports the Bank having the requisite knowledge of harm due to Shareholders' wrongdoing during this time period. I have already addressed the fact that the Bank remained "in the dark" during this period, as was apparent from the evidence of Ms Dolenko, as well as the evidence of Mr Popkov including that, *"where exactly the money went, how it went, what transactions there were, whether they will be able to pay – cover the loans or not, we had no idea. We had no clarity."*

1348. Whilst the Shareholders rely upon the preliminary assessment of the Bank's financial standing in the short DIA report of 19 December 2014 and the identification of six companies as having "characteristics of technical organisations" and "characteristics of non-operating organisations", it contained nothing to suggest that the Shareholders were, or appeared to be, beneficial owners of the Borrowers (and as already addressed it is clear that the Bank did not know, and the Shareholders were keeping such knowledge from the Bank many months later). Nor is there evidence that meetings with Mr Romakov (CFO of the Bank) on 21 December or her meetings the previous day with Mr Vartsibasov, Mr Iskandyrov and Ms Postnov yielded any such information.

1349. On 22 December 2014, the Bank was formally placed in temporary administration, with Sergey Trofimov of the DIA as temporary administrator. As Mr Popkov explained in his first statement, on or around 25 December, the DIA published an initial express valuation report in which they concluded that the Bank had lost all its capital and that the "hole" in the Bank's balance sheet at that preliminary stage was estimated to be about RUB67.8 billion (about US$1.1 billion). However, as Mr Popkov explained, Otkritie had no involvement in this report and the DIA's recommendation was for a "comprehensive review of the Bank's loan assets".

1350. On 24 December Ms Dolenko was sent an Otkritie prepared report on the liabilities of the Borrowers. It is clear that this was a preliminary report involving a brief internal analysis of the Bank's loan portfolio. It referred to certain borrowers being "affiliated with the Bank", but everything needed to be confirmed. Whilst she was asked questions in cross-examination in relation to particular companies (including Baymore) she was consistent in her evidence that she did not know it was a technical company until the 29 April 2015 report. As at 25 December Ms Dolenko was still assembling personnel required for the temporary administration. On 26 December Ms Dolenko met with Mr Popkov, which was followed by an email of 27 December 2014 with a "to do list" which referred to a "verification of off balance books" and particular Borrowers being decided as "problem assets" and reference to a "non-official" perimeter of the Bank (when in fact, as I have found, the whole offshore network was for the benefit of the Shareholders).

1351. The Shareholders seek to place much reliance on a CBR letter dated 29 December 2014 to the Russian Minister of Internal Affairs which stated, amongst other matters:-

> "The causes of financial difficulties of NB TRUST (OJSC) were the actions of the owners and the management of the Bank performed during a long period of time, including those aimed at withdrawal of assets from the Bank, concealing of long-term assets using the schemes of funding of the borrowers that did not carry out any actual business activity, as well as financing of investment projects, the implementation of which was performed in violation of the scheduled dates, which resulted in failure to obtain incomes for timely servicing of the debt on credit resources from the Bank.
> …
> According to the Bank of Russia, these facts give reason to believe that the actions of the former management and owners of the Bank contained criminal offences as set out in the relevant articles of the Criminal Code of the Russian Federation."

1352. These are very high level statements that are not justified within the content of the letter. Mr Popkov's evidence is that he/Otkritie did not provide any information on which the CBR's conclusion could be based and he was unaware of the letter at the time, and

only became aware of it in Spring 2015. Equally Ms Dolenko did not see the letter, and she was not aware of the basis on which the CBR had asked for a criminal investigation to be opened. For his part Mr Popkov was himself not aware of anyone in the temporary administration proving information to the CBR about potential criminal offences. The precise source of the information is not clear. Ms Dolenko thought that the CBR and the DIA carried out a joint inspection and the letter was the result of it. For her part Ms Podstrekha (who was not involved in drafting the letter) thought it was based on materials of the temporary administrators. Whatever its source the statements were, as noted, at a very high level.

1353. Whilst it is apparent from Mr Popkov's cross-examination that by the end of December 2014 he knew about the existence of certain of the companies in the offshore network and that some had a business whilst others had the characteristic of technical companies, that evidence does not demonstrate that he knew that such companies were owned by the Shareholders (as addressed above that only came out after Mr Worsley's documentation was provided in November/December 2015), nor that any particular loans were irrecoverable (and indeed, as already addressed above defaults had not yet occurred). Nor is the evidence that he communicated such knowledge as he had to Ms Dolenko.

1354. So far as Ms Dolenko's knowledge is concerned, I am satisfied that her state of knowledge at the end of December 2014 was as set out in the following answers, at a time when the investigations into the portfolio were only to take place in February/March 2015:-

> "A. In December 2014 we were exclusively dealing with the operational activity and the preparation of the comprehensive inspection. All those facts that were uncovered, you and I, we discussed them before. These were the 11 borrowers, affiliated to the Bank, and other conditions of the credit portfolio, which was viewed by us as dubious or spurious. The whole process of the studying of the portfolio occurred later on, in February and March of 2015. In December 2014 there was no such information with us, confirmed information with us.
>
> Q. When, Ms Dolenko, do you say that you personally reached the conclusion that it was very likely that the shareholders had caused loss to the Bank by causing loans to be made to the borrowers in issue in these proceedings?
>
> A. The problem debt group started working in January. I think that the first results of the inspection in relation to each separate asset were received by us, not earlier than the end of February/beginning of March 2015."

1355. It is also clear that this answer was directed at the investigation, not at knowledge or belief that it was very likely that the Shareholders had caused loss to the Bank (it being clear that the Bank was unaware of such matters until after sight of Mr Worsley's

documents – and information about ultimate beneficial ownership was being actively kept from the new administrators in the meantime, as addressed above).

1356. On 15 January 2015 the CBR issued a press release that made high level unparticularised references to "long-lasting actions of the former owners and management of the bank", "schemes" and "asset diversion" . As Mr Popkov rightly pointed out in the evidence, it contained "no specific detail from the Central Bank with regard to what specific assets were siphoned off, what schemes were implemented" and he confirmed that it was not something they were given. Perhaps unsurprisingly a number of years later, he could not even recall seeing it. There is no suggestion (and it was not put to Mr Popkov) that the information was passed to the CBR by anyone on investigation team. Once again at this stage the administrators did not have the requisite knowledge of harm or of harm attributable to the Shareholders – as already addressed that came much later. Certainly, Ms Dolenko was not herself of the view, at the end of January 2015, that there had been "asset diversion" to the Shareholders stating, when this was put to her, that *"No, this is not the case"* (and it not put to Ms Dolenko that such answer was untrue). I am satisfied that she was not of such a view at the time.

1357. On 18 January Mr Popkov emailed Ms Dolenko with a list of borrowers (including Borrowers in the present case). The email contained a spreadsheet of assets. It is clear that at this time the view being taken by Mr Popkov was that assertions from ex-Bank employees needed to be verified by documentation, and that at this stage there was no knowledge of actual losses or actual wrongdoing by the Bank, but rather assumptions that monies had been lost or siphoned off as well as assumptions as to whom loans were associated with (though again without actual knowledge thereof). The need for matters to be verified was stressed by Mr Popkov in his contemporaneous email to Ms Dolenko:-

> "I won't have time to rewrite Massarskiy's statement before tomorrow. It contains errors.
>
> There are descriptions written by Marat Iskandyrov, Dmitry Postnov and Grigory Vartsibasov on:
> Cryloni, Oldehove, MDM-Leased Companies, RCP and Willow River, Personnel and Partners, interbank loans at
> the bank Trust Ukraine, Law and Business and BusinessAsset, PhosAgro
> Stivolon [sic] – the description from Romantsov – is very weak.
>
> <u>If you want, I can spam you with these descriptions. However, I think that this all needs to be verified by the lawyers and our risk and credit employees.</u> All the descriptions have been transferred to Marina Ivanova and as and where necessary to Denis Teterin, Alexander Fokin, Marianna Magtesian: the people who are appraising Trust's assets.
>
> There is no description about Priangarsky Wood Processing Complex – Matyunina's people were working on this.
> She has/they have the status
> For the time being there is no description about Stroyekologhiya, Agalid Holdings, Sakhalin Building, Ukraine Estate Management, Yaposhka."
>
> (emphasis added)

1358. As I have already noted it was only on 13 February 2015 (i.e. less than one year before the action had commenced) that the Shareholders met with Mr Popkov, Mr Aganbegyan and Mr Vadim Belyaev in London, and it was not until around 25 February 2015 that Mr Worsley even met with Mr Popkov, but even then the nature of the balance sheet management scheme was not disclosed still less what forms the subject matter of the Bank's claims, and as noted it was not until after the settlement with Mr Worsley in November 2015 that the documentation was available that showed the true position. Equally, and as already addressed, demands for repayment in respect of loans to many Borrowers were first sent on 20 February 2015 and to many others later still with the result that it was not until later dates that the existence of irrecoverable loans was known.

1359. In the above circumstances, and for the reasons given, I am satisfied and find that, in relation to Issue 65.2, the DIA and Ms Dolenko did not discover the harm in the relevant sense before 12 February 2015 (or indeed 8 April 2015) and it was not until after receipt of Mr Worsley's documentation following the settlement with Mr Worsley in November 2015 that harm as a result of the wrongdoing of the Shareholders was known to the Bank.

1360. Accordingly, in the above circumstances, and for the reasons given, harm had not been revealed to the Bank for the purposes of Article 392 of the Labour Code more than a year before any relevant commencement date (Issue 65).

P.5 Restoration of the Limitation Period (Issue 67)

1361. This issue does not arise given my findings in relation to Issues 64 and 65. A missed one year limitation period under the Labour Code can be restored if there are "valid reasons" why the claim has not brought in time. It is common ground that "valid reasons" must amount to exceptional circumstances, not dependent upon the will of the employer and beyond the employer's control that prevented it from filing a claim.

1362. The initial wiping clean of computers, the destruction of electronic Columba documentation and the ongoing concealment of the ultimate beneficial ownership of the companies throughout July and August, all meant that the Bank was deprived of the overall picture as to the fraud perpetrated on it until after receipt of the Worsley documentation in November 2015, and I have found prevented the Bank from having the requisite knowledge of harm caused by the Shareholders' wrongdoing. As such the documents of which the Bank were deprived were relevant and needed and it was Dr Rachkov's evidence that this could prevent time running, Dr Gerbutov agreed that this would be so if the actions deprived the claimant from having the relevant knowledge of harm.

1363. A consideration of this issue involves identification of when the requisite harm was known to start time running, but it does not follow that fraud or concealment does not continue to be relevant and operative after harm is known. If, contrary to my findings, the harm was known before November/December 2015, I am satisfied that the factors I have identified were not dependent upon the will of the Bank and were outside its control and amount to exceptional circumstances whereby there are valid reasons why the claims were not brought in time (on this hypothesis), and the Court should restore the limitation period and allow the claims to be brought (if, contrary to my findings) they are otherwise time-barred (Issue 67). I have no doubt that a Russian court would reach the same conclusion given the wholesale destruction of electronic data, and concealment on the part of the

Shareholders which I am satisfied was designed to thwart, or delay any claim against them, and which dictates that the claims ought not to be time barred on the applicable principles.

Q. ASSETS HELD BY THE SHAREHOLDERS' WIVES (ISSUES 68-70)

Q.1 Introduction

1364. At the time of applying for the WFO the Shareholders' wives were added as *Chabra* defendants. The ancillary asset disclosure ordered in relation to the WFO required the Shareholders and their wives to provide information in relation to asset transfers between them. The Bank says that the resulting disclosure provided evidence of instances where the Shareholders had either purchased assets with their own funds but had their wives registered as the sole owner, or transferred their assets into the names of their wives for no consideration, it being submitted that such actions were wrongful attempts at judgment proofing. The Bank also refers to the timing of such transfers either prior to collapse (when the fraud was operative) or after the collapse at a time when the Shareholders knew that they would be facing claims and their assets would be at risk.

1365. The Bank submits that assets held in the name of the Shareholders' wives or transferred to them were intended by the Shareholders to be, or remain, beneficially owned by the Shareholders so that the transfers of money and purchases of profit were made to the recipient as nominee, or as trustee for the Shareholder so that he retained his beneficial interest in the assets. In particular the Bank submits:-

(1) That such assets are held on resulting trust for the relevant Shareholder (see *Lewin on Trusts* 19th edn. at 9-006-011, 9-019-029 and 9-036-040) – this type of analysis being based on the application of ordinary principles of property law – see *Prest v Petrodel Resources* [2013] 2 AC 415, and/or

(2) Any purported transfers were "shams" in the sense that expression was used in *The Tjaskemolen* [1977] 2 Lloyd's Rep. 465 on the basis that there was no genuine intention to pass the beneficial ownership of the property,

1366. Alternatively, the Bank submits that the "transactions" by which the assets came to be held in the names of the Shareholders' wives should be set aside pursuant to section 423 of the Insolvency Act 986 on the grounds that they were transactions for no consideration (and therefore at an "under value") intended to place assets beyond the reach of the Bank and/or other parties who might bring a claim against the Shareholders in respect of their fraud.

1367. In relation to (1) above, it is submitted on behalf of Mr Yurov that as regards the family home (Oxney Court as addressed below) a resulting trust analysis no longer applies to modern socio-economic conditions*: Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432; *Jones v Kernott* [2011] UKSC 53; [2012] 1 A.C. 776. Instead, a common intention constructive trust applies, which considers the spouses or partners' intentions and relations, beyond solely contributions to the purchase price - see *Lewin on Trusts* 19th edn. at paras 9-062, 9-072, 9-085–9-088, 9-090.

1368. A point also made on behalf of the Shareholders is that as between spouses a presumption of advancement arises – see *JSC BTA Bank v Ablyazov* [2016] EWHC 3071 (Comm) at [76]-[77], *Lewin on Trusts* 19th edn. at paras 9-001-9-011 and *Snell's Equity* 33rd edn. at para 25-008 whereby the transfer of legal title is intended to carry with it the transfer of beneficial ownership (i.e. the transfers are presumed to be gifts). The burden

of rebutting that presumption is accordingly upon the Bank and it is said that the Bank has failed to do so in each case.

1369. Section 423 of the Insolvency Act provides, amongst other matters, as follows:-

> "423 Transactions defrauding creditors.
> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
> …
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
> (b) protecting the interests of persons who are victims of the transaction.
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

1370. The applicable principles in relation to section 423 of the Insolvency Act were recently considered in *JSC BTA Bank v. Ablyazov* [2018] EWCA Civ 1176. Among the points addressed was that the purpose of putting assets beyond the reach of creditors does not need to be the sole or dominant purpose of the transferor, and the Court rejected a suggestion that the prohibited purpose had to be a "substantial" purpose. As Leggatt LJ stated at [14]:

> "[T]here is no need to put a potentially confusing gloss on the statutory language. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that."

1371. The definition of a "transaction" in section 423 is set out in section 426 as including, *"a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly"*. In this regard any agreement or understanding between parties, whether formal or informal, oral or in writing is capable of being a "transaction" under s. 423 – see *Feakins v. DEFRA* [2007] BCC 54 at [76] per Jonathan Parker LJ. The Bank is accordingly right to say that a "transaction" can therefore include an arrangement between husband and wife by which property is purchased using the husband's funds but in the wife's name, so as to purportedly place it out of the reach of the husband's creditors.

1372. If the Bank has established an entitlement to relief under s. 423, the Court may make such order under s. 423(2) as it thinks fit for *"restoring the position to what it would have*

been if the transaction had not been entered into" and *"protecting the interests of persons who are victims of the transaction"*. As pointed out by Deputy Insolvency Judge Kyriakides in Johnson v Arden [2018] EWHC 1624 (Ch) at [92], the section "*is not limited to restoring the position of the [debtor], but to putting all the parties back into the position that they would have been in had the transaction not been entered into or the preference given. The exercise, therefore, that the court must carry out is restitutionary in nature, not compensatory*". In this regard it is submitted on behalf of Mr Fetisov that in relation to the assets concerning the Fetisovs it may be better to defer the question of remedy until after judgment has been given as to whether the transactions can be challenged under s.423.

Q.2 The Yurovs

1373. Mrs Yurova has lived in the UK since 2011. She and Mr Yurov have six children and she is a full time mother. She was employed by the Bank between 2001 and 2015 although it is not clear what she actually did for the Bank. She has no identified independent sources of income.

1374. The asset disclosure reveals that she is the sole registered owner of:

(1) The Yurovs' main residence at Oxney Court in Kent (purchased without a mortgage for £4.1 million in 2012);
(2) Two properties in Cyprus;
(3) Three flats in Chelsea (said to have a combined value of over £6 million) purchased on 5 September 2014, and 14 and 17 April 2015, and
(4) an investment with EFG Asset Management valued at £3 million.

1375. The Bank says that in the circumstances of the wrongful conduct that Mr Yurov knew he had perpetrated he also knew that he was likely to face claims in the future, and it is said the obvious inference is that the assets were formally registered in the name of Mrs Yurova to protect them from potential creditors, but they were in reality beneficially owned by Mr Yurov as to 100% (except for the Oxney Court family home in which it is accepted that Mrs Yurova is likely to have a 50% beneficial interest). It is also said that Mr Yurov's denials that this is the case should be given no weight given the findings I have made that he is not a witness of truth, and that I should reject his evidence, including that the assets were gifts which he made to provide for Mrs Yurova and their six children (his oral evidence including that some of the properties were purchased to generate income "*to support family life*" and that Oxney Court was purchased as a family home).

1376. Reference is made to Mr Yurov's evidence that all the assets acquired during the course of his marriage to Mrs Yurova are mutually owned. He explained that this was his understanding of the rights and duties of Russian spouses throughout the period 2012 – 2015 i.e.. that he held the assets in question jointly with Mrs Yurova. Thus, he said when cross-examined that he held the assets in question jointly with Mrs Yurova:

> "Q. Is your evidence to the judge now, though, that you always intended, in line with what you understood Russian law to be, that that wold be held 50:50 between you?
> A. It's not my intention – my understanding of the Russian law is that all the assets which family – not only assets, all the revenues which family as a family getting after

the marriage certificate was issued, and before if there was any divorce, that's a mutual property of the husband and wife and that's the Russian law'.
[…]
Q. And your wife didn't give you anything financially valuable in return for the money for these assets, did she?
A. No, according to – again, I'm not a lawyer but my understanding that such matter of the law works because according to the Russian law, the participation – sorry, the financial participation of the wife is to carry the family, carry the kids and for that reason she has a right to half of the assets. That's my understanding."

1377. Whilst I have only heard limited evidence as to the position in Russian law (Issue 70, and any case based on Russian law having fallen away, the same not having been pleaded), Mr Yurov's understanding would appear to accord with Dr Gerbutov's evidence which was that, *"Unless a marriage contract between spouses provides otherwise, all the assets received by the spouses during the marriage (including assets and incomes received by one of the spouses from his or her labour and business activities) constitute their common joint ownership irrespective of in whose name such assets were acquired. This is the effect of Articles 33 and 34 of the Family Code and Article 256 of the Civil Code"*.

1378. It is said therefore that when looking at the question of intention, the starting position is that Mr Yurov believed that he had only a 50% beneficial interest in the assets transferred to Mrs Yurova. Similar evidence was given by Mr Belyaev. To the extent that this reflected the position in Russian law, the position would logically be the same for all of the Shareholders.

1379. I do not consider the evidence given by the Shareholders in relation to a belief that they only held a 50% interest in assets transferred is subject to the (negative) conclusions I have reached as to the Shareholders' evidence generally in Section C.3 above, in circumstances where it is consistent with Dr Gerbutov's evidence and where no evidence has been adduced before me on behalf of the Bank that would justify me concluding that the position was in fact different either in terms of the Shareholders' belief or under Russian law (to the extent relevant). Accordingly, on the basis of the evidence before me I consider that the starting point is that assets would be owned 50% Mr Yurov and 50% Mrs Yurova.

1380. However the same logic does not apply as to whether the assets transferred were (as alleged by Mr Yurov) gifts to his wife. I have found Mr Yurov not to be a witness of truth and I do not accept his evidence in this regard. There is no need to register the Oxney Court family home in Mrs Yurova's name to provide for Mrs Yurova and their children. The fact that Mrs Yurova and the children live permanently in the UK and she held an investor visa allowing the family to reside in the UK whilst Mr Yurov commuted between there and Moscow are not strong reasons for the house being registered in her sole name. It is the family home (of which Mr Yurov too is an integral part) and I see no reason why 50:50 ownership (consistent with Russian law and how Mr Yurov believed assets were owned) would not achieve precisely that. The property was purchased in 2012 when (as addressed in Section F.2.5.3) the offshore network had been set up, and the Shareholders were already not acting in the best interests of the Bank or in good faith as I have found, and I am also satisfied that they knew that. In such circumstances the obvious inference, which I draw, is that the assets (which derive from Mr Yurov whether from his salary or

routed as described above) were put in Mrs Yurova's sole name to protect Mr Yurov's 50% beneficial interest/share from creditors in the event of legal action being taken against him in respect of his wrong doing in the future, and that Mr Yurov retained a 50% beneficial interest and beneficial ownership. In this regard I bear well in mind the presumption of advancement but I am satisfied that the burden upon the Bank has been discharged in this regard. I do not consider that it matters whether such 50% beneficial interest is held on a common intention constructive trust as opposed to a resulting trust. I do not consider there is anything in the Yurov's intentions and relations that leads to the beneficial interest being held on trust for Mr Yurov being anything other than 50%.

1381. The position is *a fortiori* in relation to the three properties in Chelsea (with a combined value of over £6 million) in circumstances where I reject Mr Yurov's evidence that they were gifts to *"generate income to support family life"* (which provides no explanation as to why they were in Mrs Yurova's sole name, again given that Mr Yurov is also part of that family life) and they were made on 5 September 2014 and 14 and 17 April 2015, in the former case very shortly before the Bank's collapse (and when there was a realistic prospect of the Bank collapsing into bankruptcy as the Shareholders, I am satisfied, knew) and the offshore network was in its final form (the Shareholders not having acted in the best interest of the Bank or in good faith with all associated dishonesty including Bank assets ending up in Shareholders' family trusts) and in the latter two cases when the Shareholders were in discussions with Otkritie about transferring various companies to the Bank after the collapse. In September 2014 and even more so in April 2015 the writing was on the wall that the Shareholders would face claims (indeed it is of course the Shareholders' case (albeit rejected by me) that the Bank knew all it needed to know from December 2014 onwards and as is known the Shareholders were concealing from the Bank ultimate beneficial ownership behind the nominee UBOs well into 2015).

1382. The contemporary position and the Shareholders' knowledge and belief at June 2014 (even earlier than the time of purchase) is, I am satisfied captured in Mr Worsley's email of 17 June 2014 from Mr Worsley to the private email addresses of Mr Yurov, Mr Fetisov and Mr Belyaev (the "how to carry the assets" email) that has already been addressed in section F.3 and section C.3.2 (where I rejected Mr Belyaev's evidence in relation to that email and his denial of knowledge acquired thereby for the reasons I there gave). It will be recalled that the email provided, amongst other matters, in terms which contemplated the collapse of the Bank:

> "If a corporate event comes, we close down and fire all of the team. The remaining assets (EG Billa) are run by Vassiliades (cheaper than having our own office if there are only 4 or 10 companies to manage). Bear in mind that the dead assets would fall into bankruptcy of the bank goes down, as no one could pay the interest payments. The good assets like Billa would be self supporting."

1383. In such circumstances the obvious inference, which I draw, is again that the assets (which derive from Mr Yurov whether from his salary or routed as described above) were put in Mrs Yurova's sole name to protect Mr Yurov's 50% share from creditors in the event of legal action being taken against him in respect of his wrong doing in the future, and that Mr Yurov has retained a 50% beneficial interest in such properties. Once again, I bear well in mind the presumption of advancement but I am satisfied that the burden upon the Bank has been discharged in this regard.

1384. The same is true in relation to the investment with EFG Asset Management and for the same reasons – there is again no reason why such assets (which it appears were provided from Mr Yurov's Bordier bank account) should have been in the sole name of Mrs Yurova despite having originated from Mr Yurov, and I am satisfied that Mr Yurov retained a 50% beneficial interest in such investments.

1385. So far as the two properties in Cyprus are concerned I can see no reason to distinguish these investments. It is pointed out that issues relating to rights in rem in such properties fall within the exclusive jurisdiction of the Cypriot courts – Judgments Regulation (recast) (EU 1215/2012), Article 24, and it is said that even if the Court formally has jurisdiction, it should be reluctant to decide issues relating to these properties in the absence of evidence of Cypriot law. I consider that it is appropriate that I make a finding (for the same reasons as set out above) that Mr Yurov has a 50% beneficial interest in those properties. How such interest is realised or registered may well raise enforcement issues which may involve Cypriot law or the involvement of Cypriot courts. Accordingly, I say no more about that in this judgment, though should further matters be within my jurisdiction they can be raised before me hereafter.

1386. Turning to the Bank's claim under section 423 of the Insolvency Act 1986 I am satisfied, and for the reasons already given, that the transfers satisfied the statutory purpose, namely for the purpose of putting Mr Yurov's assets (that is as to 50%) beyond the reach of his creditors, such transfers being for a prohibited purpose and as such transactions within section 423. I am satisfied that the inferences from the circumstances and timing of the transfers is that Mr Yurov and Mrs Yurova intended that Mr Yurov would retain his 50% beneficial interest or if the legal transfers were effective in equity they were transfers for the purpose of putting the assets beyond the reach of creditors – specifically the Bank. In terms of the relief to be granted under section 423(2) I will hear the parties after the handing down of judgment (if the same is not agreed).

C.3 The Belyaevs

1387. The Belyaevs' asset disclosure reveals that, amongst other assets, Mrs Belyaeva is the registered owner of government bonds with a value of £5 million. The evidence is that Mrs Belyaeva is a housewife, and her husband's evidence is that*, "any money which has come to Irina has come from me or has derived from her investments".* So far as the £5 million is concerned, Mr Belyaev states that the sums used to make these investments were "gifted" by him to his wife "in 2014 and 2015". As with Mr Yurov, Mr Belyaev's evidence was that he understood that all assets were held jointly with his wife, and I accept that evidence, so what is in issue is Mr Belyaev's 50% share and whether it was (as Mr Belyaev says) an irrevocable gift to his wife for the purpose of satisfying the requirements of Mrs Belyaeva under the UK Investor Visa Programme or whether there was no intention to transfer beneficial ownership. I heard evidence from both Mr Belyaev and Mrs Belyaeva on this matter.

1388. In the event the Belyaevs purchased a home in Connecticut, USA in October 2014. There was a pleaded issue as to a transfer of US$1.2 million in the context of the US Visa Program but I do not understand that to be pursued by the Bank. Their oral evidence was to the effect that, although they purchased their Connecticut home in October 2014, they

had neither the intention nor the opportunity at that time of settling permanently in the U.S as they had entered on tourist visas and the process of applying to stay permanently in the US was a complicated and uncertain process. Conversely, they had all that they needed in order to settle in the UK, the process was straightforward and Mr Yurov and Mr Fetisov were already in the UK. Nevertheless, they purchased their Connecticut home in order to have a base from which to spend time with their son who had started school nearby, and also as a real estate investment it being their intention at the time to settle in the UK. Mrs Belyaeva was also questioned about other matters (including in relation to a Moscow property). I did not find questioning other than in relation to the UK investment to be of any assistance to me when assessing her evidence.

1389. The evidence of Mr Belyaev and Mrs Belyaeva was that the £5 million was gifted by Mr Belyaev to his wife to allow his wife to apply for a UK investor visa. The UK government website states the current requirement for a UK investor visa to be £2 million, the threshold having been raised from £1 million in November 2014.

1390. The only documentary evidence in the form of a "memorandum of deed of gift" dated 14 October 2014 (it being the Belyaevs' evidence that, for the purposes of a UK visa application, the money had to be unconditionally gifted) provides as follows in relation to the considerably lesser sum of <u>£1.2 million</u>:-

> "The parties to this memorandum of deed of gift agree to share this information with the Home Office and will confirm the content of this document to the Home Office upon request… GBP 1.2 million was gifted to Irina Belyaeva and legal ownership of the funds was transferred to Ms Belyaeva on 14.10.14. This is an irrevocable gift to Ms Belyaeva from her husband Sergey Belyaev."

1391. Such sum of £1.2 million therefore at least bears some correlation with the amount required for a UK investor in the period up to November 2014. If, in truth, the remaining £3.8 million (or any part thereof) had been an irrecoverable gift from Mr Belyaev to Mrs Belyaeva <u>for the purposes of a visa application</u> then I consider it would have been documented in exactly the same way (given the need to prove the same to the Home Office) yet no such documentation has been disclosed.

1392. During cross-examination both Mr Belyaev and Mrs Belyaeva suggested that a larger sum of £5 million was invested because it would speed up the visa application process. Whilst there is some evidence from a website that if a greater sum is invested the application is processed faster, I did not find the explanation convincing, and I do not consider that this was the reason for Mrs Belyaeva investing £5 million. First, such an explanation is not supported by any documentation demonstrating such a gift, and any larger investment would surely require <u>the same</u> documentary proof of gift yet there is no similar memorandum of deed of gift in relation to the remaining £3.8 million. Nor, tellingly, is any such explanation proffered in either of Mr Belyaev's or Mrs Belyaeva's witness statement (as it surely would be if that explanation had been true given that such £5 million investment, and the reason for the same, was in issue). Nor is there any evidence in support of their evidence about what they were allegedly told by their British solicitors that if they invested £5 million they would be granted leave to remain within 3 years or to the effect that there was no reason for the gift of a larger sum to be evidenced in writing (which, in of itself, seems unlikely advice to give), and in such circumstances, I reject the explanation given.

1393. In the circumstances, and whilst I accept that £1.2 million of sums transferred by Mr Belyaev was by way of gift in contemplation of a UK visa application (albeit that the supporting evidence in that regard is itself limited) I reject the explanation given in relation to the remainder (£3.8 million). In the absence of any other credible explanation, and given the backdrop of the knowledge of the Shareholders of their wrongdoing, and the risk of the Bank's collapse, in 2014 (including as from June 2014 in the context of Mr Worsley's 17 June email to them), the obvious inference, which I draw, is that the £3.8 million (which came from Mr Belyaev's Bordier bank account) was transferred by Mr Belyaev to Mrs Belyaeva to protect Mr Belyaev's 50% interest in such monies from creditors in the event of legal action being taken against him in respect of his wrong doing in the future, and that Mr Belyaev retained a 50% beneficial interest in such monies, and I so find. In this regard I again bear well in mind the presumption of advancement but I am satisfied that the burden upon the Bank has been discharged in this regard. Accordingly, I am satisfied and find that Mr Belyaev retained a beneficial interest in 50% of the additional £3.8 million) i.e. £1.9 million, with the same being held on resulting trust for him.

1394. As I have already found, the contemporary position and the Shareholders' knowledge and belief at June 2014 (even earlier than the time of the transfer in November) is, I am satisfied captured in Mr Worsley's "*how to carry the assets*" email of 17 June 2014 from Mr Worsley to the private email addresses of Mr Belyaev as well as that of Mr Yurov and Mr Fetisov (and I have already addressed in Section C.3.2 why I have rejected Mr Belyaev's evidence in relation to that email and his denial of knowledge acquired thereby for the reasons I there gave). I am satisfied that he was aware of it and did know by October 2014 that the Bank might collapse. I also find the suggestion incredible that Mr Belyaev did not discuss such matters with his wife, and even making due allowance for the fact that she was busying herself with family affairs and her son's new school in the US, I do not find it credible that the perilous state of the Bank would not have been a topic of discussion between them. I am satisfied that they were both aware of the Bank's risk of collapse at the time of the transfer in October 2014.

1395. In relation to the Bank's claim under section 423 of the Insolvency Act 1986 I am satisfied, and for the reasons already given, that the transfer satisfied the statutory purpose, namely for the purpose of putting part of Mr Belyaev's assets (that is as to 50% of the remaining £3.8 million) beyond the reach of his creditors, such transfer being for a prohibited purpose and as such a transaction within section 423. I am satisfied that the inferences from the circumstances and timing of the transfer is that Mr Belyaev and Mrs Belyaeva intended that Mr Belyaev would retain his 50% beneficial interest and that the transfer (as to 50%) was a transfer for the purpose of putting assets beyond the reach of creditors – specifically the Bank. In terms of the relief to be granted under section 423(2) I will hear the parties after the handing down of judgment (if the same is not agreed).

C.4 The Fetisovs

1396. Whilst the Bank also advanced a pleaded case in relation to cash transfers through Bordier and Trust bank accounts, at trial (and in closing) the Bank's case was limited to the transfer by Mr Fetisov to his wife (Ms Pischulina) in 2015 (after the Bank's collapse) of the following assets, each of which was for no consideration (as Mr Fetisov confirmed in evidence):-

(1) His 50% interest in a residence in Oxshott, Surrey (bought in 2012 for £4.25 million) (the transfer taking place in July 2015).
(2) His 50% interest in a £1.6 million flat in Chelsea (the transfer occurring in August 2015); and
(3) His 50% interest in his *dacha* outside Moscow (which had been bought for US$4.25 million).

1397. These transfers all took place in the summer of 2015, i.e. after the collapse of the Bank and at or very soon after the time of the breakdown of discussions between the Shareholders and Otkritie. It is inherently improbable, in my view, that the timing of these transfers were coincidental. I am satisfied that by this stage Mr Fetisov knew he would be facing claims from the Bank and the obvious inference is that these steps were taken as an (admittedly unsophisticated) attempt to put particular assets outside the reach of the Bank and any judgment obtained by them. I reject Mr Fetisov's evidence that he did not believe that he faced a claim at that time. He knew what he had done, and although he had been cooperating with Otkritie I am satisfied he would have known (as was the case) that he would face a claim in respect of his wrongdoing.

1398. Mr Fetisov's witness evidence was to the effect that these transfers were gifts to his wife made for the purpose of "*making provision for my wife in circumstances where I held substantial other assets in my own name*", and he denied that Ms Pischulina was his nominee stating that, *"it's absolutely not the truth. I think it's just a severe misrepresentation of the relationship that I think normally people have with their wives but I disagree with you, that's not reality".* When cross-examined he suggested in relation to the English properties that he had gifted Ms Pischulina the money to purchase them originally in order to comply with tax requirements and the transfer of his legal interest was characterised as, *"just restoring the status quo because she paid for these properties in any way"*. However, such evidence does not feature in his witness statement (as it surely would if it was true), nor is it corroborated by any contemporary documentation.

1399. I was unimpressed with Mr Fetisov's reliance on the fact that he did not transfer his Islington townhouse to his wife which it is suggested he would have done had he been seeking to judgment proof himself. I do not consider that this follows at all – the fact that he did not transfer other assets does not mean that the assets he did transfer were genuine gifts – had he transferred his share in the Islington house that would have been yet further evidence of attempted judgment proofing. Nor did Ms Pischulina give evidence in support of the alleged reasons for the transfers which one would assume she could have done had such evidence been true. Mr Fetisov is not an honest witness for the reasons that I have given and I have no hesitation in rejecting his account as a recent invention.

1400. In all the circumstances the obvious inference, which I draw, is that the transfers were to protect Mr Fetisov's 50% interest from creditors in the event of legal action being taken against him in respect of his wrongdoing in the future, and that Mr Fetisov has retained a 50% beneficial interest in such properties, which I find to be the case. Once again I bear well in mind the presumption of advancement but I am satisfied that the burden upon the Bank has been discharged in this regard.

1401. In relation to the Bank's claim under section 423 of the Insolvency Act 1986 I am satisfied that the transfers satisfied the statutory purpose, namely for the purpose of putting part of Mr Fetisov's assets (that is his 50% interests in the properties) beyond the reach of

his creditors, such transfer being for a prohibited purpose and as such a transaction within section 423. I am satisfied that the inferences from the circumstances and timing of the transfer is that Mr Fetisov and his wife intended that Mr Fetisov would retain his 50% beneficial interest in such properties and that the transfer was in each case a transfer for the purpose of putting assets beyond the reach of creditors – specifically the Bank. Various points are made on behalf of Mr Fetisov which it is said impact upon the appropriate relief if (as I have found) the Bank has established an entitlement to relief under s. 423. In such circumstances I will hear the parties after the handing down of judgment as to the appropriate relief to be granted under section 423(2) (if the same is not agreed).

R. THE LOANS AND TRANSACTIONS
R.1 INTRODUCTION

1402. The Loans and Transactions have already been addressed, and findings made, in respect of various of the Issues already addressed, in particular in Section F (companies in the offshore network), Section G (the nature of the Loans and Transactions and the Shareholders'' involvement), Section I (CBR) and Section K (the nature of the "Balance Sheet Management" exercise) as well as Section N (causation and quantum issues). Such matters and associated findings will not be repeated in this Section, and reference should be made back to previous sections for the relevance of the Loans and Transactions and my findings in respect of the same to particular issues. Further, given my overall findings in relation to the issues for determination, it would serve no useful purpose to descend to the level of detail of each and every use to which loans were put (where the same is even ascertainable which often it is not) as they passed through a myriad of companies in the offshore network, whether in the context of balance sheet management (in the case for example of Erinskay and Baymore) or in concealing the ultimate beneficial ownership of the Shareholders (ultimately of all entities through the personal family trusts, as I have found).

1403. The sections that follow, accordingly, identify the Loans and Transactions and summarise their relevance to particular issues arising, and contain associated findings but do not address the Loans and Transactions in the minutiae of detail devoted thereto by the Bank in Volume 2 of the Bank's Closing Submissions in support of their associated submissions on the various issues arising, although I confirm that I have taken the same into account, as I have the associated submissions of Mr Yurov in respect of the Loans and Transactions, together with the additional submissions of Mr Fetisov (Mr Belyaev adopting the submissions of the other Shareholders in respect of the Loans and Transactions). My overall conclusions are as expressed in the particular sections of this judgment to which reference should be made.

R.2 ERINSKAY AND BAYMORE

R.2.1 Common Ground

1404. The "Common Ground" in this Section and the equivalent Section in respect of each of the Loans and Transactions, recounts the Agreed Facts and Matters in relation to those Loans and Transactions, as agreed by the parties.

1405. Erinskay and Baymore were pure "balance sheet management" companies that were not associated with any underlying business and owned no real property. The companies used the money loaned to them to purchase Russian Government bonds which were then sold to third parties pursuant to REPO transactions. The proceeds of those REPOs were transferred to other companies in the off-balance sheet structure; those companies, in turn, used the funds inter alia to make payments of interest / capital to the Bank on other loans.

1406. The Bank lent Erinskay a total of US$57.1 million, in two loans approved by the CC (chaired by Mr Yurov on both occasions; the minutes record that Mr Fetisov also attended the first meeting, but this is disputed by Mr Fetisov); and RUB 3.76 billion, in four loans approved by the CC (the first two chaired by Mr Yurov; Mr Fetisov is said to have voted *in absentia* at the second, but this is disputed by Mr Fetisov; and the third and fourth stated to have been chaired in absentia by Mr Fetisov, but this is not admitted by Mr Fetisov).

1407. The Bank lent Baymore a total of US$61.2 million, in two loans approved by the CC (chaired by Mr Yurov on both occasions; the minutes record that Mr Fetisov also attended the first meeting, but this is disputed by Mr Fetisov); and RUB 3.35 billion, in six loans approved by the CC (the first three chaired by Mr Yurov, with Mr Fetisov stated to have also voted in absentia on the third, but this is disputed by Mr Fetisov; and the last three said to have been chaired in absentia by Mr Fetisov, but this is not admitted by Mr Fetisov). None of the loans had collateral.

R.2.2 Mr Fetisov's attendance at CC meetings and denials in relation to Erinskay and Baymore

1408. As is apparent from the above Common Ground Mr Fetisov denies attending a number of the CC meetings. I have already addressed this aspect of his evidence at length in Section C.3.3. As I there concluded, and for the reasons there given, I am in no doubt whatsoever that the documentary record, and the evidence of Mr Popkov (which went unchallenged in this regard), was accurate as to presence and approvals, and that Mr Fetisov's evidence in cross-examination was a dishonest attempt to deny he had approved and voted for every decision which the documents showed he voted for (regardless of where he was when he did so, or indeed when he did so). This was another example of Mr Fetisov obfuscating and attempting to distance himself from the CC decisions that are in issue. I am satisfied that his professed lack of recollection of attending any CC meetings where Erinskay and Baymore were discussed (as pursued even in his Closing Submissions) was untrue, and I am also satisfied that where there were *in absentia* polls he also signed these (no doubt on his return if he was in fact away at any relevant time).

1409. Equally, and as also addressed in Section C.3.3 above, another unsatisfactory aspect of Mr Fetisov's evidence were his attempts in cross-examination to distance himself from "balance sheet management" (contrary to his acknowledgments of such practice in his

Defence and witness statements). As I found in Section C.3.3, and for the reasons there given, I am satisfied that Me Fetisov's last minute denial in cross-examination that he knew at the time that the funds lent to Erinskay and Baymore had been used to service and/or repay loans taken out by other companies was simply untrue, and that Mr Fetisov knew perfectly well what these companies were used for.

1410. I would only add at this point that Mr Belyaev's denials of knowledge of "balance sheet management" were equally unconvincing and I am satisfied he had knowledge of such matters, as addressed in Section C.3.2 above.

R.2.3 Discussion

1411. It is common ground that Erinskay and Baymore were, indeed, pure "balance sheet management" companies that were not associated with any underlying business and owned no real property, and were the two largest such companies. The nature of the balance sheet management has been addressed in Sections G.3.1 and G.3.2 (balance sheet management), and Section M (Russian Law) and further reference is made in this Section to particular "balance sheet management" companies. I have found that the Shareholders acted dishonestly, as well as unreasonably and not in the best interests of the Bank, in relation to "balance sheet management", the accounts and misleading the CBR. Equally in relation to the individual Loans and Transactions (and associated pattern of behaviour) I am satisfied that these involved multiple and repeated breaches of the Shareholders' duties, such Loans not being reasonable, or in the best interest of the Bank or in good faith, such lending being done without appropriate scrutiny, due diligence or disclosure, being (as the Bank notes) waved through the Credit Committee (often by absentee ballot in circumstances where the contemplated requirements for such a ballot do not appear to have been met) without any appropriate scrutiny, due diligence or disclosure of personal interest, coupled with the inappropriate extension of loans as repayment deadlines approached without any disclosure of the Shareholders' personal interests or benefit to them.

1412. Equally, the balance sheet management scheme was agreed between, and implemented at the direction and with the knowledge of, the Shareholders, and involved (to the knowledge of the Shareholders) the use and development of the offshore network for that purpose, as well as for the purpose of acquiring and financing (using the Bank's money) personal interests in development and other business projects (as furthered, following the recruitment of Mr Worsley, by an even more opaque and labyrinthian offshore network, with fake UBOs to conceal Shareholders' beneficial interests). As I have also found, the Shareholders were acting dishonestly and in bad faith in that regard (as addressed in Section G.3.1).

1413. The Loans and Transactions in respect of Erinskay and Baymore were an integral part of the inappropriate "balance sheet management" that took place and are illustrative and supportive of many of my associated findings. As the Bank puts it, and as I am satisfied was the case, their very *raison d'être* was the falsification of the Bank's accounts and the deception of the CBR and other third parties. This was achieved through a combination of a pretence that Erinskay and Baymore were owned by outside investors who, in reality, were Mr Worsley's "UBO nominees" installed as a front to conceal the real owners of the companies (the Shareholders as I have found), the manipulation of the companies' accounts which were "corrected" using fake deals to generate a profit and create the

misleading impression of the companies conducting a real business; and generous loans from the Bank on uncommercial terms, with no collateral or genuine means to repay, each of which was advanced with the express approval of at least one of the Shareholders. I am also satisfied that the Shareholders, and each of them, knew of all such matters.

1414. As addressed below, the proceeds of the loans were then recycled through the purchase and sale (repos) of Russian government bonds. Contrary to the Shareholders' suggestion that any legitimate advantage was received through the interposition of Erinskay and Baymore, I am satisfied that this increased the costs of the operation. As Mr Popkov explained in his second witness statement:-

> "22. Furthermore, REPO'ing OFZ securities on the Bank's account would have been cheaper than REPO'ing the same securities on behalf of the companies because the Bank could deal direct with the market, unlike the companies. Therefore, a "switch" fee of between 0.5% to 0.7% per trade was payable by the companies (which caused a significant leakage of funds from the Bank).
>
> 23. Another important point (which Mr Davidson appears to overlook in Davidson 3) is the carrying cost of the OFZ transactions (i.e. the cost of the funds). Average yields on OFZ securities were about 8% per annum, whilst REPO rates (i.e. borrowing costs) were generally much higher."

1415. Mr Fetisov was unable to offer any explanation when cross-examined as to how such practice was advantageous to the Bank stating, *"I don't know how it was exactly advantageous"*.

1416. It is an obvious point, but if there had been any genuine intention to conduct profitable bond-trading activity for the benefit of the Bank, I am satisfied that this could and would have been done by the Bank itself through its proprietary trading desk. Instead, cash was lent to Erinskay and Baymore to enable them to buy and repo bonds – as a result of which significant extra costs were incurred. Certainly, there was no legitimate commercial rationale for their use, or the transactions they entered into – as would have been obvious to any compliance department at a third party bank. As Mr Worsley asked in June 2012, *"Look at it [from] a compliance perspective at Standard Bank: Why on earth does BC [Black Coast] take cash, buy bonds from a private source, then repo those bonds to get cash back and take market risk….?"*

1417. The reason for the use of Erinskay and Baymore is clear enough – the purpose was to conceal the link between the source of the funds (the Bank) and their intended use (the inappropriate balance sheet management that I have found as well as the transfer of monies into companies ultimately beneficially owned by the Shareholders), to deceive the CBR and other third parties. This was graphically acknowledged by Mr Yurov in the document he sent to Mr Belyaev and Mr Fetisov in June 2015 that I have referred to and quoted at length, Erinskay and Baymore being among "*a few dozens of foreign companies"* established*, "in order not to record previous years' losses from banking operations in its report to the CB"* and as was also stated a *"decision was made to start submitting false accounts to the CB…"*

1418. Nor do I consider that the evidence demonstrates that Erinskay and Baymore generated profits from trading securities or that if there were any such profits those profits

were ever received by the Bank. The reality is well illustrated by the so-called "Baymore Report", produced as part of the Shareholders' unsuccessful tracing exercise:-

> "In 2014 Baymore Investments Limited borrowed, in total, RUB2.892.020.000, under loan agreements. RUB2.520.000.000 was borrowed from NBT Bank and RUB373.940.035 from other related companies.
>
> From these borrowings RUB931.320.000 were used to acquired securities directly from the current account, RUB35.900.000 were used for payments back to NBT bank and the remaining amount of RUB1.926.780.000 was deposited into the broker's account.
>
> The funds deposited in the NBT Broker account were used to acquire 1.944.000 securities at a total cost of RUB1.830.578.140. By the end of 2014 all the securities were sold at a loss of RUB179.471.020.
>
> These securities were placed under daily REPO agreements. Due to this, there is an overload of daily transactions so it was very impractical and time consuming to analyze the results of each transaction separately. Instead, a monthly analysis of the broker's report has been prepared which shows the breakdown of the total inflow and outflow of cash as well as net gain or loss from the trading in securities.
>
> As per our analysis net interest paid on REPO agreements amounts to RUB454.890.029 and no other loss/gain on REPO agreements incurred due to the fact that the REPO transactions were opened and closed on the same day."
>
> (emphasis added)

What the loans were used for is addressed in due course below, after first considering the loans themselves.

1419. Erinskay and Baymore, like other companies in the offshore network were ultimately beneficially owned by the Shareholders, but that fact was concealed from the CBR and indeed the world in general by the use of "nominee UBOs" supplied by Mr Worsley. Erinskay and Baymore were incorporated by Mr Vassiliades on 11 and 12 October 2011 respectively, on the instructions of Mr Worsley. Erinskay was seemingly "owned" by Mr Laws through Serendale Holdings Ltd ("Serendale"), a BVI company incorporated on 16 September 2011. He was later replaced with a Mr McBean. Baymore was "owned" by Mr Chadwick / Mr Rowe through Haverson Holdings Ltd ("Haverson"), another BVI company incorporated on 16 September 2011. Mr Rowe's "ownership" came later. These companies were not controlled by the Bank (as the Shareholders allege) but by the Shareholders. When the music stopped post collapse of the Bank, monies did not return to the Bank, and the Bank had to serve demands, issuing proceedings in the Russian courts, and seeking to enforce the resulting judgments, to little or no avail.

1420. The chain of purported ownership was as complicated and changing as occurred with the other offshore entities. Thus, Mr Laws was (through Serendale) the "nominee UBO" of Erinskay from the date of incorporation. On 21 September 2012, his "beneficial interest" in Serendale was transferred to another recently incorporated BVI company, Dramcon, nominally owned by Mr Worsley (through Compass Nominees Ltd). Mr

Worsley held the shares in Dramcon on trust for Arlingham, one of the Shareholders' personal vehicles. Less than a month later, on 18 October 2012, yet another BVI company was interposed in the ownership structure: Lupin Group Investments Ltd ("Lupin"), in whose favour Compass declared a trust over its shareholding in Serendale. Mr Worsley directed Lupin to be "owned" by Mr McBean, through Delta Nominees Ltd. The Shareholders' ownership of Erinskay remained unchanged (albeit it was now held through Brora, which eventually formed part of their personal trust structures). On 19 June 2013, Ms Fotiou (the Cypriot-level nominee shareholder of Erinskay) was replaced by Ms Alexandrou. The chain of ownership up to the Shareholders was maintained by a fresh Deed of Trust in favour of Serendale.

1421. Alfa Capital (a Cypriot counterparty bank) was itself suspicious when it carried out its KYC due diligence exercise in July 2013 noting the unusual, "*very Complex Shareholding Structure, with a lot of nominees and trust agreements*", the involvement of companies incorporated in "*High Risk jurisdictions (Belize)*", and the absence of publicly available information on the purported beneficial owner of Erinskay (Mr McBean).

1422. Mr McBean was, it appears, the owner of a road construction company in Zimbabwe. Alfa Capital was to approve Erinskay on the basis, at least in part, of false information provided by Mr Worsley's staff, including a fake "biography" for Mr McBean, to justify Erinskay's source of capital. The CBR was also deceived about the beneficial ownership of Erinskay, having been informed in around September 2014 that the beneficial owner was Ms Alexandrou.

1423. Baymore was also owned through a similar labyrinthian structure with its own UBOs, initially Mr Chadwick and (later) Mr Rowe, Mr Worsley's gardener, who was also the "nominee UBO" of LLC5, Polendor Finance Ltd ("Polendor") and Swaldon Holdings Ltd. Mr Rowe was misrepresented to the Bank's auditors (Deloitte) as a wealthy businessman with a *"long track record of successive investments on real estate market"*. There was a purported 'transfer' by Mr Rowe of his interest in Baymore to Ms Ashmore (another UBO procured by Mr Worsley). This was effected through a "sale" by Haverson of its interest for €1,000 to Salterns Cove Capital Ltd ("Salterns": another BVI company beneficially owned by the Shareholders through Brora). The "sale" took place in December 2012, when Mr Vassiliades had been informed by Mr Worsley that various companies, including Baymore, would be transferred to "new investors". In this case there was no need for further false documentation involving the active participation of the Shareholders (who each signed documents falsely pretending to dispose of their beneficial interests in Mourija, Oldehove, Crylani and StroyEcologiya's parent company, Yeleran).

1424. As with Erinskay, it was necessary for Mr Worsley and his staff to tell various lies to Alfa Capital in July/August 2013 when they were doing KYC, to get approval for Baymore. Mr Worsley pretended that Mr Rowe and Ms Ashmore were real investors who had concluded a genuine transfer six months previously*: "[A]t the time, the company had negative NAV of 150K, and frankly, Rowe wanted out of the trades that he had made, whilst Ashmore believed in the positions. Hence the sale"*. All untrue, and all dishonest. Again, I am satisfied the whole scheme of companies was designed not only to further inappropriate "balance sheet management" but also to conceal the Shareholders' ownership of both Baymore and Erinskay.

1425. Similarly, in December 2013, a *"strategy document for Erinskay and Baymore"* was commissioned by Mr Worsley *"in order to satisfy the CBRF requests about what Erinskay*

and Baymore do". In reality it was hardly commissioned, and certainly not in respect of these entities – it was just copied and pasted from a document prepared for an entirely different entity (Florin).

1426. Erinskay received six loans from the Bank:

(1) 24 April 2012 (loan 30/K/0348): USD 28.8 million;

(2) 6 June 2012 (loan 30/K/0371): USD 28.3 million;

(3) 30 July 2013 (loan 30/K/0414): RUB 830 million;

(4) 20 March 2014 (loan 30/K/0434): RUB 950 million;

(5) 25 July 2014 (loan 30/K/0461): RUB 630 million;

(6) 11 November 2014 (loan 30/K/0470): RUB 1.8 billion (although only RUB 1.35 billion were drawn down).

1427. In turn (as addressed below) Baymore received eight loans. The Shareholders' interests in Erinskay and Baymore were not disclosed, the Loans were not properly scrutinised, their terms were uncommercial, they were not supported by collateral and they were accompanied by false and misleading documentation. The Shareholders were self-evidently in breach of duty in relation to their approval, and each of the Shareholders is liable in respect of the same as I have also found, whether or not they were personally involved in the approval of a particular loan.

1428. It would unduly lengthen this judgment if I addressed the minutiae of each loan in detail in terms not only of its approval process, but also the uses to which it was put and through which vehicles but I am satisfied that all the loans displayed such features and had such characteristics.

1429. The first Erinskay loan 30/K/0348 (on 24 April 2012) is a representative example. It was a US$28.8 million loan for 3 years at 5% *pa*. This was an extremely low interest rate (even compared to other balance sheet loans). No capital repayments were due until 24 April 2015 – and there was no apparent justification for such deferral. The Erinskay was supposedly for "*replenishment of its operating capital and acquisition capital issues*" (unjustified and untrue given that it had no operating capital). There was no collateral.

1430. It was approved at a CC meeting on 28 March 2012. It was chaired by Mr Yurov and attended by amongst others Mr Fetisov. There was no disclosure of the Shareholders' interests in Erinskay (nor was there ever in relation to any of the Erinskay and Baymore loans). Mr Yurov does not even appear to have put his mind to the (lack of) appropriateness of this loan (or indeed others in relation to Erinskay or Baymore, or indeed other entities including Mourija and LBCS), as his answers in cross-examination show:-

> "Q. Right. So when you were sitting on the Credit Committee for these borrowers, did you need to know whether and how the borrower was going to be able to repay the loan to the Bank?

A. No, I don't think so, no.

Q. And you did not in fact know how that was going to happen, did you?

A. No.

Q. Did you on the Credit Committees for these loans satisfy yourself in each case that the loan in question or an extension of it was genuinely in the interests of the bank?

A. Yes, and I had to repeat myself: I was satisfied that by seeing the "yes" votes of other Credit Committee members.

Q. Right, and you personally gave it no independent consideration of your own. Is that correct?

A. Yes, that's correct."

This is not consistent with Mr Yurov discharging his duties under Russian law.

1431. I am also satisfied that Mr Yurov knew that neither Erinskay or Baymore (or, indeed, Mourija or LBCS) had monies of their own to service the interest on these loans, with the result that, as he also knew, they would have to be provided with further monies from the Bank (directly or indirectly) to service the same. Mr Yurov accepted as much when cross-examined:-

"Q. You also knew that the balance sheet management borrowers, as you call them, could only comply with their obligations under the repo transactions -- that is to say fund the margin calls and then buy back the securities -- if they were given more money to do so from the Bank or other such companies; yes?

A. That was my general understanding, yes."

And see also this series of questions and answers from Mr Yurov:

"Q. Your good friends, Mr Worsley and Mr Grechishnikov in particular were responsible for setting up the schemes to enable the interest payments to be made on these loans, weren't they?

A. Well, they happened to be my friends but they were employees of the Bank as well.

Q. Is that a yes?

A. Yes.

Q. They were responsible, weren't they, for setting up the schemes to enable the interest payments to be made?

A. Among other employees of the Bank, yes.

Q. And you knew that they and others, both in the Bank and Columba, were creating schemes for the movements of money around the offshore network to try to manage all of these companies' different obligations to service and repay loans on a very, very large scale; 2 billion roubles a year, you say?

A. Yes, 2 billion roubles a year, that's really not such a large scale. I have to comment, sorry, it's about $60 million at the time but I knew, yes, there were different employees of the Bank involved in the structuring of these transactions, as you call them, schemes, yes."

(emphasis added)

1432. One of the most obvious manifestations of the dishonest backdrop to all these loans is that they were seemingly accompanied by documentation that misrepresented the borrower, be it Erinskay or Baymore, and which was clearly designed to deceive as to the nature of the entities and their purported businesses in circumstances where the Shareholders cannot but have known that what was being said was not true. In this regard the CC was apparently supplied with a CMRD report which gave the impression that Erinskay was an arm's length company with independent shareholders and management seeking to pursue a genuine business in the *"sovereign debt market of the countries with developing economies"*. This was a blatant untruth. No less a lie was the statement that Erinskay's *"investment portfolio is formed from highly liquid assets"* (given that this was before any loan had been made to Erinskay, and Erinskay had not yet acquired its portfolio of Russian government bonds). Ultimately Mr Yurov had little choice but to admit as much :-

"MR PILLOW: Mr Yurov, this was the first loan to Erinskay. It hadn't had any money to buy any liquid assets at this point, had it?
A. I don't know really.

Q. Well, I'm telling you that it hadn't and if I'm right, then this statement was obviously false, wasn't it?
A. If that was a description of very first loan, when Erinskay had zero balance sheet and the first loan which was provided to it and that was the description of what Erinskay was involved before this first loan, I think that was -- yes, that was not exactly true."

(emphasis added)

1433. No less deceptive was the inclusion of a so-called *"calculation of the credit rating",* whereby Erinskay's supposed market share, corporate governance, profitability, capital adequacy etc. were assessed and assigned a score. This was all a charade even on the Shareholders' own case (i.e. on the basis, albeit inaccurately as I have found), that Erinskay was a "Bank Company", whose securities trading "business" was carried out at the Bank, with the Bank's "senior management" giving instructions in relation to particular transactions; and that the CC approval process in these cases was *"largely a formality"*. As Mr Yurov acknowledged:

> "Q. Right. That resolution was passed unanimously by the four of you. I think your evidence is that you all knew that Erinskay was a bank balance sheet management vehicle controlled by the Bank. Is that right?
>
> A. Yes, I think that was the matter, yes.
>
> Q. That's your case, and do you agree that there is no mention in this document that that is the case?
>
> A. Yes, I think so, yes. I cannot see the end of Russian document."

1434. The proceeds of this and other loans were then utilised in a myriad of transactions characteristic of inappropriate balance sheet management. Again, it would unduly lengthen this judgment if the myriad of transactions as part of the use to which each loan was put was set out, but I am satisfied that the use of this loan (and that of Baymore loan 30/K/0347) are a representative example, with the other loans exhibiting similar characteristics.

1435. These loans were used in a circular transaction involving bonds (in respect of which I am satisfied, and find, that Mr Belyaev's advice had been sought and obtained) which were then transferred through a series of intermediaries (with the approval of Mr Fetisov) to SNPM, another company beneficially owned by the Shareholders, each of whom had signed, some months previously, deeds of indemnity and a letter of engagement addressed to Mr Vassiliades instructing them to act *"for ourselves and always upon our instructions and or authorization"* in respect of SNPM (as well as numerous other Shareholder companies) and a formal letter of instruction, terminating the mandate of the previous CSP, in their capacity as *"[b]eneficial owner"* of SNPM. The funds were then used by SNPM to settle a debt that had been incurred in refinancing the EWB scheme.

1436. The forensic accountants have traced the flow of funds (as summarised in 3-Allen App. 16(c), 11-17). By 11 May 2012, Erinskay and Baymore had drawn down a total of US$60 million. On 18 May 2012, nearly all the funds were transferred to Polendor (a Cypriot company also beneficially owned by the Shareholders through Mr Rowe (the "nominee UBO" of Baymore) involving a circular movement of funds, whereby Erinskay and Baymore, paid US$60 million to Polendor to "buy" the bonds on 18 May 2012,

received US$60 million for the "same" bonds from Polendor on 28 May 2012, and "loaned" around US$57.3 million back to Polendor on 28 May 2012.

1437. This had all the hallmarks of (and was) an inappropriate "balance sheet management" scheme designed to conceal, and effective in concealing, the true lending position, as well as the ultimate beneficial ownership of Shareholders. In relation to the purchase of the US$60 million worth of bonds, Mr Worsley sought and obtained the advice of Mr Belyaev, whom he consulted on 15 May 2012. Mr Worsley's email to all three of the Shareholders was in terms that made quite clear as to who was the true beneficial owner of the offshore fund, referring to *"Your money. Your call"* and stating (in what was clearly a reference to Erinskay and Baymore (the "two companies")):

> "We are about to buy USD60M of Russia 30 bonds.
> This is part of a structure for which NBT has lent money to <u>two companies</u>.
> …
> This is a 60M trading decision. Please advise."
>
> (emphasis added)

1438. There was no query from Shareholders about who Mr Worsley was referring to (as the Shareholders clearly knew that the reference was to Erinskay and Baymore) and Mr Belyaev replied:-

> "Can we do a Repo trade instead? We might be lower in 30 s and now is not best time to buy them
> I would propose to do a trade with Ofz instead or get Russia 30 for That time through a Repo without taking a market risk and then sell it and buy it back at the same rate 2 weeks forward
> Thus well have 0 market risk"

1439. This proposal was forwarded the same day by Mr Worsley to, amongst others, Mr Iskandyrov. Mr Iskandyrov's proposal was in line with Mr Belyaev's advice, as he explained in his oral evidence:

> "Q. He says, "Don't take any market risk." It gets forwarded to you and you set about structuring a transaction that you consider may be appropriate. That's what's happening, isn't it?
>
> A. Absolutely correct. There is no contradictions as far as I see. I can clarify my answer if that's required, why I think there is no contradictions. I am acting, as Mr Belyaev proposed, with the exception that the back repo, I'm explaining to Ben that if we are doing back repo in Russia, it will be viewed as a direct loan. <u>If Erinskay and Baymore will give a direct loan, then it would be a disqualifying factor because it's not possible to use loaned money for refinancing.</u>
>
> Q. Yes.

A. I'm saying that we could transform the repo transaction,
which would be the same repo but in two actions,
purchase and then forward sale, two different contracts.
Two-week forward contract or one-week forward contract.
There is no contradiction here at all."

(emphasis added)

1440. The resulting cash was then routed (via a yet further loan) to SNPM, which used it to discharge debts to the Bank and to ZPIF Kreditnye Resursy that had originally been incurred to discharge TIBI's liabilities to EWB. Mr Fetisov expressly approved an outline of the transaction, copied to him by Mr Iskandyrov, which showed the recycling of the bonds and the use of the cash proceeds to *"repay the SNPM loan (through financing via the chain of other new companies)".* As Mr Iskandyrov explained, and Mr Fetisov confirmed, the "*loans which are now paying of SNPM*" would be refinanced through another scheme using Russian government bonds. Mr Fetisov's approval to the scheme proposed by Mr Iskandyrov was given on the same day, 22 May 2012. I reject Mr Fetisov's evidence that he was just acknowledging receipt in circumstances where the heading of Mr Iskandyrov's email was *"Erinskay/Baymore Financing to repay SNPM/Wave"*. It is clear from the face of the email that this is Erinskay/Baymore being used in balance sheet management with Erinskay and Baymore loans being used to finance the repayment or servicing of other loans, i.e., balance-sheet fraud.

1441. In his written evidence Mr Fetisov admitted being *"generally aware"* that (as he characterised matters), "*the Bank used companies in the offshore structure for trading securities and entering into REPOs, and that such companies included Erinskay and Baymore".* He went on to admit that he *"may occasionally have been consulted about the transactions they entered into at a high level (including as a member of the Credit Committee) but that did not happen routinely".* I am satisfied that this is an understatement and that Mr Fetisov also knew perfectly well that Erinskay and Baymore were companies being used for "balance sheet management".

1442. A similar pattern can be seen in respect of subsequent Erinskay loans. The next loan was USD Loan 30/K/0371 on 6 June 2012 for US$28.3 million for 3 years, again at 5% pa, with no capital repayments due until 5 June 2015 and no collateral. Erinskay was again purportedly obliged to use the funds for *"replenishment of its operating capital and acquisition capital issues"*. It was approved at CC meeting on 30 May 2012, chaired by Mr Yurov. Once again there was no disclosure of the Shareholders' interests in Erinskay, and the CC were supplied with another CMRD report which again gave the (misleading) impression (as known to the Shareholders) that Erinskay was an independent company, when in reality it was no more than a balance sheet management company. It contained an additional lie in referring to the first loan agreed on 24 April 2012 and stating that *"Erinskay … performs obligations under the loan agreement on time"* – an impossible statement given that the report was prepared on the very day the first loan was agreed and the first tranche was advanced two days later, so there could be no question of historic performance (and of course it was subsequently serviced by further "balance sheet management").

1443. The proceeds from this loan, and the corresponding loan to Baymore (30/K/0372) were dissipated through the offshore network and a similar web of sham transactions (as

reflected in Mr Davidson's diagrams at C2/5/117-119 and C3/5/46-48). Again, Russian government bonds were purchased (via Polendor and Black Coast, as before) and, this time, used to acquire shares in an "Emerging Markets Yield Fund" for Erinskay and "Russia Recovery Fund BV" for Baymore.

1444. Matters continued in the same vein with the next Erinskay loan (RUB Loan 30/K/0414 on 30 July 2013), RUB 830 million for 3 years at the higher rate of 11.5% pa but no capital repayments due for 3 years (in this case until 29 July 2016). Erinskay was obliged to use the funds for *"acquisition capital issues".* Again, there was no collateral. It was approved at a CC meeting on 3 July 2013 which was chaired by Mr Yurov. Once again there was no disclosure of the Shareholders' interests in Erinskay and again it was accompanied by a misleading CMRD report designed to give the (untrue) impression that Erinskay was an independent business whose *"shareholders"* and *"management"* were *"interested in the implementation of opportunities offered by the sovereign debt market of the countries with developing economies"* when as all the Shareholders knew it was not an independent financial business and was nothing other than a balance sheet management with bonds being swiftly recycled back into cash. Statements in the reports were positively misleading, containing, in a section on the financial position, a statement that there were no *"wage arrears to employees"* when, of course, the true position was that there were no employees, as it was not an independent business.

1445. By this stage accounts for Erinskay and Baymore had been opened at Alfa Capital (as already noted above on the false basis that the companies were owned by outside "investors" so trades could be conducted directly without having to go through Black Coast). The Shareholders continued to be kept abreast of developments and Mr Worsley again consulted with Mr Belyaev to get his approval.

1446. The effect of the trading was that it appeared (falsely) both that Erinskay was a legitimate commercial enterprise involved in trading securities and that the Bank was itself successfully trading with an arm's length counterparty and generating revenues. The reality was that the business of Erinskay was kept in-house in Columba. As Mr Davidson's diagrams show, the loan proceeds were used to buy and then sell Russian government securities, with the cash being transmitted across the offshore network (with some US$3 million ending up at Kuri Hills, from which some US$900,000 was paid (via other Shareholder companies) to Mishcon de Reya ("Mishcons") Mr Yurov's solicitors in his personal litigation against Mr Kolyada (Mr Yurov now admitting that he *"knew that the Bank was providing money to fund my defence of the Kolyada litigation*"). When the litigation concluded, £1.9 million that had been paid into Court by Mr Kolyada as security for costs was released to Mr Yurov, which was distributed amongst the Shareholders to their Bordier accounts. This occurred only days before the collapse of the Bank.

1447. The funds were transmitted in two tranches through multiple loans through Shareholder vehicles before ending up at Kuri Hills. Mr Yurov clearly knew how monies for Mishcons was being sourced as on 14 May 2014, Mr Worsley emailed Mr Yurov stating that *"I have received a demand for GBP195K from Mishcon. I will get it from the offshore structure as normal. Just FYI…"* (my emphasis) which sheds light on the normality of the use of the offshore structure to use the Bank's money for the personal benefit of the Shareholders. In this regard Kuri Hills was regularly used for such purpose - another example being in relation to WR/RCP, as addressed below, as well as for

payment of Mr Yurov's conveyancing fees on the purchase of his Surrey home and the legal fees for Mr Fetisov's personal offshore trust structure.

1448. Mr Yurov sought to justify his use of the Bank's money to fund his defence of the Kolyada litigation on the basis that, *"the reason for the litigation was caused by the Bank's Legal Department, which had poorly drafted the contract for my acquisition of the shares from Mr Kolyada. The Bank's funding of my defence was no secret within the Bank; I agreed it with Messrs Fetisov and Belyaev and it was known by Mr Drozdov and others within the Legal Department".* Quite apart from the fact that Mr Yurov should not have been using Bank staff to draft private personal contracts for himself, that is not a justification to use the Bank's money to fund Mr Yurov's defence. Mr Yurov's purported justification, however, also shows (as I am satisfied was the case) that Mr Fetisov and Mr Belyaev knew of this misuse of Bank funds, and in due course were to benefit from the same (when the Court released monies in December 2014 which went via Kuri Hills to their Bordier accounts). Mr Yurov admits that he was obliged to account for the legal costs to the Bank but has never done so – as addressed in Section C.3.1 above, his justification based on an alleged set-off in relation to Otkritie does not bear examination as the monies belonged to the Bank, not Otkritie.

1449. The other loans taken out by Erinskay followed the same characteristics with no repayments for a number of years, no collateral and no disclosure of interest. For example, the RUB Loan 30/K/0434 on 20 March 2014 was taken out in this manner, being approved at a CC meeting on 20 March 2014, chaired by Mr Yurov and attended by, amongst others, Mr Fetisov. There was no disclosure of the Shareholders' interests in Erinskay. Mr Fetisov knew very well that the Bank was lending money to Erinskay to pass to other companies in the offshore network so as to avoid default on margin calls and loan repayments. Indeed, on the very day of the CC meeting Mr Worsley had emailed Mr Fetisov amongst others stating, *"Funding critical today to avoid default next week."* The email was replied to by Mr Postnov (with Mr Fetisov copied in) stating, *"RUR 250 mio have been granted to Erinskay."*

1450. RUB Loan 30/K/0461 approved at a CC meeting on 23 July 2014 followed the same pattern. No capital repayments for 3 years, again a specified obligation to use the funds for "*acquisition capital issues*". No collateral, and no disclosure of Shareholders' interests in Erinskay. There was again a CMRD report produced designed to give the false impression that Erinskay was a genuine, arm's length business carrying on real commercial activity when, as the Shareholders knew it was no more than a balance sheet management vehicle. The report contained blatant falsehoods designed to deceive those who, unlike the Shareholders, were not in the know (the most obvious example being the CBR):-

> "Justification of the borrower's real activity
> The main factors, confirming the score of Erinskay … as the company conducting the actual investment activity, are the borrower's holding of a large block of government debt instructions … as well as the proven facts of the transactions in the securities market.
> Erinskay … discloses the information on its activity in full. All the borrower's operations are economically reasonable. The company does not implement frequent and unmotivated changes in its sole executive body and had not lost its title and financial documents. The company employs 6 people and it is sufficient to arrange

investment activities. Company's employee costs correspond to the current conditions of the local labor market, staff payments are made regularly. The borrower leases office space 113 sq m in area, ensuring the normal business operations.
In view of the foregoing, we conclude that Erinskay … carries out the real activity with the securities market transactions."

1451. Erinskay, of course, did not have any employees, office space, or any operations of its own. It was a thoroughly dishonest document purporting to justify lending, and designed to deceive anyone who checked up on the justification for lending – most obviously the CBR (who did indeed commence an audit in August 2014, and leasing agreements and the like were precisely the type of agreements they were interested in). In this regard, there was a history of fake rental agreements being generated (for example in November 2011 in relation to amongst others SiberianKD, Wave, Mourija, and LBCS, in May 2012 sham employment contracts and rental agreements were being procured for Edenbury), and later in March 2014, Mr Iskandyrov proposed that Edenbury be provided with a fake website, email domain, rented offices, staff with regular wage payments and a separate phone number.

1452. Finally, in relation to Erinskay loans, RUB Loan 30/K/0470 of 1 November 2014, a loan of RUB 1.8 billion, followed the same pattern with a deferred period before capital repayments, no collateral, no disclosure of the Shareholders' interests in Erinskay and again a specified obligation to use the funds for "acquisition capital issues". The loan was approved at a CC meeting on 10 November 2014 chaired by Mr Fetisov with, once again, a deceptive CMRD report.

1453. Turning to Baymore, Baymore received eight loans from the Bank:

(1) 2 May 2012 (loan 30/K/0347): USD 31.2 million, 3 years at 5% (CC meeting 28 March chaired by Mr Yurov);

(2) 5 June 2012 (loan 30/K/0372): USD 30 million, 3 years at 5% (CC meeting 30 May chaired by Mr Yurov);

(3) 31 October 2012 (loan 30/K/0388): RUB 300 million, 3 years at 6.5% (CC meeting 25 October chaired by Mr Yurov);

(4) 29 July 2013 (loan 30/K/0415): RUB 730 million, 3 years, 11.5% (CC meeting 3 July chaired by Mr Yurov, Mr Fetisov attending);

(5) 26 March 2014 (loan 30/K/0435): RUB 700 million, 3 years 11.5% (CC meeting 20 March chaired by Mr Yurov, Mr Fetisov attending);

(6) 25 July 2014 (loan 30/K/0459): RUB 700 million, 3 years 11.5% (CC meeting 23 July chaired by Mr Fetisov);

(7) 11 November 2014 (loan 30/K/0471): RUB 670 million, 3 years 11.5% (CC meeting 10 November chaired by Mr Fetisov);

(8) 3 December 2014 (loan 30/K/0481): RUB 800 million (RUB 150 million drawn down), c. 3 years, 11.5% (CC meeting 2 December chaired by Mr Fetisov).

1454. Suffice it to note that the loans were in similarly uncommercial terms with no collateral and no disclosure of Shareholders' interests in Baymore, approved at CC meetings by at least one of the Shareholders, the purpose of the loans being to acquire securities but in fact used in a similar way to the Erinskay loans.

1455. Once again there were CMRD reports that painted a misleading picture of an independent business with a favourable credit rating when the truth was that Baymore was nothing more than a balance sheet management company performing a similar role to Erinskay.

1456. The credit risk reports prepared for Baymore were, like those for Erinskay, deceptive documents prepared in order to mislead the CBR, auditors, or anyone else who happened to inspect the borrowers' credit files, into believing that these were genuine, arm's length loans to independent third parties, containing (misleading) statements such as that *"Baymore Investments Limited applied to the Bank with a request to open a loan facility*" and that Baymore *"currently develops commercial activities connected with the securities market*" (again, falsely pretending that this was a genuine business conducting real commercial activity). There were also outright lies, *"According to the results of almost 3 months of work in 2012, the company's assets amounted to about USD 101.76 thousand and were predominantly formed from absolutely liquid assets in the form of cash"* (in a report that pre-dated the first loan and so Baymore could not have had any material assets at that stage).

1457. In terms of the use to which the monies were put, a similar picture emerges. End recipients included Mischons in respect of Mr Yurov's legal fees (as already noted), Kuri Hills, SNPM, SiberianKD. LBCS, and Stivilon (see 3-Davidson App 2 & 2A). Some of the loan proceeds serviced the loans of TIBI and TIBH, and some of the cash was recycled through repos and used by Baymore itself to service its own loans (allowing it to create a false credit rating).

R.2.4 The status of the loans and the Bank's loss

1458. Erinskay and Baymore had no genuine independent business and any (apparent) ability to service their debt depended on the ongoing balance sheet fraud. In addition to examples of the Bank's cash being recycled to service the loans (as shown by Mr Davidson), the documentation shows interest payments being made with money sourced from other entities within the offshore network.

1459. Once the music stopped with the balance sheet fraud coming to an end upon the Bank's collapse, the Erinskay and Baymore loans inevitably went into default. I am satisfied that there is no basis for the suggestion (made by Mr Davidson) that Mr Popkov was responsible for the defaults caused by certain borrowers including Erinskay and Baymore.

1460. Demands for repayment were served on 20 February 2015 and no response was received (which is hardly surprising given that they were nothing more than shell companies). In the event there were some limited recoveries in the form of cash balances (for which credit has been given). There have been proceedings leading to judgment against Erinskay and Baymore in the Russian courts, but this has not led to further recoveries. The outstanding principal on the Erinskay loans is loans is US$55,050,574 and RUB 3,760,000,000, whilst that on the Baymore loans is US$58,010,242 and RUB

3,350,000,000. Whilst Mr Yurov seeks to submit that much of the lending "returned to the Bank" (based on work done by Mr Davidson) such an exercise was not demonstrated on the facts, and a key flaw in such submission is the failure to distinguish between the Bank itself and other entities. It is also (falsely) premised on the purported distinction between Bank and Shareholder Companies which I have rejected.

R.2.5. The Erinskay and Baymore Derivative Transactions and any associated credit

1461. It is common ground that on 9/10 December 2014, Erinskay and Baymore sold their portfolio of Russian government bonds on the relevant exchange, and the Bank purchased an equivalent amount of bonds from the exchange, as part of a transaction intended to transfer the bonds from Erinskay/Baymore to the Bank. The Bank, as seller, and Erinskay and Baymore respectively, as buyers, then entered into non-deliverable forward trades in respect of the bonds with a settlement date in June 2015. The Bank terminated the forwards in May 2015, before the settlement date (which it was contractually entitled to do) and gave notice purporting to show that the Bank was entitled to the sums of RUB 552,725,944 and RUB 351,095,355 from Erinskay and Baymore respectively.

1462. The derivative transactions were approved by the CC, chaired by Mr Fetisov, on 9 December 2014. Mr Iskandyrov's evidence was that the decision to conclude the transactions was made by the *"Investment block"* (which us the part of the Bank for which Mr Belyaev was responsible). Their purposes were, self-evidently, not legitimate. In purporting to dispose of the bonds, Erinskay and Baymore avoided having to pay margin calls (that would have resulted in a default), while the Bank evaded capital adequacy rules (which required it to mark to a falling market) by concluding forward agreements obliging Erinskay and Baymore to repurchase the bonds for the same price in six months. Equally it cannot possibly be said that the conclusion of the derivative contracts was in the Bank's interests – it plainly was not. Their effect was that the Bank would have to pay Erinskay and Baymore if the bond market rose, whereas if the market did not rise the debt to the Bank would be owed by worthless shell companies.

1463. The scheme was implemented through Master Agreements and accompanying Confirmations. Following the companies' default, the Bank exercised its contractual rights of early termination and notices were served. Mr Davidson accepts that the Bank was *"acting within its contractual rights when it terminated the NDFAs with the borrowers because each borrower's overall overdue indebtedness to NBT exceeded the threshold amount of USD 100.0m".* Erinskay and Baymore failed to comply. Proceedings were issued by the Bank in Russia, resulting in judgments upholding the Bank's claim in full: some RUB 552 million (against Erinskay) and RUB 351 million (against Baymore). The judgment debts remain unpaid.

1464. In circumstances where no monetary claim is advanced in respect of the derivative transactions, it is not necessary to consider whether the Bank's calculations are correct. For the avoidance of doubt, however, if relevant, I am satisfied that Mr Davidson's conclusion that the Bank should have made payments to Erinskay and Baymore (and therefore that it had somehow profited) is based on a false premise, his calculations being based on the prices of the bonds and not the prices of derivative contracts whereas the Model Terms require a different calculation, namely how much would be payable to enter into a replacement derivative transaction on similar terms to the terminated transaction, with the same date of payment or delivery. That exercise was not done by him.

1465. Issue 76 asks, *"are the Shareholders entitled on their statements of case to advance a positive case that the Bank should give credit for the capital gain and/or income earned on the bonds purchased on 9/10 December 2014? If so, should such credit be given and in what amount?"* I am satisfied that there was no proper plea advanced by any of the Shareholders that would justify such a positive case. Had such a positive case been advanced I am satisfied that factual and/or expert evidence would have been required both in terms of the costs of financing incurred by the Bank and the value of the bonds and the income earned on them by the Bank. No such evidence is before me.

1466. In any event I consider that there is a more fundamental answer. The Shareholders treat any increase in the value of bonds as matters to be given credit for, as if the Bank is holding or realising the value of security. It is not. As the Bank points out, Erinskay and Baymore sold their portfolio of Russian government bonds on the relevant exchange and the Bank purchased an equivalent amount of bonds from the exchange. The consequence is that the Bank gave, and Erinskay and Baymore received, valuable consideration for the bonds, which the Bank acquired under transactions that were separate from the loans. In such circumstances the Bank is not obliged to give credit for any subsequent appreciation in the value of, or income earned on, the bonds – these are collateral matters – and such sums are not required to be taken into account. The position would be the same if (for example) losses had been suffered whilst the Bank continued to hold the bonds – any such loss could not be placed at the Shareholders' door.

R.3 LBCS

R.3.1 Common Ground

1467. LBCS was a pure "balance sheet management" company that was not associated with any underlying business and owned no real property. The first loan, on 21 June 2013, was for RUB 1.1 billion. The proceeds of that loan were used inter alia in the sum of RUB 50 million (approximately US$1.52 million) for the Merrill Lynch transaction. The end recipient of the RUB 50 million was Merrill Lynch "*for the purchase of 265,511 shares (8.95% of the share capital) in Management Company Trust (majority shareholder of NBT) by TIB Holdings [TIBH], Neaspal, Winsala and Zaploma for USD 7.5 m (approx. RUB 245.8m)"* (agreed Issue 10.2). The second loan, on 15 August 2013, was for RUB 1.075 billion. Both loans were approved by the CC, chaired by Mr Yurov. Neither of the loans had collateral. These matters are addressed in more detail below.

R.3.2 Discussion

1468. LBCS, as a "balance sheet management" company shares similar characteristics to Erinskay and Baymore and I will not repeat my associated findings about "balance sheet management" and the Shareholders' knowledge of the same. Equally I can deal relatively briefly with the making of the two loans as they have the same features as the loans to Erinskay and Baymore being on uncommercial terms, with no accompanying declaration of the Shareholders' interests, and accompanied by similarly misleading documentation. I will address the use made of the loans in more detail as a substantial proportion of the loans was used for the benefit of Shareholders through Taransay (the Shareholders' bond trading vehicle) which generated substantial profit which was routed through Kuri Hills and on to the Shareholders' Bordier bank accounts, through the Merrill Lynch transaction whereby the Shareholders increased their stake in the Bank through the purchase of the minority interest of Merrill Lynch, and through SiberianKD (an admitted Shareholder company which benefitted in the sum of RUB 531.2 million which was used to pay down and/or service its loans with the Bank).

1469. As an entity used for "balance sheet management" there can be no doubt that the Shareholders knew what LBCS was being used for. However, the position is *a fortiori* in the case of LBCS given that one of the reasons for the LBCS loans was that the proceeds were going to be, and were, used to finance the Shareholders' buy-out of Merrill Lynch as well as their personal bond trading through Taransay (involving the Shareholders and coordinated through Mr Worsley). Indeed, for once, Mr Fetisov accepted that it was "*possible*" that one of the reasons he would have known about the loans to LBCS was because the proceeds were going to be (and were in fact) used to finance the Shareholders' buy-out of Merrill Lynch's minority stake in the Bank and he was "*definitely*" involved in the negotiations with Merrill Lynch about the price, and equally he admitted that there were "*one or two meetings*" involving himself and Messrs Yurov, Belyaev and Worsley "where we decided that we would like Mr Worsley to execute a few limited proprietary trades".

1470. LBCS was also used for other purposes and illustrates other aspects of the misleading picture created as to the Bank and its finances to the CBR and the world:-

(1) To create the impression of a capital injection into the Bank, falsely stated in the accounts to be a shareholder contribution of "additional paid-in capital" when the reality was that it was financed through a scheme involving LBCS (as to RUB 990 million) and SiberianKD (as to RUB 510 million) (see 4-Allen 8.2). Mr Allen's conclusion (which was not challenged in cross-examination) was as follows:-

> "8.8 Based on the above analysis, RUB 1.5 billion of the financial support received by NBT from MC Trust on 31 May 2013 was financed using loan funds provided by NBT and ZPIF Kreditnye Resursy (a fund wholly owned by NBT) to SiberianKD and LBCS, and not from funds of the shareholders. Taking into account the source of funds, the transactions do not represent, by substance, true "financial support"."

Clearly the purpose of this scheme was to create a misleading picture to both the Bank's auditors and the CBR.

(2) Not only were LBCS's accounts misstated, but (together with other Borrowers) "corrective" (or fictitious) deals were created to create a profit when there was none – again to mislead the CBR. Memorably Mr Worsley described the actions of the *"accounting geniuses in Moscow"* as "*criminal"* – which included falsifying quarterly reports of LBCS, Erinskay, Baymore, Crylani and SiberianKD by inserting *"numbers we liked, without supporting docs".*

(3) As with other Borrowers that were not genuine commercial enterprises steps were taken to create a false appearance that such entities had real premises – again to mislead the CBR as illustrated by a discussion in November 2011 about producing a fake rental agreement with a "real address" as a "picture" to present to the CBR. In this regard Mr Iskandyrov emailed Mr Worsley on 29 November 2011, stating:

> "I attached file with info about same problem in accordance with letter of CBRF
> We need to discuss with Vassiliadis to "rent" real offices for
> Wave Property Development and Management Limited
> SNPM Structured Notes and Products (Cyprus) Management Limited
> SiberianKD Timber Enterprises Limited
> Otterway Holding Corporation Limited
> NRT Holdings Ltd
> Mourija Trading Limited
> LB Collection Services Limited
> Jermanta Limited"

Mr Worsley agreed the same day asking, responded on the same asking *"What is needed please? ""Rental contracts'? Pictures? Address"?* Mr Iskandyrov replied in terms that showed that what was required was *"Rental contract for 20-30 sq.m. with real address but - this all is only picture"* with payment invoices from Vassiliades. Mr Worsley replied, *"OK, I will talk to him. It will be possible"*, asking *"Do they all need to have different street number????"*. Mr Iskandyrov emailed later to say that it would be *"better to have a different address".*

(4) There is also at least some suggestion that LBCS was also being used for tax avoidance if not tax evasion. For example Mr Bolshikhin emailed Mr Worsley on 20 March 2014,

asking:

> "We need two offshore companies for binding with SiberianKD and LB Collection.
> We are going to use their on scheme of decrease tax.
> Please let us know what companies can we use?"

In a chaser Mr Bolshikhin explained that that the purpose of his request was to enable completion – in 2014 – of the audit for 2011:

> "We are waiting your decision. It is urgent. Without it we can't finished audit LB Collection and SiberianKD 2011.
>
> Also kindly note that both offshore companies have to was born till January 2011 year"

A later email from Mr Butylkov shows that (as with other such schemes) backdated (and no doubt sham) contracts were going to be used:

> "This companies will use only for the "paper" forward deals in 2011 and 2012.
> If it's possible, we will use them for change 2 companies in FS-2013 (on the request of NBT)."

(5) It appears LBCS was also used to hold an interest in LLC CA Pravo and Business ("Pravo") (which also received loans from the Bank) and which (at least per the evidence of Messrs Yurov and Fetisov), was to take bad retail loans "off the Bank's balance sheet". In his response to Ernst & Young's due diligence exercise in 2009 Mr Yurov said the Shareholders had "operational control" over Pravo.

1471. None of this would have been possible without the involvement of a compliant auditor. In the case of LBCS (and other Borrowers) this was JIB, who were described by Mr Worsley in a contemporaneous email, copied to Mr Yurov, as *"dishonest",* reference being made to the "best option" for their replacement, described in terms as, *"[t]hey will accept back dated deals to reduce profits to zero. They will do whatever we ask".*

1472. It is clear that LBCS was beneficially owned by the Shareholders. LBCS was incorporated in Cyprus on 22 February 2010; its nominee shareholder was Mr Zacharoulis. The shares were held on trust for the Shareholders personally, as the Shareholders well knew. In this regard, the administration of LBCS was transferred to Vassiliades in September 2011, with the Letter of Engagement (*"to act for ourselves and always upon our instructions and or authorization"*) and accompanying Deed of Indemnity signed personally by each of the Shareholders. The mandate of the previous service provider was terminated by a letter of instruction signed by each of the Shareholders in his capacity as *"[b]eneficial owner"* of LBCS. As with other Borrowers, such ownership was subsequently concealed behind "nominee UBOs" supplied by Mr Worsley. Indeed on 15 July 2013 (so around the time when the loans to LBCS were made, each of the Shareholders as *"[b]eneficial owner"* of LBCS signed a letter of instruction to "transfer" their beneficial title to Tactio (which was, of course, another Shareholder Company). The following day, "title" was transferred (again on the written instructions of the Shareholders), to Seilwood Investments Ltd ("Seilwood"), a company held by Mr Chadwick who was another of Mr Worsley's UBOs – thereby concealing the ultimate true

beneficial ownership of the Shareholders of LBCS.

1473. As for the loans to LBCS, the first was RUB Loan 30/K/0411 on 21 June 2013 for RUB 1.1 billion at 5% pa until 21 June 2016. LBCS was required to use the funds for the purpose of "*purchasing securities*". Once again there was no collateral, and the interest rate was very low. It was approved at CC meeting on 19 June 2013 which was chaired by Mr Yurov. There was no disclosure of the Shareholders' interests in LBCS and there was a similar format to those that had been prepared for Erinskay and Baymore (as already addressed) – and as usual the false impression created was that this was a genuine, arm's length, third party borrower which, as Mr Yurov of course knew, was untrue (not least given his involvement in the various transfers of ownership already identified also involving the other Shareholders). The report contained blatant lies including *"LB Collection Services Ltd does not have a current card file of unpaid documents to bank accounts, unfulfilled obligations to the budgets of the Russian Federation and the Republic of Cyprus, as well as overdue debts to employees on wages"* and purported to address the (allegedly) satisfactory financial position of the company, *"… the financial position from the point of view of most indicators seems to be satisfactory, financial indicators are at a sufficient level in relation to standard values and are not inferior to similar financial institutions - non-bank institutions that are comparable in size and nature of business …"*. All untrue and positively misleading. As with Erinskay and Baymore (and Mourija) Mr Yurov's approach (hardly consistent with his duties) was not even to give the loan independent consideration, he denied needing to know whether and how the borrower was going to be able to repay the loan and he accepted that he did not in fact know how that was going to happen. He accepted that the "balance sheet management" borrowers Erinskay, Baymore, Mourija and LBCS could only comply with their obligations under the repo transactions (fund the margin calls and then buy back the securities) if they were given more money to do so from the Bank or other such companies.

1474. The second loan to LBCS had all the same features and characteristics. This was RUB Loan 30/K/0417, 15 August 2013, in the amount of RUB 1.09 billion (with a drawdown of RUB 1.075 billion in several tranches) at 11.5% pa until 15 August 2016. LBCS was required to use the funds for the purpose of "*purchasing of securities*". Once again there was no collateral, and it was approved at a CC meeting on 3 July 2013 chaired by Mr Yurov. Whilst Mr Fetisov was recorded as only being present for discussion of question 6, he would, of course, have seen it on the agenda even if not present.

1475. Turning to the use of the loans, the proceeds of the first loan were dissipated almost immediately through numerous loans to other Shareholder companies (see 3-Davidson App. 3 and 3-Allen App. 10), including Seilwood (also used to distribute profits made by WR and RCP to the Shareholders and in "balance sheet management" schemes with LBCS), Lemford Holdings Ltd ("Lemford") (a BVI company administered by Mr Worsley – Lemford being yet another company in relation to which Mr Worsley signed sham loan agreements as a director), Drenville Holdings Ltd ("Drenville") (another BVI company administered by Mr Worsley, used in numerous loan transactions, and which was also used in relation to the financing of a margin call for Taransay as addressed below). There is nothing to suggest that these were other than shell companies used as part of the offshore network – this was not commercial lending on LBCS's part. To further a pretence that LBCS was funding the transfers from its own purported trading activities some of the cash was first recycled by purchasing and then repo'ing bonds. There was no good reason for any of this activity which I am satisfied was simply designed to obscure.

1476. No sooner had the funds been received by Drenville, Lemford and Seilwood then they were transferred on to other companies owned by the Shareholders, including from Drenville to Beadon (which bought bonds from SiberianKD), Dunemor (which bought a portfolio of loans from Biznesaktiv (Mr Davidson cannot trace the funds beyond that)), Taransay, Haverson and Brean, and from Lemford to Mefrito (who bought shares in a real estate unit fund from Fintailor (Mr Davidson cannot trace the finds beyond that)), whilst Seilwood issued loans to Nikilin (which purchased a promissory note issued by Zosimal from LLC Belt (Mr Davidson cannot trace the funds past Belt)). The likes of Biznesaktiv, Fintailor and Belt are "Category (3)" type companies (addressed in the Bank's Points of Loss document), as to which Sections N.2.6 and N.2.6.1 are repeated. In terms of tracing as to where money ended up, I do not consider it appropriate to draw inferences that go beyond the expert evidence before me. In any event the point is irrelevant as addressed in Section N.2.6.1.

1477. In relation to LBSC, the only specific issue raised in the List of Issues is "Was part of the first loan used to fund the bond trading activities of Taransay?". As appears below, the answer is clearly yes. Taransay is *"agreed to be a personal company of the Defendants through which they engaged in bond trading for their own benefit"* (Yurov Written Closing p.241). It was a Cypriot company held via Mr Worsley, through the usual (opaque) Deed of Trust arrangements using Arlingham and Serrinson. Mr Yurov's evidence (which on this I accept as a reflection of the truth), is that it was "*overseen by Mr Belyaev*" and "*the money paid to us from Taransay was short-term trading profits from the trades which Mr Belyaev carried out for us and himself".* I am satisfied that Mr Belyaev downplayed his involvement in Taransay in his written evidence, by saying that *"The idea was for Mr Worsley to set up and manage an independent trading platform, Taransay, which he could grow and develop for his own benefit with [the Shareholders] as his business partners".* The documentation clearly shows that Mr Belyaev was actively involved in Taransay with the other Shareholders being consulted and participating in the decision-making.

1478. That part of the first loan was used to fund the bond trading activities of Taransay is apparent both from the documentation and Mr Davidson's own evidence (and indeed is accepted on page 241 on Mr Yurov's Closing Submissions). In this regard on 25 June 2013, Mr Worsley emailed Mr Iskandyrov stating, *"Please be ready tomorrow with a scheme to invest USD5-10m. If nikolays gives to ok we will trade open forward again".* When cross-examined Mr Fetisov accepted that this was about Taransay trading, and that meetings took place between him and Messrs Yurov, Belyaev and Worsley where decisions were taken to execute proprietary trades. On 26 June 2013, there was an exchange of emails between Mr Worsley and Mr Iskandyrov, in which Mr Worsley said, *"We need money into Taransay ASAP. I just spoke to Sergey. Can you get say USD7M into Taransay tomorrow pls. We are looking at OFZ with yields around 7.5% and we want a 100MUSD position."* Mr Iskandyrov stated, "*i received info that we have free 200 mio on LB Collection is it would be enough - or i need to find another 30 mio?"*

1479. There can be no doubt that the Shareholders were personally involved in what was going on. In this regard Mr Worsley sent another email on 26 June 2013, stating, *"Again, the money should go from LB to another company, and then to Taransay, in my opinion. This saves a direct link between LB and Taransay. Nikolay called em yesterday too. I believe that he will talk to Ilya and Sergey this morning. If we get the go ahead to make*

the deal, we will need the funds ASAP."

1480. This evidence suggests, and I am satisfied it was the case, that each of the Shareholders was directly and personally involved in decision-making in relation to this trade and were having contemporaneous discussions about it, which I am satisfied would, in the context of Mr Worsley's email, have included the source of the funding and the routing of the monies, including the need to interpose another company to break the link between the loan to LBSC (approved by Mr Yurov very recently) and their own trading vehicle Taransay. The sensitivity in separating Taransay from Bank loans can also be seen from an email from Mr Worsley to Mr Iskandyrov the previous year in which he said, *"The Taransay transactions need to 'look' separate from the NBT transactions. Let's be careful on email))"*.

1481. On 27 June 2013, RUB 200 million (around US$4 million) of the proceeds of the first LBCS loan (having first been recycled through the repo mechanism) was paid by LBCS to Taransay – via Drenville with the result that there was no direct transactional link between LBCS and Taransay. As identified by Mr Davidson, on 27 June 2013 BCS, on behalf of LBCS, entered into repurchase agreements using Russian government bonds and transferred funds of RUB 200 million to LBCS's RUB account at Piraeus Bank. LBCS used the funds received from BCS to make a loan of RUB 200 million to Drenville, to be repaid by 27 June 2014 29 ("LBCS-Drenville Loan 3"), by transferring the funds to its RUB account at Piraeus Bank. Drenville did not provide any collateral for this loan. Drenville used the loan received from LBCS, and other funds in its account, to make a loan of RUB 260 million to Taransay, to be repaid by 27 June 2014, by transferring the funds to its RUB account at Piraeus Bank. Taransay did not provide any collateral for this loan either. Taransay then used the loan received from Drenville to make a payment of credit support of RUB 260 million to third-party bank Alfa Capital.

1482. The involvement of Shareholders is reflected in Mr Worsley's email (to the Shareholders' personal email accounts): *"We just bought: 205 102.15 1 bio 209 100.8 1 bio 211 96.4 1 bio".* An update in relation to Taransay was sent by Mr Worsley (again, to the Shareholders' personal email accounts) on 8 July 2013 and Mr Belyaev was in regular contact with Mr Worsley (for example on 17 September 2013 Mr Worsley sought and obtained instructions from Mr Belyaev on trading).

1483. On 19 September 2013, the trade was closed out and a profit of RUB 92 million (c. around US$2.7 million) profit was made by the Shareholders. Mr Yurov was informed about this by a text message from Mr Worsley, and directed him to send it to Kuri Hills:

> "Mr Worsley: "92M rub is the net profit from the OFZ trade".
> Mr Yurov: "Cool".
> Mr Worsley: "Send out as normal..?)
> Mr Yurov: "Sure"
> Mr Worsley: "Cool……".

1484. A few days later, on 23 September 2013, Mr Worsley was in touch with the Shareholders' personal banker at Bordier, Mr Doubrovkine, attaching documents evidencing Taransay's source of money (LBCS and SiberianKD), and saying: *"I am about to send USD2.73M to Kuri. It is proceeds from trading in the OFZ market in Russia. As you know, OFZs are short term Russian Sovereign debt instruments. We put down*

principal with Alfa Bank, and leveraged the position, and then sold it.". As with the normal *modus operandi* of payments via Kuri Hills to the Shareholders it was sent via a sham "loan" agreement ("*sent to Kuri Hills as a Loan*") and directed into the Shareholders' personal Swiss bank accounts at Bordier (a similar transaction was carried out in 2012, involving another Borrower (Wave) and again resulted in profits generated by Taransay being deposited in the Shareholders' Swiss bank accounts: see R.10 below).

1485. Mr Yurov points out that when in September 2013 Taransay sold OFZ bonds to Alfa Capital it received a net payment of RUB 454 million, and an email at {D4/32.5/1} setting out the list of payments made by Taransay, includes it paying RUB 265 million to Drenville (which is the equivalent of interest of over 10 percent p.a.) and Drenville paying RUB 203.7 million back to LBCS (8 percent p.a.). Associated questions were put to Mr Allen in cross-examination. It is said that Taransay has repaid all the funds which it received from LBCS with full interest and the Bank has not lost as a result of the payment (and indeed received interest). It is said the position would have been no different if Taransay had borrowed funds from a third-party bank instead.

1486. I am satisfied, however, that Mr Yurov's submission entirely misses the point. What this shows is that the Shareholders, without declaring any personal interest, and routing the money through other companies (to conceal where it was going), obtained a loan from the Bank which they used for their own personal advantage (with the entire margin being funded using the Bank's cash) so as to make a profit for themselves which then ended up in their Swiss bank accounts via Kuri Hills and a purported loan (which was nothing of the sort). None of this from start to finish (not least the actual loan to LBCS itself) is the conduct of persons acting in accordance with their duties to the Bank.

1487. As already noted, it is common ground, as shown by Mr Davidson's tracing analysis, that cash advanced by the Bank to LBCS was used to purchase from Merrill Lynch an 8.95% stake in MC Trust (the majority shareholder in the Bank). The end recipient of RUB 50 million (approximately US$1.52 million) out of the RUB 1.1 billion loan provided to LBCS was Merrill Lynch, for the purpose of the *"purchase of 265,511 shares (8.95% of the share capital) in Management Company Trust (majority shareholder of NBT) by TIB Holdings [TIBH], Neaspal, Winsala and Zaploma for USD 7.5 m (approx. RUB 245.8m)."*

1488. Mr Allen's unchallenged evidence is that the funds for the acquisition were sourced not only from LBCS (US$1.5 million) but also Black Coast (US$4.4 million). The money travelled through various offshore companies (as summarised in the diagram at C3/6/112) the net result being that Bank funds were used to increase the Shareholders' own stake in the Bank. This is obviously a benefit to the Shareholders using the Bank's own monies.

1489. It is recognised in Mr Yurov's Written Closing that *"the potential gain of Merrill Lynch's shares could of course have given the Defendants a benefit",* but it is said that it *"did not actually confer any financial or other benefit to the Defendants in the particular circumstances in which the Bank found itself".* This is a reference to the Bank's shares being frozen throughout the Yukos investigation which affected the ability of the Bank to raise finance and it is said to have prevented dividends being paid to Shareholders. This is hardly an attractive submission, as whether or not any benefit could be realised, the Shareholders had increased their share in the Bank, and as such benefitted, through the use of the Bank's own money. However, no separate claim arises out of the benefit itself.

1490. In terms of other parts of the first LBCS loan, Mr Davidson has shown that RUB 531.2 million of the first LBCS loan via various offshore companies ended up with SiberianKD, which then used it to repay a loan to the Bank (i.e. misapplying the LBCS loan proceeds for the purpose of discharging a liability of a company admittedly owned by the Shareholders. In addition some RUB 145 million of the first loan was used to purchase the rights of assignment of loans made by the Bank to retail borrowers. In this regard, Mr Davidson tracks US$12 million issued to Erinskay, Baymore and LBCS as having been received by Biznesaktiv, which was further used by Biznesaktiv to acquire a retail portfolio with a face value of RUB 3,526.7 million m from the Bank. The Bank points out that the as a net result of this transaction, the Bank lost a retail portfolio with a face value of RUB 3,526.7 million (the consideration of RUB 713.6 million being paid to the Bank from the Bank's own funds). There is no evidence as to the value of the loan portfolio but neither is there any evidence that it was worth only a fraction of its face value.

1491. As to the use of the second loan, and as appears from Mr Davidson's evidence, some RUB 973 million (US$27.5 million) was transferred via Drenville to Black Coast and used to purchase Russian government bonds. These, in turn, were recycled through the Bank Winter scheme, whereby Black Coast "returned" the bonds on 9 September 2013, only to get them back four days later (and not traced further). It is difficult to see any purpose for all the various transfers other than to mislead both the Bank's auditors and the CBR (the transactions are considered further in relation to Black Coast (Section R.6)). Such matters, which fall within Category (4) of the Bank's Points of Loss Table, are in any event collateral to the Bank's loss (LBCS's outstanding liability to the Bank).

1492. Once again as a shell company that had rapidly paid away a large part of its loan capital it was only in a position to service debt and margin calls from other offshore vehicles (with Mr Davidson showing that sums of RUB 67 million, RUB30 million, and RUB35 million had been sourced from Erinskay, and RUB 60 million from Baymore). Mr Grechishnikov, a close personal friend of Mr Yurov's, was the person charged with responsibility for arranging LBCS's interest payments (amongst many other aspects of the fraud).

R.3.3 The Bank's Loss

1493. LBCS predictably defaulted soon after the Bank collapsed and its sources of funds dried up. There was no response to the Bank's demand for repayment and in the absence of collateral only limited recoveries have been made. Proceedings were commenced, and judgment obtained, in the Russian courts, but did not yield any further recoveries. The accountancy experts have agreed that the outstanding principal on the loans is RUB 2,142,336,091. Whilst Mr Yurov takes various points on quantum in relation to LBCS, including those falling within Category (1), Category (2), Category (3) and Category (4) as addressed in the Bank's Points of Loss table, none of these impact upon the Bank's recoverable loss, as addressed in Sections N.2.2 to N.2.9 which are repeated in relation to the quantum of the Bank's loss.

R.4 MOURIJA

R.4.1 Common Ground

1494. Mourija was a pure "balance sheet management" company that was not associated with any underlying business and owned no real property. The first loan, on 3 March 2009, was for US$35 million. It was approved by the CC, chaired by Mr Yurov. Subsequently, the principal repayment date was extended (eventually to March 2017) and the dates for the payment of interest were deferred. The amendments were approved at a series of CC meetings chaired by Mr Yurov (save for a meeting on 22 February 2012 said to have been chaired by Mr Fetisov, but this is not admitted by Mr Fetisov). The second loan, on 14 November 2011, was for RUB 535 million. It was approved by the CC, chaired by Mr Yurov. Subsequently, the principal repayment date was extended (ultimately to November 2017) and the interest schedule was revised. The amendments were approved at a series of CC meetings, chaired by Mr Yurov.

R.4.2 Discussion

1495. Mourija shared many of the characteristics of Erinskay and Baymore and indeed has already been mentioned in that context in Section R.1 above. Mr Yurov himself described it as having served *"the same purpose as Erinskay and Baymore, the difference being that Credit Linked Notes ("CLNs") appear to have been involved rather than the purchase of government securities … My general impression, however, is that Mourija's role was similar to Baymore and Erinskay, that is to generate liquidity for the purposes of the Bank".* The use of Mourija for "balance sheet management" was inappropriate for the reasons already addressed in Sections G.3.1 and G.3.2. Of course making loans that result in cash leaving the Bank does not generate liquidity for the Bank.

1496. As with loans to other Borrowers, the loans were advanced by the Bank to Mourija with the approval of at least one of the Shareholders sitting on the CC, and without disclosure of their beneficial ownership of the company. The credit terms were uncommercial and were repeatedly relaxed in favour of the borrower, with the agreement of at least one of the Shareholders on each occasion. It is the Bank's case that the proceeds were then deployed not for any legitimate business of Mourija's (not that Mourija had any legitimate business), but for the personal benefit of the Shareholders through refinancing liabilities originally incurred to enable them to purchase Mr Kolyada's stake in the Bank, and to fund a capital injection into the Bank itself. The Shareholders submit that this cannot in fact be demonstrated. The point is addressed in due course below.

1497. Mourija's supposed assets, which were of suspect value at best, were falsified, and the same was facilitated by parties including Mourija's auditors (JIB). In this regard, on 21 April 2014, Mr Bolshikhin emailed Mr Worsley and various of his staff raising his concerns about a proposed change of accountants for several companies including Mourija. Mr Bolshikhin stated in relation to Mourija, *"The company has an assets with questionable appraisal (bonds of Astana Finance and Finance-Lizing). JIB had not a question about them in 2009 and 2010. We hope that we will be able show the same amount in 2011-2013 (apr. 680 mln rur). We fear that new auditor will show the true amount – zero".* Mr Worsley's email in response (copied to Mr Yurov), I am satisfied, reflected the reality in relation to false valuation of assets and the involvement of the likes of JIB in that:

"In your email you refer to certain issues that we need to keep private. EG false valuation of the assets of Mourija, false valuation of TIB Holdings…
You also refer to 'stupid questions', which are in fact 'proper accounting questions'.
Mate, we are moving all accounting to Cyprus. We now have an international team. We really cannot talk about dodgy accounting actions in such an open forum (you CC'd to our whole international team….).
These people live in Cyprus, and work there. They may also have a different view of ethics than JIB have (IE they are honest), and may also not know the history.
If you need me to keep certain accounts with JIB, for certain reasons, then in future please email just me (and CC Ilya if you like to), and I will help……
As to JIB: They are dishonest, incompetent, and a nightmare to deal with. They are also political….. If we need them in certain instances, we can keep them, but overall, it's time to change them. They will still have our local Russian business."

(emphasis added)

1498. As with other Borrowers, false documentation was also used to deceive the CBR in the form of false rental agreements and the like, often long after the incorporation of the entity concerned - for example an email exchange between Mr Worsley and Iskandyrov on 29 November 2011 discussed the creation of a false rental agreement for Mourija (as well as other companies) so as to give the impression that it had premises and (by implication) a genuine business.

1499. In terms of ownership (and contrary to the Shareholders' denials) I am satisfied, as I have already found, that Mourija was at all times beneficially owned by the Shareholders. It was incorporated in Cyprus on 30 April 2008. The initial registered shareholder was TIBH, and whilst it was a company forming part of the ownership structure of the Bank itself it was admittedly owned by the Shareholders. Mr Yurov had previously accepted that the Shareholders had "operational control" over Mourija. The reality is that they each beneficially owned and controlled Mourija as they each well knew:

(1) On 7 October 2010, the Shareholders signed a letter in their *"capacity as the beneficial shareholder of MOURIJA",* addressed to the then corporate service providers giving an instruction to appoint signatories for bank accounts to be opened for Mourija at Marfin Popular Bank in Cyprus, making a declaration as to the lawfulness of the assets and cash to be deposited on the account, and granting the Cypriot service providers an indemnity.

(2) Thereafter, when Mourija and various other of the Shareholders' companies were transferred to Vassiliades' management in September 2011, the Shareholders signed a further letter of engagement and accompanying indemnity (in yet more detailed terms) addressed to Vassiliades.

(3) Yet further, the previous administrators' mandate was terminated by a letter, signed by each of the Shareholders, confirming that they were the *"beneficial owner(s) of MOURIJA".*

(4) On 23 November 2011, each of the Shareholders as "*beneficial owners of MOURIJA*" signed an instruction appointing Mr Vassiliades as the signatory on Mourija's bank account and assumed "*full responsibility towards [Vassiliades] for all their acts and deeds by and in connection with [Mourija]*". The shares in Mourija were stated to be

beneficially owned as to 42.86% by Mr Yurov and 28.57% by each of Mr Fetisov and Mr Belyaev (i.e. as usual 3:2:2).

(5) The application form for opening a bank account for Mourija at Piraeus Bank, dated 23 November 2011, was also signed by each Shareholder (personally). It described the nature of Mourija's business as *"Investment and lending in the areas of securities in Russia and the CIS"* (which was, of course, misleading given that it was no more than a "balance sheet management" company that had neither an underlying business nor property) and also referred to its initial source of funds as being *"loans and revenues from clients"* (of course Mourija had no clients).

1500. Whilst as with other Borrowers, further distance was subsequently put between the Shareholders and Mourija, it remained beneficially owned by the Shareholders. In this regard:

(1) TIBH was first replaced with Ms Charalambidou (a Vassiliades employee) who held the shares in Mourija on trust directly for Messrs Yurov, Belyaev and Fetisov (in the usual 3:2:2 ratio) pursuant to Deeds of Trust dated 19 September 2011. The Shareholders subsequently signed a letter of instruction recording that they were the beneficial owners of Mourija (and so can hardly be unaware of their (continued) ownership).

(2) On 19 December 2012, Ms Charalambidou executed a Deed of Trust over the shares in Mourija in favour of a BVI company, Venn Investment Holdings Ltd ("Venn"), upon the (direct) instructions of the Shareholders, with a "nominee UBO" supplied by Mr Worsley (a Mr Gadsby), whose interest in Venn, through a Belize vehicle, was held on trust for Brora, one of the Shareholders' personal holding companies.

1501. To muddy the waters further in relation to Mourija (the scheme also extended to Baymore, Oldehove, Crylani and SiberianKD) Mr Worsley, to the knowledge of the Shareholders, misled Vassiliades about the reason for the "sale" and the introduction of Mr Gadsby. Thus by an email on 7 December 2012 Mr Worsley told Vassiliades that:

> "The UBOs of the following companies [including Mourija] have decided to divest themselves of the companies, so that they may focus on their other core businesses … The companies will be transferred from the current ownership (DOT [from] the nominee up to the three UBOs), to a new [structure] where the nominee shareholders will sign new DOT up to TIB Holdings. This will involve instruction letters from the three UBOs, but as they also own TIB Holdings, there will not in fact be any change of ownership.
> TIB Holdings will then <u>sell the companies to the new investors</u>. "(emphasis added)

(When in truth there was no divestment/disposal to Venn/Mr Gadsby at all, just a further layer of concealment of their continued beneficial interest.)

1502. By 18 December 2012, draft letters of instruction provided for the "transfer" of the Shareholders' beneficial ownership in Mourija, SiberianKD, Oldehove, Crylani, and various other Shareholder companies, to Tactio – it being contemplated that they be "*executed by YBF*". A further set of draft instructions then contemplated "transfers" by

Tactio to the offshore vehicles of the "nominee UBOs". I am satisfied that the Shareholders knew of, and were involved in such scheme. In this regard these draft instructions were sent by Mr Worsley to Mr Iskandyrov on 19 December 2012 asking *"Can you get YBF to sign these please."* It is clear that they did so. In this regard, Mr Worsley emailed Mr Belyaev with an update, referring to the *"transfer of assets as per the papers to sign today"* whilst Mr Iskandyrov forwarded the draft instructions to the secretaries of Mr Belyaev and Mr Yurov (Ms Karalkina and Ms Sidorova) asking them to procure each of the Shareholders to sign *"these documents"* and stating *"They know what this is all about"* (as I am satisfied they did). The Shareholders signed the instructions and they were returned in executed form to Mr Iskandyrov on 20 December 2012. The Shareholders were therefore complicit in these further attempts to deceive and conceal (their) ultimate beneficial ownership. Vassiliades recorded the purported change of beneficial ownership to Tactio on 18 December 2012 and to Mr Gadsby the following day, with a Deed of Trust being executed by Mr Gadsby in favour of Brora two days later.

1503. In terms of the loans themselves, and as already foreshadowed, they had similar characteristics to those to other "balance sheet management" companies that have already been addressed. The first was a US$35 million Loan (30/K/0155 on 3 March 2009) for 2 years with no capital repayments required until 3 March 2011, at the (low) interest rate of 5%, once again without any collateral. The stated purpose of the loan was *"replenishment of working capital, purchase of the bank's promissory notes"* and the Bank was entitled to require early repayment if there was an Event of Default (cl. 3.6), including a breach of Mourija's obligation to use the loan for the stated purpose (cl 8.1(b)). It was approved at a CC meeting on 25 February 2009, chaired by Mr Yurov. As was par for the course (as will be becoming apparent), there was no disclosure by the Shareholders of their beneficial interest in Mourija, and there is nothing (by way of a credit memorandum or risk management report or the like) to suggest any due diligence (and Mr Yurov could not remember any such document being prepared). That is unsurprising given that the purpose of the loan was understood to be for "balance sheet management" (per Mr Yurov's evidence).

1504. There is a CMRD report albeit dated the day after the CC meeting. Mr Yurov's evidence is that he *"would not pay a lot of attention what was written here".* It was, of course, prepared for the benefit of, and so as to deceive, third parties such as the CBR. Once again it contained misleading and false statements of a similar nature to those previously identified with other Borrowers such as that it was involved in debt financing in the real estate sector and other industries, had a stable financial status, that its goodwill was assessed as "*high*", that the quality of its management was "*high*", that "*the share of related party transactions is insignificant" and that "at present the Bank is considering granting a loan of USD 35 million to Mourija Trading Limited for the acquisition of 100% of the equity of Business Group LLC, and also the rights of claim against the indicated company*".

1505. The Shareholders, of course, knew that Mourija was nothing other than a "balance sheet management" company, and that what was being stated was misleading. Mr Yurov admitted as much, in terms of his understanding when cross-examined, in a passage which included this exchange.

> "Q. If this document was before the meeting, you would all have known that to describe the status of Mourija as financially stable was at best misleading,

wasn't it, because on your own case it depended on the bank for support, for stability?

A. That was my understanding, yes, but my understanding here as well and now that financial stability in the terms of the balance sheet of this company means that the company had in the past certain operations and it was commercially profitable without explanation what was the source of these commercial transactions. So I saw that and I currently see this as a formal description of what Mourija was and any other companies and formally Mourija was incorporated, my understanding, company with its balance sheet with financial figures, which have to be described somehow for the records of the Bank." (emphasis added)

1506. I have already referred (in the context of Erinskay and Baymore) to Mr Yurov's own evidence as to his own lack of independent consideration of the associated loans (which applied also to Mourija as well as LBCS), and he also accepted, when cross-examined, that he knew that, in order to pay interest as it fell due, the Borrowers would have to be "lent" more money from the Bank either directly or from other sources in the offshore network (Mr Worsley and Mr Grechishnikov being responsible for creating schemes to move money around such offshore network so as to service and repay loans (as has already been noted)).

1507. A particular characteristic of this loan (to be repeated in relation to other loans) was that the principal repayment date was repeatedly extended, as were the dates for the payment of interest, with the last set of amendments resulting in all interest accruing after June/August 2012 being due on the extended principal repayment date (3 March 2017). There was no proper basis for such repeated deferment of not only principal but also interest – i.e. unlike normal commercial arms-length loans Mourija was not even required to service the loan on a regular and ongoing basis. Such amendments were approved at CC meetings on 9 February 2011 (chaired by Mr Yurov); 22 February 2012 (chaired by Mr Fetisov); 20 June 2012 (chaired by Mr Yurov); 6 February 2013 (chaired by Mr Yurov); and 28 February 2014 (chaired by Mr Yurov and attended by Mr Fetisov). I have already noted that (as with other Borrowers) there was never, on any occasion, any disclosure by the Shareholders of their beneficial interests (as there clearly should have been). Nor is there any evidence to suggest that when considering such approvals there was any exploration of what the loan was for and what had been done with it, as there clearly should have been (Mr Fetisov accepted that, in theory, in order to approve the extension of the Mourija loan, he would have needed to know exactly what the loan was for and what Mourija had done with it). I am satisfied that all the Shareholders must have known that there was no commercial justification for extending the loans in the terms that they were.

1508. There is disagreement between the parties as to the use to which the funds were put. I do not consider it ultimately matters for the purpose of the Bank's claims, but I address the available evidence below.

1509. On 3 March 2009, Mourija purchased a promissory note from the Bank for US$ 35 million and sold it back to the Bank on 6 March 2009, with interest, for US$ 35.014 million. There is self-evidently no commercial benefit to Mourija of doing so. Mourija used the proceeds from the sale of the note to fund the transfer of funds to TIBI on 11

March 2009, (1) US$ 18.2 million under agreement TIB/M-PN to purchase 12 promissory notes issued by Business Group from TIBI and (2) US$ 16.4 million under agreement SAP_BG to purchase all the share capital in Business Group. TIBI is not the Bank (and such transfers from Mourija are in "Category 3").

1510. Mr Allen then says that TIBI used the funds received from Mourija as follows, (1) 11 March 2009 – US$ 4.4 million used as part of a payment to refinance the EWUB interbank lending and (2) 12 March 2009 – US$ 31.6 million transferred to a TIBI ruble account to buy CLNs from the Bank.

1511. The reason that matters are not straightforward is that on 11 March 2009 TIBI received at total of US$231.8 million into its account consisting of US$55 million (from the Bank), US$142.2m (from EWUB) and US$34.6 million (from Mourija), and then on 12 March 2009 TIBI paid out the following sums, (1) to EWUB US$201.6 million and (2) to TIBI (ruble account): US$31 million, which was converted to rubles and then paid to the Bank to purchase the CLNs.

1512. As Mr Davidson points out, due to the mixing of funds Mr Allen can only make an assumption that what happened is what he says happened - i.e. he has allocated the payments from Mourija to show that they went to buy the CLNs based on an assumption, whereas they could have been allocated differently as going entirely to the EWUB scheme (as part of the US$ 201.6 million payment to EWUB as part of the funds used to purchase the CLNs) (if the latter this would be a separate collateral transaction within Category 4, in any event). Mr Yurov submits that the latter is a more natural way to look at it, as in order to link the Mourija funds to the payment for the CLNs Mr Allen splits the funds into a payment of US$ 31.6 million (the total sum paid for the CLNs) and one of US$ 4.4 million (the remainder, which he acknowledges went to EWUB) whereas there is no factual basis for such split and, having regard to the timing, the EWUB payment was made on 11 March and the CLN payment on 12 March, so the Bank would have had to predict on 11 March that it would need US$ 31.6 million on 12 March for the CLNs and set that those funds aside, only sending the remaining US$ 4.4 million balance as part of the EWUB scheme.

1513. Due to the intermingling of funds it will never be possible to know for certain either way. Thus as Mr Allen said:

> "Q. It would have been equally possible, wouldn't it, to say that the entirety of the 34 million that went from Mourija to TIBI went out again on 11 March to fund the payment to EWUB?
> A. Yes, we have the same mixing of funds issue, same day, same funds.
> Q. Yes and there is nothing you can see on the evidence or in the statements to suggest that one analysis is better than the other; it's simply either is a possible way of analysing it?
> A. It's mixed, mix funds."

1514. Once the funds are intermingled there is an inherent difficulty in identifying what actually happened. I do not consider it is possible to make a finding of fact in relation to the routing of these particular monies as to do so would be little more than speculation, and the timing point alone does not suffice to reach a definitive conclusion. Mr Allen may

well be correct in his assumption, but equally he may not be.

1515. It is, ultimately, however, something of an arid debate. The issue arises in the context of the funding of the Shareholders' acquisition of Mr Kolyada's 16.44% share in the Bank for US$40 million and a Shareholder "cash contribution" to the Bank in 2007, which had been recorded as "additional paid-in capital" in the Bank's financial statements. As to the former it is clear that the Bank's money (whatever the precise source or routing) was used to purchase Mr Kolyada's shares by the Shareholders (although a false story was later to be concocted by Mr Worsley that they were buying on behalf of the Bank – see Mr Worsley's email to Mr Yurov's private email account of 15 October 2014). As to the supposed Shareholder "cash contribution" this requires a little elaboration.

1516. The written evidence of Mr Fetisov was that of the US$140 million advanced under the Crédit Suisse Loan, US$40 million was used to acquire Mr Kolyada's shareholding in the Bank, and the remaining US$100 million was *"invested in the banks [i.e. TIB and NBT that merged to become the Bank] to increase their capital base".* Mr Belyaev asserted that *"the amount of capital donated by NBT's major shareholders amounted to roughly US $200,000,000 … The financial support provided to NBT by Mr Yurov, Mr Fetisov and me far exceeded my salary and bonuses for the roughly 15 years that I was employed by the Bank, yet it is not mentioned at all in the Bank's narrative of events".*

1517. However, there was, in reality, no cash contribution by Shareholders. I am satisfied that in reality it was financed (or refinanced) by the Bank itself. It matters not in this regard whether it all came via the EWUB or (as Mr Allen considered) part of it was financed with the proceeds of the first Mourija loan. Whether or not the Mourija loan was involved, Mr Allen's overall conclusion in this regard, which went unchallenged, and which I accept, was as follows:-

> "Having considered the Bank's IFRS financial statements for 2007 – 2013, I have only been able to identify references to shareholder cash contributions of RUB 5 billion (USD 191.7 million) in this period. I have analysed the source of funds for 99% of these contributions, and as I explain in sections 5 – 8, the vast majority of these were in fact ultimately derived from NBT's own funds. These were recycled using a complex chain of intermediaries, financial instruments and/or back-to-back loan schemes giving an impression that the funds came from the shareholders. Given the source of funds, these transactions do not, in my view, by substance represent genuine "financial support" from the shareholders. It is further not clear to me on what basis it was deemed appropriate to recognise these as an increase in paid-in shareholder capital in the IFRS financial statements, given these were sourced from the Bank's own funds. As such, the transactions would have led to an artificial increase in the Bank's equity through an inflation of its asset base." (emphasis added)

1518. Mr Fetisov himself admitted, *"I was generally aware that the Bank raised funds through the sale of its Credit Loan Notes (CLNs) in the market. I understood that such notes were issued to TIBIL, which acquired them with funding from the Bank and applied the sale proceeds for the Bank's benefit…*". This is an acknowledgement that the Bank's own monies were used (albeit that the Shareholders themselves benefitted). In

circumstances where it was ultimately the Bank's own money that was being used, in no real sense did the Bank benefit, still less did it benefit from any real contribution from the Shareholders. Mr Yurov's evidence on the point (feigning ignorance of what went on) was not credible. At one point he even went so far as to say that he did not even "*recognise TIBI and the role it is claimed to have played in these transactions*", which I am satisfied was untrue.

1519. Turning to the second loan, this was a RUB 550 million loan (30/K/0342 – 14 November 2011), originally for 1 year at the (low) rate of 7% pa, again with no capital repayments due until 14 November 2012. The terms were otherwise materially the same as the first loan. Some RUB 535 million was, in the event, drawn down. It was approved at a CC meeting on 27 October 2011 that was chaired by Mr Yurov, and again there was no disclosure of the Shareholders' interests in Mourija. The subsequent life of the loan followed a similar pattern to that of the first loan, with extensions of the principal repayment date (ultimately to 14 November 2017) and the interest schedule was revised, with a significant proportion of the interest being deferred until the end of the extended term. The amendments were approved at a series of CC meetings which were all chaired by Mr Yurov (on 20 June 2012; 30 October 2012; 27 February 2013; and 21 October 2014). There is an example of Mr Yurov's involvement in authorising the creation of a false and backdated record of the CC meeting on 30 October 2012. In this regard, on 8 November 2012 he was asked by Mr Postnov to *"instruct the secretary of the Bank's Credit Committee to include the decisions in accordance with the attached drafts in the minutes of the committee meeting held on 30/10/2012".* The second item to be "inserted" into the minutes concerned the extension of the second Mourija loan. Mr Yurov candidly acknowledged that he *"…agreed to include this into the minutes of the Credit Committee. That's my signature".* In this regard I understood him to be accepting that there was, in fact, no discussion of the Mourija loan at the 30 October 2012 meeting (with the consequence that, on his own evidence he was involved in knowingly falsifying what purported to be a record of the meeting). After questions from the Court, Mr Yurov said this to Mr Pillow:

> "A. No, if what you showed me is correct -- and I think it's correct -- the discussion -- the discussion in absentia took place not on 30 October but later, in November, but I accepted that this resolution will be included on 30 October, so the question is it is true if the previous document is authentic and it really took place, the answer is -- well, that was not take – this discussion not take place on 30 October is true."

1520. Whilst Mr Davidson's tracing exercise does not extend to this loan there is a contemporaneous email exchange between Mr Iskandyrov and Mr Fetisov (on the day of the CC meeting at which Mr Yurov approved the loan (27 October 2011)), which shows that the loan proceeds were applied in a scheme involving Black Coast that had been personally approved by Mr Fetisov and was a further (inappropriate) "balance sheet management" exercise:-

> "Nikolay,
> We decided on the following to resolve the matter of the sale of PLK shares:
>
> 1. use money from financing funds (Black Coast - the one where RUS30 is) temporarily for 1 week <u>we divert $18 million and give a loan to Mourija</u>

2. Mourija uses this money to by PLK shares
3. After 1 week the Bank issues Mourija a loan for 18 million % [sic]
4. Mourija returns the money on the loan to Black Coast
5. Black Coast buys back RUS30 from the fund RUS 30 Please approve." (emphasis added)

Mr Fetisov responded the same day: "ok".

1521. The email does not support the contention that this was a refinancing of a "defaulted investment" (though Mr Yurov and Mr Fetisov submit it does). In any event the overall transaction has all the hallmarks of the (wrongful) use of "balance sheet management", as addressed in Sections G.3.1 and G. 3.2.

R.4.3 The Bank's loss

1522. Once again as a shell company with no real business, Mourija depended on its liabilities being met with funds sourced from the Shareholders' offshore network as part of (inappropriate) "balance sheet management". In such circumstances, and predictably, following the Bank's collapse, Mourija defaulted on the loans. The Bank served demands for early repayment on 20 February 2015, but no response was received from Mourija. The Bank has made only limited recoveries (given the lack of collateral). The accountancy experts have agreed that the outstanding principal on the loans is US$19,780,000 and RUB 535,000,000.

1523. Whilst Mr Yurov takes various points on quantum in relation to Mourija, including those falling within Category (3) and Category (4) as addressed in the Bank's Points of Loss table, none of these impact upon the Bank's recoverable loss, as addressed in Sections N.2.2 to N.2.9 which are repeated in relation to the quantum of the Bank's loss.

R.5 LLC5 (SPARTAKOVSKAYA)

R.5.1 Common Ground

1524. From January 2011 until late October 2014, LLC5 was the 99% owner of Filenta. Filenta was the owner of an office building at 5 Spartskovskaya Street in Moscow, which was an office building occupied by the Bank as its head office (the premises). In September 2012, Filenta borrowed RUB 3.59 billion from the Bank. The credit facility was approved by the CC, chaired by Mr Yurov. The proceeds of the loan were used to repay the indebtedness of SiberianKD and Wave. In July 2014, the debt was converted into US$, as a result of which Filenta owed $103.5 million to the Bank. The conversion was approved by the CC, chaired by Mr Yurov with Mr Fetisov recorded as voting in favour *in absentia* (but this is not admitted by Mr Fetisov). In September 2014, Filenta's liability was transferred to LLC5. This was approved by the CC, chaired by Mr Yurov with Mr Fetisov recorded as voting in favour *in absentia* (but this is not admitted by Mr Fetisov). The day before LLC5 assumed the obligations of Filenta, the mortgage agreement over the premises was terminated by mutual consent of the Bank and Filenta. In late October 2014, LLC5 transferred its interest in Filenta to Delharem Holdings Ltd. The premises were transferred by Filenta to the Bank pursuant to an agreement dated 20 November 2014 (varied on 22 December 2014) for the issue of shares to Filenta in exchange for title to the premises.

R.5.2 Discussion

1525. As noted as part of the "Common Ground", LLC5 (full name LLC Management Company Spartakovskaya 5) was, as is reflected in its name, the owner of the building that was (and remains) the Bank's headquarters in Moscow (the "Premises"). It was a vehicle owned by the Shareholders that was also used in "balance sheet management" and which was used for their own personal benefit. From January 2011 to late October 2014 LLC5 was the 99% owner of Filenta LLC ("Filenta") the former owner of the Premises.

1526. LLC5 was, I am satisfied, at all material times owned by the Shareholders, albeit through a long, and deliberately opaque chain that involved a Cypriot layer (Milenford), two BVI layers (Reywood and Lanwood), and a "nominee UBO" (Mr Rowe) who held the shares in Lanwood on trust for Arlingham, one of the Shareholders' holding vehicles in the BVI. Mr Rowe was in fact nothing other than Mr Worsley's gardener/handyman, but he was represented to the world very differently as appears below.

1527. Filenta was also owned by the Shareholders, having been held through TIBI, Crylani and Nikilin before being transferred (as to 99%) to LLC5. Following the Bank's collapse, Mr Worsley (correctly) referred to Filenta as "*your property*" in his correspondence with the Shareholders (a description they never sought to challenge as that description was accurate). Nikilin was itself a Shareholder company receiving loans from the Bank (including loan proceeds that I am satisfied Mr Yurov used to acquire a luxury property near Moscow).

1528. As with numerous other offshore companies the Shareholders' ownership of LLC5/Filenta was concealed behind Mr Rowe as a "nominee UBO" (in fact he fronted numerous other offshore companies including Baymore, Polendor and Swaldon). There is also no doubt that the Bank's auditors (KPMG and Deloitte) were deliberately misled as to the identity of the beneficial owners of Filenta and various other Shareholder companies, with "scripts" being written for the likes of Mr Rowe to use in Skype

interviews with the auditors, that contained a whole raft of lies. For example Mr Postnov's email to Mr Worsley and Mr Vartsibasov on 25 April 2013 gave some "tips" for Mr Rowe's interview:-

> "We have represented mr. Rowe to the auditors as British citizen living in France with long track record of successive investments on real estate market.
>
> Mr. Rowe is the actual owner of Spartak office building with area 7.6 thousands sqm. The building is in perfect condition and situated in a Moscow district with high demand for office premises. It meets special requirements for banking office and this factor strongly supports its market value that stays at RR 3.8 bln.
> The building was acquired from Crylani Group in January 2011 with equity stake in LLC Filenta. Initially NBT financed the deal with loan to LLC Spartakovskaya Management Company but later it was rearranged in RUR 3.59 bln. loan to Filenta.
> The loan matures in September 2015 but mr. Rowe plans to repay it with asset sale in 1.5 year. He was close to sale the building last summer to Brenworth (the prepayment have been received already) but the offer of RUR 3.7 was not attractive enough (preliminary offer for RUR 4.5 bln was not confirmed).
>
> The building is leased by the Bank with leasing payment of RUR 26.5 mio per month. This is the sources for interest payments.
>
> The interest rate for loan is 6% p.a. Mr. Rowe does not know all details of the previous NBT involvement in this assets but as far as he understands the bank provided financing to the previous asset holder in pre-GFC period and now keeps credit facility on conditions consistent with cash flow generated by the building. Anyway, it creates a great investment opportunity for mr. Rowe.
>
> Mr. Rowe strongly believes in great prospects of Moscow real estate market. The office premises density here is lower than in other CEE capitals and with any sign of economic upswing supply-demand balance became pretty tight. On the other hand the clear tendency exists for tenant to move from expensive spots inside Sadovoe Ring to more smart locations close to Third Transport Circles. Spartak fits this investment idea very well. The price mr. Rowe paid for it was not particular demanding and the financing was ready available so the reasons for him to go into the project are quite clear.
>
> Mr. Rowe is happy to obtain NBT as a principal lessee for his property. With the whole building occupied by a sole large and reliable organization with responsible and predictable manner to conduct business he has no problems with revenue collection and client relations. As a result the opex are reduced effectively."
>
> (emphasis added)

1529. The CBR was also misled about the beneficial ownership of Filenta, having been told by letter dated 22 October 2012 that the beneficial owners were Mr Rowe (as to 99%) and

Ms Yenovkian, the Cypriot nominee (as to 1%, which was the interest still held through Crylani at that stage).

1530. The Bank's loan to LLC5/Filenta is closely related to events in relation to Crylani and the repayment by TIBI of its loans not only from EWB but also Donau. The Shareholders' interest in Filenta was originally held through their own vehicle, TIBI. On 4 May 2009, TIBI "sold" its 100% shareholding in Filenta to Crylani for RUB 2.06 billion (TIBI itself had only spent about RUB 942 million on the acquisition, according to the spreadsheet attached to Mr Fetisov's "hidden assets and financings" email to Mr Eggleton on 14 October 2008). This was part of an effort made, I am satisfied, with the knowledge and approval of the Shareholders in the second half of 2008 and early 2009, to inject as much cash as possible into TIBI to enable it to discharge its obligations to EWB/Donau (see further Section R.12 below). The purchase by Crylani of the shares in Filenta was funded through an entirely circular transaction whereby TIBI repaid a loan to Crylani and the funds were then transferred by Crylani back to TIBI as consideration under the Filenta SPA. As Mr Davidson himself explained:

> "CR/TIB-LF – Due to be repaid by 31 December 2009. On 6 May 2009, Crylani received RUB1.95bn into its bank account from TIBI in relation to this loan. The funds were used to make a payment of RUB2.06bn to TIBI in relation to agreement Cr/TIB-SPA_Fil dated 4 May 2009. This agreement was between TIBI (as the seller) and Crylani (as the purchaser) for the purchase of 100% of the share capital of Filenta LLC for RUB2.06bn."

1531. Mr Davidson has examined both the Crylani and the LLC5 loans, but he has not traced the proceeds of those loans to the acquisition of the Premises or the shares in Filenta. So far as the Crylani loan is concerned, no tracing link can be established because the purchase of shares in Filenta was funded with cash transferred by TIBI itself on 6 May 2009 in "repayment" (the source of these funds of TIBI has not been ascertained but I accept that it is likely to be the Bank itself, through either EWB or Donau). In relation to the LLC5 loan, and as demonstrated by Mr Davidson's analysis, this was in fact itself the product of a multi-step refinancing of an earlier "repayment" by Crylani of some RUB 3.2 billion of its loan from the Bank. Mr Davidson accepted that the funds supposedly repaid by Crylani, or a substantial part of those funds, in fact end up being owed to the Bank by LLC5. Crylani then used the proceeds of its loan from the Bank to inject cash into TIBI (by reference to various, inflated asset "sales"), which in turn used it to pay down its debts to EWB, those loans being used to refinance, amongst other matters, some RUB 4.38 billion of loans advanced to TIBI by Donau. It is obvious from Mr Davidson's findings that the ultimate beneficiary of the LLC5 loan was TIBI; and that there is a direct link between EWB lending and Donau lending (the former refinancing the latter).

1532. In Mr Yurov's Written Closing Submissions much time is spent looking at other loans to LLC5 and Filenta designed to demonstrate that the Bank was, it was submitted, no worse off overall at the end of the process than at the beginning (and so, it is said, no loss was suffered by the Bank in relation to September 2012 loan in its 2014 LLC5 incarnation). Mr Yurov's submission is encapsulated at page 261 of Mr Yurov's Closing Submissions as follows:-

> "3.The Bank issued a series of loans in 2011 and 2012 to restructure the

holding of the Building. In January 2011, it loaned money to LLC5 to buy Filenta from its previous owner, Crylani; the loan was secured by a pledge over the Building. In May 2012 (apparently in response to a CBR direction), it refinanced the loan to LLC5 with a new loan directly to Filenta. That loan was due to expire in August 2012. The Bank granted a one-month 'bridge' which in effect discharged the loan with funds sent to Filenta via other companies, before issuing a new loan to Filenta for the same amount in September 2012. The overall effect of these transactions was neutral; they had no net effect on the Bank's financial position. At each stage the funds left and returned to the Bank within a short period, usually a matter of days.

4. In late 2014, the Bank took the Building onto its balance sheet as additional capital. It released the pledge, novated the loan to LLC5 and, just after it had gone into administration, it issued Bank shares to Filenta. The end position of the Bank is the same as it would have been if it had simply owned the Building outright."

1533. But this submission entirely misses the point as it fails to focus on the September 2012 loan and what became of it, and what loss the Bank suffered in relation to the 2014 LLC5 loan (which is the subject matter of the Bank's claim). It is important to understand that the claim advanced by the Bank relates to the particular credit facility agreement with Filenta on 14 September 2012, and the subsequent life of that transaction.

1534. By that agreement, a loan of RUB 3.59 billion was made available for a term of three years at 6% pa for the exclusive purpose *of "settlement with the company Brenworth Finance ["Brenworth"] per Agreement dated 10 July 2012. The borrower is not authorised to use borrowed funds for repayment of the outstanding debt per other credit agreements executed with the Bank"* (cl. 2.3). The loan was secured inter alia by a mortgage over the Premises. The loan to Filenta was unanimously approved at a CC meeting (chaired by Mr Yurov) on 7 September 2012. There was no disclosure of the Shareholders' interest in Filenta or LLC5 (as there clearly should have been), nor of the real purpose of the loan which was to discharge the liabilities of SiberianKD and Wave (themselves being the latest in a series of steps to refinance, ultimately, TIBI's liabilities including to the entity Donau). Instead, the CC resolution recorded the purpose of the loan to be *"payment to Brenworth Finance Ltd under agreement dated 10 July 2012"* (which whilst literally true, was in reality seriously misleading because, as Mr Davidson demonstrated, Brenworth was just a vehicle for the onward transmission of the funds to SiberianKD and Wave).

1535. Even the purported "preliminary agreement on sale and purchase of non-residential premises" between Filenta and Brenworth was backdated (it bears the date of 10 July 2012 but the email record shows a draft being finalised on 7 August 2012). Following its signing by the nominee director of Brenworth, the backdated contract was then supplied to Piraeus Bank to justify a movement of funds from Brenworth to Filenta. Subsequently, the "preliminary agreement" was cancelled (so as to give an apparent justification for a movement of cash back to Brenworth). The "Schemes Database" depicts these circular transactions and the role they played in a Black Coast repo refinancing.

1536. There does not seem to have been any proper consideration of the appropriateness of the loan or of the collateral to be taken before approval was given – for example the undertaking of an independent valuation of the Premises so as to establish whether the envisaged collateral was sufficient to cover such a large loan, nor indeed any credit report or risk analysis, or any other due diligence being undertaken as to the creditworthiness of Filenta and/or its ability to repay the loan. It is also an example of a CC approval being obtained *in absentia* without any apparent justification for the same – certainly Mr Yurov was unable to think of any reason why that was done given that there was no requisite urgency, when he was cross-examined.

1537. Subsequently, the terms of the loan were amended. The first change was on 18 July 2014 when the debt was converted into US$ - resulting in Filenta owing the Bank US$103.5 million. This change had been approved at a CC meeting on 10 July 2014, chaired by Mr Yurov and attended (*in absentia*) by (amongst others) Mr Fetisov. I am satisfied that Mr Fetisov did give his approval, and indeed the evidence shows that he was himself personally involved in, and was asking for updates in relation to, the process of "*changing loans into USD*". Mr Fetisov accepted during the course of his cross-examination that in order to have voted in favour of this change (as he did), he would have needed to know who Filenta was, what the loan was for, how it had been used and how Filenta was supposed to repay it. I infer from the circumstances that he, like Mr Yurov, was aware of the circular transaction involving Brenworth, the involvement of their company SiberianKD, in the transmission of the loan proceeds, and the fact that this was a part of a larger scheme involving the refinancing, ultimately, of the debts of TIBI (another of their companies).

1538. On 30 September 2014, Filenta's liability under the loan agreement was transferred to LLC5. The approval for the changes was obtained at a CC meeting on 24 September 2014 (again *in absentia* for no apparent good reason), chaired by Mr Yurov and attended by, amongst others, Mr Fetisov. There is no evidence that the CC considered what would have been obvious matters to be considered before agreeing to such a change (such as the financial standing of LLC5). Of course the reality was that LLC5 had no real business activity, no revenue stream and its only asset, aside from a small sum in cash held in an account at the Bank, was its interest in Filenta – which was subsequently sold to two other offshore companies owned by the Shareholders – Delharem and Estrenor – in exchange for promissory notes of no value. Again, there was no good reason for the CC to make the resolution *in absentia*. Contrary to any normal banking transaction, the decision was made to permit the transfer of the liabilities to LLC5 before execution of the pledge agreement – so that the Bank was exposed to a risk of a default with no collateral.

1539. In fact, no collateral was ever provided as the day before LLC5 assumed the obligations of Filenta, 29 September 2014, the mortgage over the Premises was terminated by mutual consent of the Bank and Filenta (although the Additional Agreement No 3 – made by the Bank and the substituted Borrower, LLC5 – and the CC resolution of 24 September 2014 assumed that the Premises would be provided as collateral). At a further CC meeting on 20 October 2014 (chaired by Mr Yurov), unanimous approval was given to a guarantee being issued by Filenta in respect of LLC5's liabilities under the (novated) loan. Once again there was no disclosure of the Shareholders' interest in Filenta or LLC5. On 20 November 2014, the Bank entered into an agreement (varied on 22 December 2014) to issue shares to Filenta in exchange for title to the Premises, the value of which was ultimately stated to be RUB 1.38 billion.

1540. By March 2015, LLC5 defaulted and, in response to a demand for repayment, the Bank received no response. Proceedings were commenced by the Bank in Russia, with the result that LLC5 was declared bankrupt on 28 March 2016. The accountancy experts have agreed that the outstanding principal is US$90,161,512.

1541. Mr Yurov's submission that the September 2012 Filenta loan was simply "*a one month bridge*" and had no net effect on the Bank's financial position is wrong as it fails to have regard to what happened to that loan, and what loss was suffered by reason of the 2014 LLC5 loan. Equally what happened to other loans is collateral, and does not stand to be taken into account.

1542. Having regard to the matters addressed above, it is possible to answer Issues 93 and 93.1 and 93.2. These Issues are as follows:

> "93. In August 2012, did the Bank lend SiberianKD and Wave a total of RUB 3.8 billion, which was ultimately paid by Brentworth to Filenta as a deposit under an SPA and then used by Filenta to repay an earlier loan made to Filenta by the Bank? If so:
>
> 93.1 were the loans in August and September 2012 linked, so as to provide a one month 'bridge' and, taken together, had no net effect on the Bank's financial position; or
>
> 93.2 was the effect of this loan to 'refinance' part of the Bank's loan originally advanced to Crylani?"

1543. Issue 93 is to be answered, Yes, the proceeds of the Bank's loans to SiberianKD and Wave in August 2012 were ultimately transferred to Filenta, enabling it to repay an earlier loan made by the Bank – which was itself one of the intermediate steps in the refinancing of TIBI's liabilities including to Donau. However, in relation to Issue 93.1, once all of the relevant context is taken into account, it is not correct to say that this scheme had no "*net effect on the Bank's financial position*". In relation to Issue 93.2 the answer is Yes, the effect of this loan was to "refinance" part of the Bank's loan originally advanced to Crylani, which was in turn used to meet TIBI's liabilities, including to Donau.

R.5.3 The Bank's Loss

1544. However, the more fundamental point is that the Bank has suffered a loss on the LCC5 loan itself, and that was a loss of US$90,161,512, which it is entitled to claim against the Shareholders. Sections N.2.2 to N.2.9 are repeated in relation to the quantum of the Bank's loss.

1545. Two specific submissions are made as to alleged credits that should be given:-

(1) The first is that it is said that the Bank "has not suffered any loss on any of these Loans, because the funds were returned to it within a matter of weeks via circular transanctions at each stage in the lending process."

(2) The second is Mr Yurov's answer to Issue 94 – it is submitted that the question: *"Are the Shareholders entitled on their statements of case to advance a positive case that the Bank should give credit for the value of the premises transferred by Filenta? If so, should such credit be given and in what amount?"* is to be answered yes, and the figure used should be RUB 4.14 billion (a valuation figure from Congress Consulting LLC dated 17 September 2014 that Mr Davidson relies upon).

However, neither submission bears examination, and I am satisfied that no credit stands to be given.

1546. As to the former, this fails to focus on the loss suffered in relation to the LLC5 loan, and that what occurred in relation to other loans is collateral, and not relevant for the reasons addressed in Sections N.2.2 to N.2.9. It also fails to recognise that Mr Davidson's analysis established that the LLC5 loan was itself the product of a multi-step re-financing of an earlier "repayment" by Crylani of some RUB 3.2 billion of its loan from the Bank (see 3-Davidson App 4, 6-11). That repayment by Crylani has already been credited in the sense that the Bank does not advance a claim for the portion of the Crylani loan that has been repaid.

1547. As to the latter point, there are a number of answers. The first is that this point was not, I am satisfied, pleaded, as it should have been if such a point was to be advanced. This is not a technical pleading point for two reasons – first it is clear from points that the Shareholders did plead in relation to quantum (but are no longer in issue) that they (rightly) recognised that it was necessary specifically to plead any alleged credits. The second point (which follows on from the first) is that one of the reasons why it is necessary to plead such points is that the Bank would have been entitled to, and would have wished to, adduce expert valuation evidence. It would be prejudicial and unjust were the Shareholders to be allowed to pursue such a case at this stage, not least in circumstances where there is a considerable difference in the figures relied upon by the parties based on such limited valuations as are before me.

1548. The second, and fundamental point, is that the Bank would not, in any event, be obliged to give any credit. It is common ground that the Premises were transferred to the Bank pursuant to an agreement dated 20 November 2014 (varied on 22 December 2014) for the issue of shares to Filenta in exchange for title to the Premises. As the Bank rightly points out, this constitutes neither a recovery nor unrealised collateral, but a separate transaction involving a transfer of the Premises for valuable consideration. Thus, any benefit is collateral. The fact that subsequently the shares were rendered worthless, following the Bank's collapse, makes no difference to the point of principle. Moreover, there is no principled basis on which the transfer of the Premises (by Filenta) in exchange for shares in the Bank should reduce the liability of the new borrower (LLC5) under the novated loan agreement.

1549. The fact that the experts agree that the Premises should be treated as an "*indirect benefit*" to the Bank is not in point. This simply shows that any alleged benefit is collateral. In any event Mr Davidson's own evidence is that the LLC5 loan proceeds are traceable ultimately to TIBI's repayment of its debts, including to Donau, but not to the purchase of the Premises, and the "*end position*" in relation to the LLC5 loan is that the "*principal balance outstanding on the loan, net of repayments made, is USD 90.1m*" and Mr Davidson does not say that credit should be given for the value of the Premises.

1550. I would only add that I do not consider that I have sufficient evidence before me to assess an appropriate credit, even had there been any requirement to give credit. I have no expert evidence on valuation (as would clearly be required). If, contrary to my conclusion it was appropriate to give credit, and to have regard to what is before me, then I would have concluded that any credit ought not to be any more than that determined by the Bank's Board of Directors in December 2014 - the value taken for the purpose of the issue of the shares to Filenta, "*The monetary valuation of the Building, being provided as payment for the Shares, was determined by decision of the Issuer's Board of directors (Minutes of meeting of the Board of directors of NB TRUST (OJSC) No.25/N/14 dated 22.12.2014) and is 1,381,334,513.98 roubles (One billion three hundred and eighty-one million three hundred and thirty-four thousand five hundred and thirteen roubles 98 kopecks)"* as that figure, rather than the earlier valuation report of Congress Consulting LLC dated 17 September 2014 (in the figure of RUB 4.14 billion), would be the most recent available assessment, and one that is more likely to take into account the impact of the financial crisis in Russia in Q4 of 2014.

R.6 STIVILON AND BLACK COAST

R.6.1 Common Ground re: Stivilon

1551. Stivilon was the owner of the leasehold rights of a land plot in Gelendzhik on the Russian Black Sea coast on which it was intended to develop a hotel and residential complex. The original owners of Stivilon were Alexander Materikin, Oleg Shkoda and Vladislav Sutormin (the "Original Owners").

1552. In early 2008, when Stivilon was owned by the Original Owners, the Bank provided a loan for the purposes of the Gelendzhik project by purchasing CLNs of which Gofra was debtor. Gofra was used for the purposes of that loan and was recorded on the Bank's IFRS accounts as a subsidiary of the Bank (on the basis of control and attribution to the Bank of the benefits related to its operations/net assets, but not direct or indirect ownership).

1553. In October 2008, Gofra became the owner of 70% of Stivilon as a result of defaults by the Original Owners in respect of the facilities provided by the Bank. On 24 December 2008, the Bank entered into a contract to acquire 19% of Stivilon from Gofra for RUB 584 million (which was indirectly paid to TIB Equities, a wholly owned subsidiary of the Bank). During April 2009, the 51% majority interest in Stivilon was transferred from Gofra to Elis Trade (via TIBI and Nikilin).

1554. On 10 March 2010, the Bank entered into a RUB 3 billion loan facility agreement with Stivilon. The loan was approved by the CC chaired by Mr Yurov; Mr Fetisov is recorded as having also voted in favour of the loan *in absentia*, but this is disputed by Mr Fetisov. As at 10 March 2010, the registered shareholders of Stivilon were: (i) the Bank as to 19%; (ii) Elis Trade as to 51% and (iii) the Original Owners as to 30%.

1555. On 23 March 2010, Stivilon drew down RUB 2.26 billion under the loan facility agreement. On the same day, RUB 1.5 billion was lent by Stivilon to Elis Trade, which converted the funds into US$ and made a US$50.2 million loan repayment to the Bank under a loan which it had taken out on 17 April 2009. In November 2010, the 51% majority shareholding in Stivilon was transferred from Elis Trade to Black Coast.

1556. Stivilon ultimately drew down the full RUB 3 billion under the loan facility. On 27 February 2013, the CC (chaired by Mr Yurov) voted to extend the repayment date for the loan to 7 March 2016 and none of the RUB 3 billion principal had been paid back by 22 December 2014 when the temporary administrators were appointed.

R.6.2 Discussion

1557. Whilst there considerable common ground between the parties in relation to Gelendzhik project (although Mr Yurov's Closing Submissions in that regard are somewhat at odds with his description of it as "garbage") and also as to the use of Stivilon, the parties are fundamentally at odds in relation to the ownership of Stivilon , the use and treatment of the circa US$100 million loan entered into by Stivilon in March 2010, and the loss suffered by the Bank (claimed at RUB 2.1 billion net of recoveries), whereas the Shareholders submit that no loss has been suffered alternatively (but unpleaded) that the Bank should have recovered more than RUB 1.7 million for the leasehold rights to the land following default in March 2015 (and sale of such rights in the second quarter of

2017).

1558. The Bank summarises its case at paragraphs 1 to 5 of its Closing Submissions in relation to Stivilon as follows:-

> "1. Stivilon is an example of a Borrower associated with a genuine underlying commercial project, albeit an unsuccessful one, namely the development of a hotel and residential complex in Gelendzhik on the Black Sea coast. This project was never finished and never became a cash-generating business.
>
> 2. The DIA Report suggests that Stivilon became a Bank client in October 2007. Stivilon was owned by three Russian businessmen at the time. However, the documents show that, during the financial crisis of 2008, a Cypriot company called Gofra (owned by the Shareholders personally) acquired 70% of Stivilon from its original owners. The Bank then purchased 19% of Stivilon from Gofra for RUB 584m in December 2008 (which was recorded in the Bank's accounts) with the Shareholders retaining a 51% interest for themselves.
>
> 3. In March 2010, Stivilon entered into a RUB 3bn loan facility with the Bank (equivalent to about $100 million at the time). Mr Yurov and Mr Fetisov were amongst the CC members who approved this loan. There was however no disclosure of the Shareholders' personal majority beneficial interest in the company and the Stivilon loan facility was presented to the outside world (and the CBR) as genuine arm's length commercial lending. Nor was there any of the due diligence that any bona fide bank would have undertaken in relation to lending on this scale. Further, when an initial tranche of RUB 2.26m was drawn down pursuant to the loan facility, most of that money (RUB 1.5bn) was immediately applied for a purpose totally unconnected with Stivilon's business (paying off a debt owed by another Shareholder company, Elis Trade, to the Bank).
>
> 4. Ultimately, the project was a failure and not a single kopek of the RUB 3 billion principal sum was ever paid back by Stivilon. Indeed, on the day that the principal was originally due to be repaid, 7 March 2013, the repayment date was extended by the CC (chaired by Mr Yurov) by three years with the result that the loan was still outstanding when the Bank collapsed. Of course, had Stivilon ever completed the resort complex and been commercially successful, the Shareholders would have reaped the benefit of that success through their undeclared majority interest in the company. However, given that Stivilon was not a success, when the Bank collapsed in late 2014, the Shareholders laid no claim to it and came to suggest that it was a 'Bank Company' (i.e., that the entire 70% majority interest had been beneficially owned by the Bank throughout). "
>
> 5. The Stivilon loan went into default in March 2015. Bankruptcy proceedings were commenced by the Bank in March 2016 and a bankruptcy order was made in April 2016. The Bank's security consisted of a pledge over the leasehold rights to the land in Gelendzhik. When the loan was taken out in March 2010, this security was expressed to be worth RUB 6bn (i.e., fully

twice the amount of the loan facility) and Mr Yurov asserted in his oral evidence that the land in Gelendzhik was "the most valuable land in Russia" {Day14/59:6-17}. However, in the second quarter of 2017, the Bank recovered only about RUB 1.4 billion by taking over the leasehold rights to the land…"

1559. In contrast, the Shareholders' case can be seen from paragraphs 77 to 83 at pages 292-293 of Mr Yurovs' Closing Submissions:-

"77. The Bank claims that its loss as the outstanding balance on the Stivilon Loan and the price it paid in respect of the Gofra Transaction [Gofra's sale of 19 percent of the shares in Stivilon to the Bank in December 2008].

78. However, it has not suffered any loss. As demonstrated above, Stivilon was a Bank company and the Gelendzhik project was held and run for the benefit of the Bank. It was managed by senior Bank employees and its budget was run from within the Bank itself, as the documents made clear and Mr Iskandyrov confirmed. Ms Podstrekha confirmed that it was presented to the CBR as the Bank's own investment project.

79. Following the default of its original lending it came to hold a 70 percent interest in Stivilon through Gofra, which was a declared subsidiary in its IFRS accounts because of its economic control over it. This would have let to Stivilon being affiliated with the Bank under Russian law, which would have had severe effects on the Bank's capital. Thus, the Bank took 19 percent of the shares onto its balance sheet (the maximum amount below the affiliation threshold) and Gofra retained the remaining 51 percent. Mr Iskandyrov confirmed that it was 'absolutely correct' that this split was put in place to avoid formal affiliation and to preserve the Bank's capital. The Bank impugns this transaction, 'the Gofra Transaction', but it was an entirely intra-group transaction, which transferred shares from the Bank's subsidiary to the Bank itself. Similarly, the payment went from the Bank to Gofra and was repaid to the Bank's wholly-owned subsidiary, TIB Equities and back to the Bank in dividends. The Bank suffered no loss on this transaction.

80. Another part of the restructuring was the transfer of the Stivilon shares from Gofra to Elis Trade, via TIBI and Nikilin in March and April 2009. Elis Trade purchased the shares from Nikilin by means of a loan from the Bank.

81. A large part of the Stivilon Loan in March 2010 was paid to Elis Trade which used the funds to repay its loan to the Bank. The funds therefore returned to the Bank on the same day. Some of the loan was used to repay a loan from Stivilon to Gofra (again, a Bank subsidiary). The remainder of the Stivilon Loan was used to pay for costs on the project, in the Bank's interest as was a Bank project. Thus the funds all returned to the Bank or its economic control, apart from those which were spent on its own project. It has suffered no loss.

82. The Bank says that the repayment of the loan to Elis Trade benefited the Defendants because it refinanced a loan to Nikilin which itself refinanced a loan to TIBI which had been used to purchase Bank CLNs which had been

sold to purchase the Kolyada shares. However, this lengthy chain breaks at an early link: Mr Allen accepted that there were several alternatives to his view that the Nikilin loan was paid to TIBI to purchase the CLNs. He accepted that an alternative view was that the loan went to fund Nikilin's purchase of the Stivilon shares from TIBI – in which case there was no benefit to the Defendants. As set out above, this can be traced on Nikilin's bank statements and the figures and dates match up, so that it is the far more likely option.

83. Therefore, the Bank has not suffered loss from the Loan or Transaction but simply restructured a project which it ran for its own benefit – and nor have the Defendants benefited from the restructuring or lending."

1560. The fundamental difficulty with the Shareholders' case is that it fails to grapple with (1) the ownership of Stivilon itself (in fact ultimately beneficially owned by the Shareholders at all material times and not by the Bank as the Shareholders allege), (2) whether the Stivilon Loan on 10 March 2010 (and the subsequent extensions thereof) were in the best interests of the Bank, (3) whether the Shareholders were in breach of their duties in relation thereto (the loan and extensions were self-evidently not in the best interests of the Bank and the Shareholders were in breach of duty in relation thereto), and (4) what loss the Bank has suffered by virtue of the Stivilon Loan and Gofra Transaction and the Shareholders' associated breaches of duty (the outstanding loan indebtedness after credit for recoveries), once again instead focussing on collateral matters, and funds transferred back either to separate entities not the Bank (i.e. Category (3) transfers – which are irrelevant to any issues of loss or quantum) or funds transferred to the Bank but under separate transactions (i.e. Category (4) transfers – which are collateral matters irrelevant to any issue of loss or quantum).

1561. Turning first to the ownership of Stivilon. As already noted, the original owners of Stivilon were three Russian businessmen called Alexander Materikin, Oleg Shkoda and Vladislav Sutormin. It appears that the Bank provided financing to the Stivilon project in early 2008 using Gofra as an SPV. However, as the Bank rightly points out, that does not mean that Gofra was owned by the Bank (as Mr Fetisov submits – contrary to the position stated in the Bank's own accounts). As addressed below, the documents including the accounts, are clear that Gofra was not owned by the Bank.

1562. The finance was provided by Gofra acquiring 25% of Stivilon from the Original Owners and Gofra providing a loan to Stivilon. This finance was provided on terms that, if Stivilon failed to repay, Gofra would be entitled not only to retain its 25% interest in Stivilon but also to receive a further 45%. The loan was not repaid and, in 2008, Gofra therefore acquired 70% of Stivilon with the Original Owners retaining 30%.

1563. The acquisition of 70% of Stivilon by Gofra is recorded in both the Bank's audited accounts for 2008 and the contemporaneous transactional documents. The 2008 accounts record that the "Group" acquired 70% of Stivilon in October 2008 for a consideration of RUB 1,083,443,000 in circumstances where its former owners were "*in distressed financial position"*. Gofra was identified as a subsidiary of the Bank and hence as part of the "Group". However, the 2008 accounts also explain that the Bank did not have any direct or indirect shareholding in Gofra but that it was included in the accounts as a *"subsidiary"* because it was one of a number of companies *"established under the terms*

that impose strict limits on the decision-making powers of their management. In addition, the benefits related to their operations and net assets are presently attributable to the Bank via a number of agreements".

1564. This acquisition is confirmed by the transactional documents in the form of the sale and purchase agreements between Gofra and the Original Owners and supplementary agreements, the 20 March 2008 shareholders' agreement between Gofra and the Original Owners, the further agreement of 31 March 2008, and three "netting certificates" produced on 1 October 2008. Thereafter on 24 December 2008, the Bank entered into an agreement to purchase 19% of Stivilon from Gofra for RUB 584 million (as at December 2008, RUB 584 million was worth about US$20.8 million implying a total value for Stivilon of around RUB 3 billion). That transaction left Gofra with a 51% stake in Stivilon. As the Bank rightly points out, this transaction would make no sense if Gofra was owned by the Bank itself as, on that basis, the Bank would have been purchasing 19% of Stivilon from itself.

1565. It is common ground why the Bank's purchase of an interest in Stivilon had to be limited to a 19% stake. If the Bank bought 20% or more of Stivilon, then issues would have arisen in relation to affiliation and consolidation. Mr Zavadsky explains that IFRS require a partial consolidation of the accounts of the Bank and those of any company in which it owns 20% or more of the shares.

1566. The accounts stated that the Bank did not own Gofra (which was true). They did not state, however who did. It is clear on the evidence, however that Gofra was beneficially owned by the Shareholders. In this regard Gofra was incorporated in Cyprus in April 2007 and was part of the offshore network transferred to the management of Vassiliades in 2011. On 2 September 2008, Mr Drozdov sent an email to the Shareholders attaching a series of corporate structure diagrams for "Non affiliates". One of these diagrams shows that Gofra was a wholly owned subsidiary of a company called Jermanta Limited. Gofra was similarly shown as a subsidiary of Jermanta in charts sent to Mr Worsley in 2010. Jermanta was another company transferred to the management of Vassiliades in 2011. In December 2011, each of the Shareholders personally signed indemnities declaring themselves to be the beneficial owners of both Gofra and Jermanta. A document dated 2 August 2013, sealed with the Gofra corporate seal, identifies the Shareholders as the beneficial owners of Gofra. Whilst the Bank's 2010 audited accounts suggest that Gofra became a Bank subsidiary in May 2010 this is inconsistent with the documents referred to above, and I am satisfied that they reveal the true position. At the time at which Gofra actually held the interest in Stivilon, it was owned by the Shareholders personally through Jermanta. However, the point is academic as, by May 2010, Gofra had ceased to have any interest in Stivilon (as the Shareholders' 51% interest had been transferred from Gofra to Elis Trade).

1567. The Bank's 2009 accounts state that in March 2009, the "Group" (which must be a reference to Gofra) sold 51% of Stivilon for RUB730 million and thus *"lost control of this company".* The Bank's continuing minority 19% shareholding in Stivilon was re-categorised as an *"available-for-sale"* financial asset and included in all the subsequent years' accounts on that basis. The accounts also record that the 51% stake had been sold for c. RUB 318.7 million less than its book value and that this was *"recorded as distribution to shareholders in the consolidated statement of changes in equity"* (this was a reflection in the accounts of the fact that the Shareholders had benefitted at the expense

of the Bank by acquiring 51% of Stivilon at less than the book value). In passing it is to be noted that a sale of 51% of Stivilon for RUB 739 million would imply an overall value for the company of RUB 1.45 billion. However, as appears below, when the Bank lent Stivilon RUB 3 billion in March 2010, the CC voting protocol (without supporting justification) asserted that its leasehold rights over the land alone were worth RUB 6 billion.

1568. The statement in the accounts that the Bank had "*lost control*" of Stivilon in March 2009, was put to Mr Yurov in cross-examination, his explanation (unsupported by any evidence as to Russian law) was incoherent, makes no sense, and is contrary to the facts (as addressed below),*"Well, my understanding there and now is that the Bank lost direct control according to Russian law but the Bank still was in direct control of these companies, like, you know, at all material times, including Stivilon"*.

1569. The facts are that the 51% stake in Stivilon was sold, via two intermediary companies, to another Shareholder company called Elis Trade. However, the shares passed through two intermediary companies: (a) Gofra sold the 51% stake to TIBI; (b) TIBI sold the stake to Nikilin Investments Limited; and (c) Nikilin sold the stake to Elis Trade. As I have found, all of these companies were Shareholder companies. In that regard in relation to Elis Trade, both the 2008 and 2010 corporate structure diagrams show that Elis Trade was a subsidiary of a Cypriot company called Nomiranta Limited. Nomiranta was, in turn, also a company beneficially owned by the Shareholders. Thus, on 19 September 2011, the nominee shareholder of Nomiranta, Mr Clerides, signed three separate Deeds of Trust confirming that he held the 1,000 shares in Nomiranta for the Shareholders (428 shares for Mr Yurov and 286 shares each for Mr Belyaev and Mr Fetisov). Nomiranta was a further Cypriot company transferred to the management of Vassiliades and in respect of which each of the Shareholders personally signed an indemnity declaring that they were its beneficial owners.

1570. On 17 April 2009 Elis Trade borrowed US$69.5 million from the Bank and Elis Trade entered into a sale and purchase agreement with Nikilin requiring Elis Trade to pay $50,219,178.08 for the 51% stake in Stivilon. Thus, Elis Trade (itself a Shareholder company) was taking out a large loan from the Bank for the apparent purpose of purchasing 51% of Stivilon from another Shareholder company. However, the documents show that Gofra sold its stake in Stivilon for only about RUB 730 million (worth only about $22 million at then current exchange rates and below the then book value of the stake as described in the 2009 accounts).

1571. None of this is explicable on the Shareholders' case. It will be recalled that the Shareholders contend that all of the relevant companies except TIBI were "Bank Companies" so, on that basis: (i) Gofra, a "Bank Company", was selling 51% of Stivilon to TIBI, a "Personal Company"; (ii) TIBI was selling that same interest to Nikilin (another "Bank Company"); and (iii) the Bank was lending a very large sum to Elis Trade (another "Bank Company") so it could purchase the Stivilon shares from Nikilin (also a Bank Company). There would be no rationale for such a series of trades. In contrast, the transactions make sense if all the companies are Shareholder companies and the sale process is being used to justify a large loan to Elis Trade which is itself a Shareholder company.

1572. It is against that backdrop that the Stivilon Loan Facility Agreement of 10 March 2010

between the Bank and Stivilon stands to be considered. As at that stage, Stivilon was beneficially owned as to: (a) 19% by the Bank; (b) 51% by the Shareholders through Elis Trade; and (c) 30% by the Original Owners.

1573. The loan facility agreement was entered into on 10 March 2010 between Stivilon and the Bank ("the Loan Agreement"). Its key terms included:-

(1) Stivilon was permitted to draw down up to RUB 3 billion to be used *"exclusively for the following purposes: working capital financing, loan extension and repayment".*

(2) By cl. 2.1 of the Loan Agreement, each loan drawn down was to be repaid in not more than 36 months.

(3) The Loan Agreement itself was to expire on 7 March 2013. Interest was payable by Stivilon at the rate of 8% pa on a quarterly basis.

(4) Pursuant to cl. 6.1 of the Loan Agreement, the loan was secured by a "Mortgage (Pledge) Agreement of Land Leasehold No. 30/3/0211-1" between the Bank and Stivilon and by a pledge of the interests in the apartment element of the development held by another entity called Lazurnaya Bukhta.

1574. The Loan Agreement was signed on behalf of Stivilon by Mr Shlyuger, the General Director of Stivilon. Mr Shlyuger (or Schluger) was in fact an employee of the Financial Directorate of the Bank itself (as has already been seen it was common for Shareholders to use Bank employees in relation to projects in which they had a personal interest).

1575. The circumstances in which it was agreed were irregular, and it is clear that there was no proper justification of the loan or consideration whether it was in the best interests of the Bank (it was not). First it was agreed *in absentia*, yet there does not seem to have been any proper justification for holding the meeting in this manner, and the use of an *in absentia* vote is all the more surprising given that the loan was for around US$100 million (of course it reduces the opportunity and likelihood of proper scrutiny presented by a physical meeting). The CC was chaired by Mr Yurov, with Mr Fetisov also voting in favour of the transaction. The minutes record that the loan was to be used for *"working capital replenishment; provision of loans"*. The CC also voted to dispense with approval from the Bank's Economic Security Department, though there is no obvious justification for that (it would, of course, avoid scrutiny of the loan). There does not appear to have been any of the sort of supporting documentation that one would expect for such a large commercial loan such as a report explaining the Black Sea coast development, its anticipated timeframe and its ability to generate income for Stivilon to pay back the loan. Nor is it revealed what Stivilon was actually going to do with the money (contrast what it almost immediately did with it – see below). As already noted, the CC protocol recorded that the leasehold rights to the land were in fact worth RUB 6 billion, but this figure was unjustified and made no sense given that, only a year earlier, Gofra had disposed of 51% of Stivilon at a price that implied an overall value for the company of only RUB 1.45 billion. Nor was there any disclosure of the Shareholders' interests which there clearly should have been. There was a complete lack of the sort of due diligence that should have been undertaken for a loan of this size (even leaving aside the failure to reveal that the Shareholders had a personal interest in such lending). I reject the suggestion of Mr Fetisov (in his Written Closing at paragraph 90) that there would have been due diligence but that

the documents either have not been retained or not been found in the Bank's searches, as well as the suggestion that the loan was reasonable and in the best interests of the Bank. It defies belief that no such documentation would still exist or be found, and the approval of the Stivilon loan without supporting documentation is part of a pattern of similar approval of numerous other loans without appropriate accompanying documentation as will be apparent from the loans to other Borrowers as addressed in Section R as a whole.

1576. I am satisfied that Mr Yurov and Mr Fetisov did not act reasonably and in the Bank's best interests in approving this loan. It had not been properly justified, there was no proper justification for the value of the security (in reality inadequate for the size of the loan) and they stood to benefit from it (due to their ownership interest), quite part from the fact (as appears below) that they must have been aware that the plan was to immediately use half of the loan for inappropriate "balance sheet management". There does not appear to have been any proper scrutiny of the loan or its purpose at all. In short it appears that the loan was simply waved through. Nor do I consider the fact that the Bank did have an interest justified the agreement of the loan – it still had to be commercially justified and there was no such justification.

1577. Mr Belyaev (himself co-owner of 51% of Stivilon) was, I have no doubt, also aware of the loan (no doubt from discussion between the Shareholders). On 8 March 2010, the Supervisory Board, including Mr Belyaev himself, passed a resolution referring to the loan and how it was to be provisioned in accordance with CBR Regulation 254.

1578. Stivilon drew down an initial tranche of RUB 2.26 billion under the Loan Agreement on 23 March 2010. As for what became of the funds, no less than RUB 1.5 billion was immediately "loaned" by Stivilon to its 51% owner, Elis Trade, which converted the money into US$ and repaid US$50.2 million to the Bank under its April 2009 loan agreement (i.e. the very loan that Elis Trade had received when it acquired 51% of Stivilon in April 2009).

1579. Whilst Mr Allen's evidence links this repayment by Elis Trade to the refinancing of the Shareholders' buyout of Mr Kolyada's shares in 2006/7 that is disputed, and it is not on the critical path as no claim is dependent on personal benefits. What is clear, and as the Shareholders must have known at the time of approving the loan, is that it was intended to be used and was used other than for investment in the underlying project. The use of the remaining RUB 2.26 billion is addressed at 3-Davidson App. 5. Of the remainder of the initial drawdown (approx RUB 760 million), RUB 650 million was transferred to Gofra as repayment of principal under a loan agreement dated 19 March 2008, a further RUB 97,019,178 was transferred to Gofra as interest under the same loan; and RUB 865,498 was paid to Knight Frank for consultancy services. Leaving aside this payment it does not appear that any of the initial drawdown was used for the development of the project itself.

1580. In terms of the changing ownership structure, later in 2010 Elis Trade was replaced as the 51% owner of Stivilon by a recently-incorporated Cypriot company, Black Coast. Black Coast purchased 51% of Stivilon, and Elis Trade's debt to Stivilon was transferred to Black Coast. The Cypriot nominee shareholder of Black Coast held the shares on trust for Mr Worsley who, in turn, held them as nominee for the Shareholders. Black Coast was a Shareholder company held in precisely the same way as the many admitted "Personal Companies" (see the discussion in Section F.6 and the answer to Issue 6). The ultimate

beneficial owners of Black Coast were the Shareholders.

1581. Between 28 June 2010 and 3 April 2012, Stivilon received 23 further payments from the Bank totalling RUB 740 million by way of further draw-downs under the Loan Agreement (bringing the total drawdown to RUB 3 billion). These lesser sums were used to make multiple small payments to various firms in connection with the Gelendzhik development (as Mr Davidson confirmed) albeit that it appears that no major construction works were undertaken.

1582. On 26 December 2012, the Bank entered into an "Investment Contract" with Stivilon. Under this Investment Contract, the Bank was to become the owner of one of the 17 holiday "cottages" to be constructed on the land leased by Stivilon (but never in fact constructed) for a price of RUB 80,562,388. In total, the Bank paid RUB 72,600,000 to Stivilon pursuant to this contract, which Stivilon used for multiple business-related expenses. Whilst no claim is made in respect of such sum, this purchase makes no sense whatsoever had the Bank been (as alleged) the 70% majority owner of Stivilon all along.

1583. Stivilon had, of course, to pay interest to the Bank quarterly. This was problematic as the complex was never completed, and Stivilon never became cash generating – as it had no commercial income of its own it needed a source of funds to pay the interest. Mr Davidson has shown that the funds came from the likes of SiberianKD, Erinskay and Baymore. I am in no doubt that the Shareholders must have known that Stivilon was not generating revenue of its own and that its interest obligations would have to be, and were, serviced through (inappropriate) "balance sheet management" loans (often through complex schemes such as money being routed to Black Coast so it could make the interest payment on behalf of Stivilon (as to which see the email from Mr Butylkov of Columba to Mr Worsley and others dated 11 March 2014). Mr Yurov, in his witness statement sought to create the impression that Stivilon was servicing the interest repayments from its own funds: "*It appears from the [DIA Report] that Stivilon successfully serviced its indebtedness to the Bank at least until April 2015… and it appears that Stivilon was financially stable until at least 2014".* Stivilon had no commercial income, and as such I do not consider it was apt to describe it as "*financially stable*". Any stability came from inappropriate lending to other entities in the offshore network.

1584. After the making of the initial Stivilon loan there was also a subsequent history of the approval of deferments of interest. Thus, on 22 June 2012, the Loan Agreement was amended pursuant to Supplementary Agreement No. 25 so as to defer a portion of the interest payable by Stivilon, the amendment being approved by the CC on 20 June 2012, with Mr Yurov acting as chairman and voting in favour of the amendment. The minutes do not provide any commercial rationale as to why the Bank should agree to defer a substantial portion of the interest (merely containing a description of the amendment), and it is difficult to see what that rationale would be (so far as the interests of the Bank are concerned). On 7 March 2013, the Loan Agreement was amended again to extend the date for repayment of the principal by three years to 7 March 2016, being approved by the CC on 27 February 2013 with Mr Yurov again acting as Chairman. Again, there was merely a description of the amendment in the minutes without any attempt to explain any commercial rationale or justification for the Bank deferring repayment of the loan for a further three years and it is again difficult to see what that rationale would be (so far as the interests of the Bank are concerned). The effect of the amendments was simply to benefit the owners of Stivilon, either in terms of reducing interest or deferring when the

principal of the loan would have to be paid back. Faced with the minutes Mr Yurov's attempts to distance himself from the decisions even went so far as to say that the CC document was not *"authentic"*. I accept, however, the unchallenged evidence of Mr Popkov that the CC documents in the bundle accurately represent what was on the Bank's files.

1585. In due course the Shareholders' interests in Stivilon were settled into their personal trusts. In this regard during 2013/2014, Black Coast (and hence the majority interest in Stivilon) was moved into the Shareholders' newly-constituted Isle of Man trusts. The new ownership structure for Black Coast was that Black Coast came under the ownership of Dianthi Nominees Limited, Dianthi was in turn beneficially owned by Lotus River and Lotus River, although nominally owned by Mr Worsley, was in fact beneficially owned by Arlingham, the Shareholders' BVI vehicle. I have already addressed why I am satisfied that Black Coast was beneficially owned by the Shareholders, and why I have rejected Mr Yurov's evidence that it was a "Bank Company" and the suggestion that this all happened by mistake or (as suggested by Mr Fetisov) by a fraud on the part of Mr Worsley – see, in particular, Section F.2.5.3 and Section F.2.6 above.

R.6.3 The Bank's Loss

1586. As already noted the project was a failure and none of the RUB 3 billion principal sum was ever paid back by Stivilon. The day the principal was originally due to be repaid, 7 March 2013, and as already addressed above, that repayment date was extended by the CC (chaired by Mr Yurov) by three years (and without any commercial rationale or proper justification) with the result that the loan was still outstanding when the Bank collapsed. The Stivilon loan went into default in March 2015. Bankruptcy proceedings were commenced by the Bank in March 2016 and a bankruptcy order was made in April 2016.

1587. The Bank's security consisted of a pledge over the leasehold rights to the land in Gelendzhik. Whilst, as already noted, when the loan was taken out in March 2010, this security was expressed to be worth RUB 6 billion, in the second quarter of 2017, the Bank recovered only about RUB 1.4 billion by taking over the leasehold rights to the land, leaving a loss to the Bank on the Stivilon loan of some RUB 2.1 billion (net of recoveries), which includes the loss suffered on the Bank's acquisition of 19% of Stivilon from Gofra (the shares being worthless). I am satisfied that this represents the Bank's loss. Sections N.2.2 to N.2.9 are repeated.

1588. There was some suggestion (in particular from Mr Fetisov) that the Bank's new management (deliberately) undervalued the land, and that credit should be given for a higher figure. However, I am satisfied no credit should be given. First, this is an allegation which ought to have been pleaded if it was to be advanced, but it has not been pleaded. It is a serious allegation and whether or not involving an allegation of deliberate wrongdoing it would have to have been specifically pleaded. If it had been pleaded there would have needed to be valuation evidence from an expert. There is no such evidence before me. I am satisfied that the point is not open to the Shareholders in such circumstances.

1589. I would only add that what limited evidence is available does not support a higher valuation. A December 2015 report on the project (i.e. a year after the Bank's collapse) shows that planning permission had been given but that options for the construction of either a large hotel complex or an apartment hotel were still being explored, and the report

estimated that it would be necessary to invest RUB 2.5 billion in the construction, which would take 2 years. This was a project that was a long way from fruition and its prospects remained speculative. In his oral evidence, which I accept, Mr Mylnikov explained that the Bank had tried to auction the land at a substantial discount to the appraised market price but nobody wanted to buy it. In such circumstances it is questionable whether there even was a readily ascertainable market value, still less in excess of the figure at which the Bank took over the leasehold rights to the land.

1590. I reject the suggestion that the Bank has not suffered loss on the basis that Stivilon was a "Bank Company" and that the Gelendzhik project was held and run for the Bank. That is a false premise for the reasons that I have identified above. Stivilon was a company ultimately beneficially owned by Shareholders. Equally, the Shareholders' reliance on funds transferred back to separate entities not the Bank (i.e. Category (3) transfers) are irrelevant to any issues of loss or quantum, as are any funds transferred to the Bank but under separate transactions (i.e. Category (4) transfers) – which are collateral matters irrelevant to any issue of loss or quantum. Sections N.2.2 to N.2.9 are repeated.

R.6.4 BLACK COAST

R.6.4.1 Common Ground

1591. During September 2011, the Bank and Bank Winter & Co AG ("Bank Winter") entered into two escrow/trust agreements by which Bank Winter was to lend to Black Coast Russian government bonds with a combined face value of US$175 million (the "Bonds") in its own name but as trustee for the Bank. The Bank deposited the Bonds in a custody account with Bank Winter.

1592. On 7 September 2011, Bank Winter and Black Coast entered into a Global Master Securities Lending Agreement. Between 7 and 30 September 2011, Bank Winter issued to Black Coast four confirmations providing for Black Coast to borrow Russian government bonds with a face value of US$175 million for a period of two years. Black Coast was not required to and did not provide any collateral in respect of such borrowing.

1593. Having received the Bonds from Bank Winter, Black Coast entered into REPO transactions whereby most of the bonds (face value US$150 million) were sold to Alfa Capital. The transactions were re-structured in September/October 2013 such that the quantity of the bonds subject to the arrangements between the Bank/Bank Winter/Black Coast was reduced to face value US$61.5 million.

1594. On 6 December 2012, Bank Winter wrote to the Bank providing a statement showing that the Bonds were in the Bank's *"GMSLA account"* and stating that: *"There are no other accounts and related agreements"*. On 11 December 2012: (i) the Bank sent a copy of this statement to the CBR and (ii) indicated the CBR could contact Bank Winter direct if it wished to do so.

1595. On 27 December 2012, a meeting took place between the CBR and representatives of the Bank (including Mr Yurov). Representatives of the Bank stated to the CBR that Bank Winter *"confirmed the presence of the Eurobonds of the Russian Federation at the Bank's custody account with a maturity in 2030, current market cost is USD 173.6 mln. The*

response of [Bank Winter] contains the indication to the absence of any agreements, which are connected with the indicated securities, which are also the sources of the supposed encumbrance".

1596. No bonds have been returned to the Bank by Bank Winter. The market value of the bonds that have not been returned was US$51,226,302 as of 31 December 2015.

R.6.4.2 Discussion

1597. I have already addressed the role of Black Coast in terms of the fact that in late 2010 Elis Trade was replaced as the 51% owner of Stivilon by Black Coast which thereafter acted as the Shareholders' vehicle for the holding of the Shareholders' majority interest in Stivilon.

1598. The aspect of the use of Black Coast that is under consideration at this point is a different one, namely its use in 2011 in fiduciary lending, involving an Austrian private bank, Bank Winter. There is nothing inherently wrong with fiduciary lending. However, the Bank says that the essential purpose of the Black Coast scheme was for the Bank to provide a large amount of cash to Black Coast in a way that could be disguised in the Bank's audited accounts. This involved the Bank purchasing a substantial amount of Russian government bonds and then lending them, via Bank Winter, to Black Coast so that it could use them to raise funds by means of repo transactions. The Bank says the transactions with Bank Winter were organised in such a way that the Bank could falsely represent to the auditors and the CBR that it was still the owner of the Bonds, that they were held by Bank Winter in the Bank's custody account, and thus that they were an asset on the Bank's balance sheet. In this regard the Bank has commenced proceedings against Bank Winter in Austria in relation to this scheme in which it asserts that Bank Winter was an active and knowing participant in such a deception, that Bank Winter knew that Mr Worsley was not the UBO of Black Coast and that the proceeds of the securities borrowed and then repo'd by Black Coast were not used to finance any genuine real estate project, but to refinance other back-to-back transactions and for other "balance sheet management" purposes.

1599. The evidence shows (and indeed there is some measure of common ground) that the purpose of the Black Coast transactions was to replace the EWUB scheme, although the Bank's characterisation as to the reason why this was necessary, and what the Bank set out to achieve is not. The Bank says that the EWUB scheme had come under repeated scrutiny from the CBR necessitating its replacement. In this regard at a meeting between the CBR and the Bank on 25 March 2011, representatives of the Bank told the CBR that "*inter-bank transactions*" with EWUB had been subject to "*termination*" owing to "*the expiry of agreements and based on the terms and conditions of the transactions concluded*".

1600. At Section D.4. I dealt with the issue as to whether the EWUB and Donau schemes were "inherently dishonest" and concluded that (in the absence of any such pleaded case) it was not open to allege that the EWUB and Donau schemes were "inherently dishonest", but in any event such case is not on the critical path in relation to the Bank's case on "balance sheet management" or my overall findings in that regard. However, as Mr Stanley confirmed there was no objection to such schemes being addressed, and findings made as to the existence of arrangements, the history of them, and their deployment as

part of the matrix to various other points that are made, including as one of the ways that off balance sheet lending was done.

1601. I address the Bank Winter scheme and the role of Black Coast in that regard below. I have no doubt that its purpose was to conceal off balance sheet lending, and that the CBR was misled, and though the CBR had its suspicions it did not actually know what was going on. In this regard it was provided with misleading information including from Bank Winter itself. Ultimately, however, the Bank Winter fiduciary lending is simply one more example of a means by which the (inappropriate) balance sheet lending was being carried out and another example of the CBR being misled in that regard. The misleading of the CBR has, however, already been addressed at length in Section I.4 above.

1602. An issue arises as to the use to which the proceeds of the Black Coast Transaction were put. The Shareholders say that it was (1) used to repay the EWUB fiduciary lending scheme, and (2) that the funds thereby released were used to advance a loan to Stivilon, and on the basis that it is alleged that Stivilon was a Bank project it is said that the funds were used for the benefit of the Bank.

1603. In terms of the passage of the funds up to EWUB the position, in summary, is as follows:-

(1) Following two escrow/trust agreements being entered into between the Bank and Bank Winter in August and September 2011, together with a Global Master Securities Lending Agreement on 7 September 2011, between 7 and 30 September 2011, Bank Winter issued four confirmations to Black Coast providing for Black Coast to borrow Russian government bonds with a face value of US$ 175 million for a period of two years.

(2) Having received the bonds from Bank Winter, Black Coast entered into REPO transactions whereby most of the bonds (with a face value US$ 150 million) were sold to Alfa Capital.

(3) These sales to Alfa were REPOs which produced US$136 million in cash for Black Coast, namely US$ 90.5 million on 12 September 2011 and US$ 45 million on 19 September 2011.

(4) Black Coast then transferred US$ 124 million to TIBI, namely US$ 86.1 million on 13 September 2011 (received by TIBI on 14 September) and US$ 37.9 million on 20 September 2011 (received by TIBI on 21 September).

(5) It appears that TIBI then used US$ 118 million to refinance the EWUB lending portfolio, namely US$ 86 million on 14 September 2011 and US$ 31.9 million on 21 September 2011 (see Allen 2 schedule 8 para 40). More specifically (and as appears from TIBI's EWUB bank statement):

(a) On 14 September 2011 TIBI's account was debited by US$86,000,000 described as "Loan Principal Repayment" and US$12,541.67 described as "Matured Loan Interest". This reduced the balance to US$86,12,541.67. The same day the account was credited with US$86,100,000 from Black Coast (net balance US$225.48).

(b) On 21 September 2011 TIBI received US$37,900,000 from Black Coast and the same day the account was debited by US$31,963,518.93 for "FX purchase" and by "US$ 6,023,664.80" to TIBI, reducing the balance to US$500.08.

1604. Thus TIBI's bank statement with EWUB shows the receipt by TIBI of $124 million of the proceeds of the transaction and the subsequent use of those funds by TIBI to discharge an (unspecified) debt of US$86 million and to buy foreign exchange (US$31,963,518.93) as well as US$6,023,664.80 going back to TIBI. In such circumstances, and given that this is the final payment on the EWUB account and that it was closed from that day, it appears that the funds from Black Coast did go to end (and replace) the EWUB scheme.

1605. However, it is argued in Mr Yurov's Closing Submissions that *"after refinancing the EWUB scheme, the funds from Black Coast were advanced to fund the Gelendzhik [project], owned by Stivilon, Black Coast's subsidiary to refinance the non-performing loan made by the Bank"* (para 19 on p. 379). However as the Bank rightly points out there is no expert evidence purporting to link these payments with the funding of the Gelendzhik project and indeed no evidence that Gelendzhik was ever funded via EWUB. Mr Davidson did not consider Back Coast in his Issue 3 report and there is no evidence from him that the money received by TIBI (beneficially owned by Shareholders) was "returned" to the Bank by means of a refinancing of any loan made to or in connection with the Gelendzhik project. By way of riposte, Mr Yurov (in his Reply to the Bank's Points of Loss document) relies on Mr Allen's tracing evidence of the Black Coast lending and his conclusion that it went to refinance the EWUB portfolio. However, that goes no further than to show the payments identified above. Mr Yurov also relies on Mr Iskandyrov's evidence and certain documentary evidence which it is submitted show that the Black Coast lending was planned from the outset to finance Stivilon, using the Bank Winter fiduciary lending scheme, and that that is what happened.

1606. It is true that Mr Iskandyrov said that by means of the liquidity generated from the REPO deals via the Black Coast/Bank Winter scheme, *"The Defendants were able to use the Bank's cash to continue to repay loans of companies under their control to EWUB/Donau and to fund their projects, in this case the development in Gelendzhik then held by Stivilon"* and Mr Yurov also points out that at the meeting on 25 May 2011 with Bank Winter it appears that the Gelendzhik project was discussed and that Stivilon was presented as a suitable candidate for the Bank Winter fiduciary lending scheme, but there is no evidence before me from which I could safely conclude that that is what actually occurred, or in what amount, or through what mechanism. In any event the point would ultimately take the Shareholders nowhere even if it could be proved, given that Stivilon was not a Bank project but rather one that would (if ultimately profitable) have benefitted the Shareholders and Stivilon (through Black Coast) being ultimately beneficially owned by the Shareholders. Accordingly even if it was funded through the Bank Winter fiduciary lending, this would just be another way the Bank's money was used for (inappropriate) lending for the Shareholders' benefit.

1607. I address the Bank Winter lending in more detail below as it is another illustration of the Bank's willingness (to the knowledge of the Shareholders) to use inappropriate "balance sheet management" schemes as well as another instance in relation to which the CBR was (to the knowledge of the Shareholders) deceived.

1608. Each of the Shareholders played down their knowledge of Black Coast and its involvement in the Bank Winter scheme (aided by the lack of any CC meeting as, so far as the Bank's records were concerned, there was no "loan" to be approved). I am satisfied, however, that each of the Shareholders knew of the Bank Winter scheme and its purpose to replace the EWUB scheme as part of the Bank's (inappropriate) "balance sheet management".

1609. For his part Mr Fetisov, whilst denying any *"material knowledge of the Black Coast Transaction specifically",* accepted as much in his written evidence, *"TIB therefore sought to replace the loans which had been made through EWB and Donau, including by entering into new fiduciary arrangements with Bank Winter…"* and *"In effect, this transaction would be replacing East West United Bank with Bank Winter as the fiduciary lender, at no net cost to the Bank, with the benefit of additional liquidity provided through the REPOs with Alfa Capital Cyprus."* He gave similar oral evidence. His Defence also stated, *"In the premises, the transaction would in effect be replacing East West United Bank with Bank Winter as fiduciary lender".* He also acknowledged in his written evidence that *"I may have approved the move to Bank Winter"* (as I am satisfied he did).

1610. Mr Fetisov was clearly aware of the new relationship with Bank Winter and the proposed transaction structure. On 5 August 2011, he emailed Mr Iskandyrov and others stating:

> "Hi Gents,
> I propose starting to use the account in this bank for carrying out trade operations right away. We need to put 20-30 mm USD in there and start to trade them somehow – even if this won't be very profitable or we lose some money in the moment, we need to do it. Please state your ideas and a plan of action with the responsible parties and dates by email tomorrow.
>
> Marat, what's the status of this project?"
>
> (emphasis added)

1611. Not only was Mr Fetisov therefore aware of what was envisaged – he was also involved in giving the impression that it was a genuine trading relationship (which it was not) even if money was lost as a consequence (an approach which was hardly in the Bank's best interests). Mr Iskandyrov's response to Mr Fetisov shows that at this stage the plan was to use a SPV (which itself suggests this was not all about lending to Black Coast, albeit that in due course when Black Coast was used this no doubt gave a veneer of an underlying business venture):

> "Status:
> - cash and paper-based account opened for the bank
> - SPV – transferred by email to WinterBank – I am waiting for the go-ahead from them (hopefully today)
> and I'll send the original copies of the documents
> - by 15/08/22 – we open an account for the SPV in WinterBank
> - 16-17 the Bank and the SPV sign GMSLA, trusteeship agmt,

- before 22 – we fill in documents for a company's brokerage services in AlfaBank, RenCap, Otkritie – Ben responsible.
- 22-27 – the Bank buys 30 + 30 + 40 RUS 30 to the account in WinterBank
- 22-30 – SPV invests funds in REPO through the chosen brokers (in the event that something's amiss
with the brokers, how can the broker address NBT)

31-3– movement of funds from SPV to the bank's account in EWUB."

1612. Mr Fetisov's response (in the same chain) was "*OK agreed*". Mr Fetisov sent a further email confirming that initial trades of US$20-25 million should be made through the Bank Winter account, and at some point in August it was decided that Black Coast would be the borrowing company and an initial transaction involving US$20 million of bonds was set up pursuant to Mr Fetisov's instructions.

1613. It is clear, therefore, that Mr Fetisov was aware of, and supported, the plan to use the Bank Winter transactions to generate funds to refinance the EWUB scheme which, as already noted, is what happened. For his part Mr Yurov went as far as to say in his Defence that he had "*no knowledge of the details of the alleged Black Coast Transaction*", whilst Mr Belyaev makes no mention at all of Black Coast in his Defence. I am satisfied however, that each of the Shareholders knew of Black Coast and its role in the Bank Winter Transaction. This is evidenced by contemporary correspondence and also would have been derived through the fact that Black Coast was beneficially owned by them.

1614. As already noted, during September 2011, the Bank and Bank Winter entered into two escrow/trust agreements by which Bank Winter was instructed to lend the securities to Black Coast in its own name but in fact for the account of the Bank. Ironically an insight of the true purpose of what was going on was given in the recitals to these agreements which specifically refer to the CBR's N1 capital adequacy rules:

> "WHEREAS the Trustee is willing to act in such capacity for the Client in order to address N 1 issues in accordance with all applicable laws and regulations, and on a full disclosure basis to all competent regulatory authorities"

1615. This was a charade – the whole purpose of the Bank Winter Scheme was the opposite. The purpose of the Recital was no doubt to allow Bank Winter to deny any knowledge that the Bank was not going to be telling the CBR what was going on (as to do so would have defeated the whole object of the Bank Winter scheme). Other provisions in relation to that façade, again no doubt to protect Bank Winter, appear at Clause 7 of the agreement which provided that Bank Winter: *"has not been involved to any extent in the structuring intended by the Trustor and has made no representations as to the merits of the present structure for any purpose intended by the Trustor…."*. Whilst Clause 8.2 provided that the Bank *"represents and warrants to the Trustee that it will fully disclose this Agreement at all relevant times to its statutory auditors, corporate boards and all competent supervisory authorities, and in its statutory accounts in full keeping with all relevant accounting rules and principles"*.

1616. In fact the Bank tried without success to get Clause 8.2 deleted, with Mr Iskandyrov responding to Bank Winter on the draft transactional documentation on 15 June 2011

stating, *"exclude art 8.2 from Trusteeship agreement"* (no doubt because the intention was to keep the nature of the transaction secret from the CBR auditors). However, Clause 8.2 remained. It is also clear that the Bank was keen that the nature of the transaction did not appear on bank statements as there was a series of emails between the Bank and Bank Winter in which the Bank repeatedly sought clarification as to what would appear on the bank statements produced by Bank Winter, with Mr Iskandyrov asking in the same email on 15 June 2011 in which he asked Bank Winter to delete the warranty about disclosure to regulators, *"how Winter bank will show custody account statement – example pls"* which was followed up on 24 June 2011 by Mr Kurbakov (of the Bank) asking *"Do you show us a delivery lending securities in the securities statements?"* and on 28 June 2011, *"How will you show securities lending transactions in the securities statements? Will we see all transactions (receipt/delivery securities to the third parties or will it be something else?"*

1617. It is clear that Bank Winter understood what the Bank was getting at, as on 28 June 2011, Mr Kampelmuehler of Bank Winter provided confirmation that the securities account statement would show *"the current securities on the respective account and not the movements*" and that the *"lender's account has the reference "GMSLA account"..."* However, this was insufficient reassurance to the Bank which continued to press for more details. This led to Mr Kampelmuehler confirming on 21 July 2011 that the Bank's account would still show a "credit" even when the securities had in fact been transferred to a third party. It is obvious that what the Bank wanted from the start was a statement from Bank Winter showing the securities as apparently being in the custody account even when they had been lent on and repo'd – no doubt for the purpose of auditors and the CBR.

1618. Another feature of the Bank Winter transaction (and an example of significant monetary "leakage") is the large "structuring fee" of 6% of the entire transaction value for what was in reality acting as nothing more than the Bank's agent to lend the Bonds to Black Coast without any financial risk (though with an undoubted reputational risk if any regulators came to appreciate what was going on). Yet further 4% of the fees were payable "upfront" (and so could not be paid out of any "profits" – contrary to Mr Yurov's suggestion).

1619. I have already foreshadowed the subsequent steps in implementing the Bank Winter Transaction. On 7 September 2011, Bank Winter and Black Coast entered into a Global Master Securities Lending Agreement (the "Master Agreement"), a standard form umbrella contract providing for the parties to enter into individual transactions by which the lender loans securities to the borrower to be returned on a fixed date. The standard form of the Master Agreement contains detailed provisions in relation to the collateral to be supplied by the borrower (cl. 5 and the Schedule). Between 7 and 30 September 2011, Bank Winter issued to Black Coast four "Confirmations" pursuant to the Master Agreement setting out the terms of four separate securities lending transactions in respect of Russian government bonds with notional values of US$100 million, US$16.5 million, US$50million and US$8.5 million. These Confirmations provided that the bonds were to be returned by Black Coast in September 2013 and that the provisions relating to collateral in the Master Agreement were "not applicable" (i.e. Black Coast would not be providing any collateral to Bank Winter).

1620. On 1 September 2011, Black Coast entered into a Global Master Repurchase Agreement with Alfa Capital. This was also an umbrella agreement pursuant to which individual repo transactions could be made. As already noted Black Coast then proceeded to repo US$150 million of bonds with Alfa Capital. In consequence, and as Mr Worsley noted in an email to the Shareholders on 16 May 2012, this left Black Coast exposed to potential margin calls: *"We must therefore take into account the possibility that we would need to take funding from NBT, get it into Black Coast's account at NBT, and send from there to Alfa Bank"*. Black Coast received the proceeds of these repos (about US$136 million) in its account on 19 September 2011. US$124 million was then transferred from Black Coast's Piraeus Bank account to TIBI (a company beneficially owned by the Shareholders personally) on 13 and 20 September 2011. These funds were credited to TIBI's account with EWB on 14 and 21 September 2011. I have already addressed the subsequent steps, and the parties' respective submissions in respect of the same.

1621. On 30 January 2012, there was a meeting between representatives of the Bank and Bank Winter. On 28 February 2012, Mr Iskandyrov wrote to Bank Winter {D2/92.1/1} stating:

> "My management asked me to explain again the scheme of our cooperation under the Trusteeship agreement and GMSLA.
>
> The key question for my understanding now is why in the custody account statements show that we still have the bonds at the NBT's custody account with Bank Winter.
>
> Under which accounting rule is it made?"

1622. On 16 May 2012, Mr Worsley wrote to all three Shareholders about *"the Repo positions that we have in Russia 30"*. Mr Worsley noted that there was a risk of significant margin calls on the "open positions" of US$175m (which was a clear reference to the Bank Winter transaction) and he stated that *"We must therefore take into account the possibility that we would need to take funding from NBT, get it into Black Coast's account at NBT, and send from there to Alfa Bank"*. None of the Shareholders suggested they did not know what he was talking about (they clearly did). This email shows that the Shareholders knew of the relationship between Bank Winter and Black Coast and that the bonds lent to Black Coast had in fact been repo'd (the context for the discussion of margin calls).

1623. There were, to the knowledge of, and with the involvement of Shareholders, other similar transactions attempted with a view to mirroring the Bank Winter transaction including with VP Bank in May 2012, with a face-to-face meeting between the Shareholders and the CEO of VP Bank taking place on 31 May 2012. The previous day Mr Worsley had emailed the Shareholders stating:

> "Re the meeting tomorrow at 1030am
> VP Bank: A rated Swiss bank
> Meeting: CEO Roger Hartmann
> Reason for the meeting: VP need to get to know you all, so that they are comfortable to trade with NBT. Be relaxed, be cool, etc
> Transactions under review:
> 1) We build a trading history with them (EG in Russia 30)

2) Part of those securities are lent to companies, under Fiduciary agreement (as per Winter Bank). Then Repo, and monies used to cover positions.

3) Key Issue: VP asked me why such a structure is needed. I said that some of NBT borrowers do not wish that the market knows that they borrow from NBT, as the Moscow market is very competitive, and for example if Company A wants to sell an asset to Alfa Bank or RosBank etc, it is best that Alfa/Ros do not know that NBT is lending to Company A..... VP accept this view.

4) Presentation: I have presented myself as a borrower from NBT, and also a consultant to NBT who runs its non banking assets. Hence, as a borrower, I am interested in setting up this structure. I have signed NDA with VP re NBT. In the NDA, I agreed that I would be the channel between NBT and VP (except trading decisions), so that as with Winter, we keep this private." (emphasis added)

1624. Once again the words emphasised above evidence the Shareholders' knowledge about the Bank Winter transaction and its true nature. It is also clear that Mr Worsley intended to misrepresent himself as a supposed borrower with a concocted justification as to why the borrowing had to be structured by way of bond lending followed by repo transactions. Given the lack of reaction to such letter, Mr Fetisov reverted to saying he paid it little attention, *"I probably paid very little attention to this email, skipping through first three or four lines, if that, understanding that's not my cup of tea and I would not be going regardless, and that's really it. That's really -- what he lied about, I probably didn't read, if he lied about anything."* Also describing the email as containing Mr Worsley's *"wild business ideas"*. However, I am satisfied what was proposed was serious and Mr Fetisov knew that very well. Indeed, in due course later in the year, draft transactional documents were prepared. Mr Fetisov was also clearly involved in a decision to stay with Bank Winter as on 5 June 2012 he met with Bank Winter in Moscow. An email exchange of the same date between Mr Worsley and Mr Iskandyrov refers to this meeting and Mr Iskandyrov reported to Mr Worsley that Mr Fetisov *"approved that we will stay with them 3-3.5 year".*

1625. It is clear that the CBR was not told the truth about the Bank Winter transaction. What it was told (as Ms Podstrekha explained) was that the Bank had informed the CBR that it had deposited US$180 million worth of bonds with Bank Winter (which was hardly the whole story). Predictably in November 2012, the CBR sought confirmation that the bonds were not subject to any encumbrances, as can be seen from CBR's 2012 audit report {D8/79T/1} which states:

> "The information was requested from the Bank regarding any encumbrances on the government external loan bonds of the Russian Federation maturing in 2030, issue XI, owned by the Bank. In the explanatory note provided by the bank, it explained that "there are no encumbrances on RUSSIA 11 2030 Eurobonds". The work group requested the additional information from the Bank regarding RUSSIA 11 2030 Eurobonds, and the Bank explained: "the securities owned by the Bank are free from any encumbrances, are neither pledged, nor transferred to any nominee holders." (emphasis added)

1626. On 23 July 2012, the CBR issued an "Order" requiring the Bank to take certain steps as a result of problems identified during the 2012 audit. One of the steps that the Bank was required to take was, *"transfer Eurobonds of the Russian Ministry of Finance "Russia 2030" (ISIN XS0114288789), which are stored in the depository of BANK WINTER UND CO. AKTIENGESELLSCHAFT, to another public depository".* Of course the bonds had been repo's and were not in the custody account.

1627. It appears that Mr Yurov met with representatives of Bank Winter in October 2012 as on 4 October 2012, Mr Iskandyrov wrote to Mr Yurov informing him that the owner of Bank Winter would be in Moscow the following week with 2 members of the board, Mr Iskandyrov explaining:

> "It's through it that we're doing the deal for USD 150 million in refinancing.
> They are asking to meet with you on October 16-17.
> The meeting will be to get acquainted, express mutual respect, and discuss other possible ways to work together.
> Nikolay was in touch with them six months ago. They now want to meet with the top person. Please let me know if a meeting is possible."

1628. Bank Winter's pleaded case in the Austrian proceedings is that there was indeed a meeting with Mr Yurov on 16 October 2012, and from a combination of the email and such meeting Mr Yurov cannot but have been aware of the Bank Winter transaction and the nature of the business undertaken between them (albeit he denied any specific knowledge when cross-examined which I am satisfied was not true).

1629. It is clear that the Bank came under increasing pressure from the CBR in relation to Bank Winter in November 2012. In this regard on 9 November 2012, Mr Iskandyrov wrote to Mr Worsley stating, "*Ben, hi. I would be still in the bank in one hour Grisha talk with CBRF people. He will receive example of answer from another bank's which satisfy CBRF. I think we need to see this answer and after that one more time to speak with Winter on Monday. Michael will prepare scheme in one hour."*

1630. On 13 November 2012 Mr Worsley emailed Mr Iskandyrov and the private email address of Mr Yuri Levine (seemingly an Aon broker involved with the transaction) attaching a photograph of a potential scheme to satisfy the CBR by placing newly purchased bonds in the Bank's custody account on a short-term basis. Later the same day, Mr Worsley emailed Mr Iskandyrov, Mr Vartsibasov and Mr Postnov (at his d@inishmore address). Mr Worsley noted that Winter Bank were *"getting very conservative*" and that he did not believe that they would agree to the newly suggested scheme because their *"regulators will look at why these bond movements are happening*". He had formed the view that Winter Bank wanted out should they have to deal with any central bank, and he stated in his email:

> "If all this is correct, then we need to work on the Russian side, and to get agreement that questions will be directed only to NBT. That way, WB do not have to deal with any of the CB's, and they will keep the positions open...."

1631. Mr Worsley then forwarded these emails to Mr Fetisov commenting:

> "Hi there.
> Yesterday there were various meetings with Marat and Postnov and Grisha. Then Marat and I had a couple of calls with Winter Bank.
> See email below.
> you might want to see Marat and Postnov and Grisha today in order to talk through it all.
> This is just a heads up for you.
> From our side, we are just working on ideas so far. No actions have been taken. Hence your input needed....."

Whilst he (predictably) claimed he had just ignored this email I am satisfied that he would have read it and become aware of its contents.

1632. On 14 November 2012, Mr Iskandyrov emailed Mr Worsley, Mr Vartsibasov and Mr Postnov (at his "@inishmore" address):

> "Ben, Hi
> I discussed yesterday this idea with Winterbank
> They say that in general it can be work but it will be worse for them. Because they need to explain what they did for their authorities etc. In other words they refuse our idea.
> Only one decision - we need to return securities to our account with Winterbank before they will have received request from CBRF.
> In this case they answer that bond on account without any pledge.
> And after week start new trache.
>
> I spoke with Dikusar - NBT have enough money for this funding
> I spoke with Popov (Chief of accountant) - he will check today normativ that NBT can provide 3 loans with total amount of 175 mio $
> I spoke with Potapov - can we replace type of securities for next tranche with WinterBank (He said that RUS30 - it unique bonds for our deal and we cannot replace it for another bonds)"
>
> **Potapov said with Nikolay about it.**
> **When I will receive all answer - we will go with Grisha to Nikolay to approve all deal."**

1633. The references to "Nikolay" in this email are, I am satisfied, references to Mr Fetisov. Mr Worsley also sent a text message to Mr Yurov to tell him that the CBR had started to *"ask about winter bank"* and "*We will just have to re finance and close winter position and get statement. Then open again. 175m. We are planning steps. Just FYI."* Whilst Mr Yurov denied knowing what this email was all about it is plain that it was about showing to the CBR that the bonds were available and unencumbered assets of the Bank.

1634. The problem with the CBR was eventually "solved" by obtaining from Bank Winter an account statement and covering letter that appeared to show US$175 million of bonds in the Bank's custody account and falsely stated that there were no "related agreements".

This subterfuge was arranged by the Bank. Thus, on 29 November 2012, the Bank sent an official letter to Bank Winter stating: "*National Bank TRUST JSC hereby authorizes Bank Winter und Co. AG to provide the Central Bank of the Russian Federation with an answer as to whether or not National Bank Trust has bonds issued by the Ministry of Finance of the Russian Federation in its depo account with Bank Winter, the amount of such bonds, and to confirm that the bonds are not subject to a pledge agreement.* "

1635. On 6 December 2012, Bank Winter duly issued a document entitled "Confirmation of Balances", the attachment to which stated that the Bank had bonds with a nominal value of US$175 million in its securities account with Bank Winter. In response to a specific question whether such bonds were encumbered in any way, the letter falsely stated: "*There are no other accounts and related agreements*". This deception was then repeated in a letter from the Bank to the CBR on 11 December 2012. It deserves to be quoted at some length as it clearly shows the Bank lying to the CBR:

> "Due to the interest of the Bank of Russia in getting the additional information concerning securities which belong to the property of the Bank and are kept in the Bank Winter und Co. AG depositary, the Bank has sent the relevant writing instructions directly to the address of the depositary. The phone conversations were also organized by the Bank, during which the Bank Winter representatives had been informed about the possible request from the Bank of Russia, and received the instructions from the Bank as a client about the necessity of the preparation of the precise answer to this question within the shortest time possible and confirmed the readiness of the Bank Winter to release all the information the Bank of Russian is interested in. Such cooperation procedure complies with the existing practice of organization of relations between depositary and its clients and will enable the Bank of Russia to perform its supervisory role with minimum expense of time and resources.
>
> **Apart from the aforementioned agreement on the release of the information to the Bank of Russia, the Bank has sent a request for providing of the current information regarding the condition of the safekeeping account and if there are any encumbrances concerning the assets recognized on this account to the Bank Winter und Co. AG. In its answer the depositary confirmed the Eurobonds of the Russian Federation on the safekeeping account of the Bank maturing in 2030 with the current market value of 173,6 million US dollars. The answer also contains the directions regarding the absence of any agreements, concerning the aforementioned securities, which are the source of potential encumbrances. The copy of the Bank Winter und Co. AG answer is attached to this letter**.
>
> Consequently, at the present moment the Bank has taken all the possible measures to enable the Bank of Russia of getting the relevant information. After arranging the further work the Ban of Russia has an opportunity to apply at its discretion with an appropriate request to the Bank Winter und Co. AG or to use the rendered by the Bank Winter und Co. information at the disposal of the Bank."

1636. Ms Podstrekha confirmed when cross-examined that the CBR does not engage in correspondence with private banks outside Russia and described this attempt to shift the onus onto the CBR as *"the next ruse from the Bank"*. On 27 December 2012, a meeting took place between representatives of the Bank and the CBR (attended by Mr Yurov, with Mr Pospelov and Mr Vartsibasov who had been copied into the emails above and who therefore clearly knew the bonds were not in the Bank Winter custody account). It is clear from the minutes that there was a discussion about whether Bank Winter was a suitable institution to hold US$175 million of Russian government bonds on behalf of the Bank. A number of statements set out in the minutes (coming from the Bank) were untrue. In particular, contrary to what was stated, the bonds were not held by Bank Winter in the custody account. When asked about such matters Mr Yurov conveniently denied any recollection of the meeting before saying, *"I have my doubts I was there."* I have no doubt he did attend and did not disassociate himself from what was being said. Such denial was absent from his reply statement despite Ms Podstrekha referring to this meeting in her first witness statement.

1637. It is also clear, therefore, that the CBR did not know that the Black Coast Transaction was an exercise in "balance sheet management" or even that there was a link between these bonds and Black Coast. The impression being deliberately conveyed to the CBR was that the bonds were sitting in a custody account in Austria and were part of the capital base available to the Bank (as was reflected in the CBR's 2014 Audit).

1638. It is clear that the Bank was also deceiving its auditors. Thus, on 6 February 2014, the Bank wrote to Bank Winter asking for confirmation for Deloitte Moscow that the Russian government bonds that had been deposited with Bank Winter pursuant to the above arrangements were available for free disposal by the Bank and were not pledged or otherwise encumbered. By a letter to Deloitte's Moscow office dated 25 March 2014, Bank Winter set out a summary of the Bank's accounts with Bank Winter. In relation to securities accounts, the letter simply stated, *"See attachment"*. The attachment consisted of an account statement showing Russian government bonds with a nominal value of US$61.5 million held in the Bank's account. Of course, as the Bank well knew, the bonds were not held by Bank Winter as they had been lent to Bank Winter and repo'd.

1639. The Bank Winter deals were due to expire in the Autumn of 2013, meaning that large amounts of cash would have to be found if Black Coast wanted to repurchase the bonds from Alfa Capital. During 2013 the possibility of doing similar deals with the Lotus Formula One Team and Bank of China ("BoC") was considered. Mr Yurov was emailed about the former by Mr Worsley on 27 February 2013. As to the latter the Shareholders were kept informed and Mr Yurov was actively involved, with Mr Worsley keeping Mr Yurov of developments. Again Mr Worsley was (falsely) representing to be the UBO of Black Coast.

1640. On 16 June 2013, Mr Worsley emailed Mr Yurov to inform him that he would be in Luxembourg meeting BoC the following day. Following Mr Worsley's meeting with BoC, he then sent various documents to BoC showing a transaction structure similar to that used with Black Coast. However, there were problems as the BoC was not willing to do a transaction based on bonds and wanted cash security (as Mr Worsley reported to Mr Yurov and Mr Fetisov). Mr Worsley sent two further emails to Mr Yurov on 19 June 2013, including forwarding an email exchange in which Mr Worsley and Mr Vartsibasov had discussed whether the CBR could obtain information about the transactions from the BoC:

"The problem would come when one of two things happen:
1) The CBR ask the Luxembourg CB, to ask BOC (same thing that Winter is scared of...). In such a case, BOC will tell CBR everything...
2) CBR asks NBT to ask BOC to disclose. In such a case, NBT cannot really 'refuse' to tell the CBR what is going on (in my opinion).
So, if all that is correct, it is like a new Winter scheme - IE it is safe at the first instance, but only because BOC can offer silence under Luxembourg laws. To which my points 1 and 2 apply.
Even with bonds, 1 and 2 are dangerous, but the difference is that with bonds, 1 and 2 are possibly less likely to be asked."

1641. Mr Yurov's response was that his *"understanding of BOC position re-disclosure to CBR is slightly different – they'll disclose info only to CBL - they'll answer to CBR that transactions are not related*"; to which Mr Worsley responded: *"In Luxembourg they said openly in the meeting room, that as the money will be pledged, if asked they will say that it is pledged. Sure that they will say 100% truth to CBL. Not sure that (based on what they said in the room) they will lie to CBR."*. It is clear therefore that Mr Yurov's view was that the BoC would give false information to the CBR (as he confirmed in evidence) – from his email he was clearly comfortable with that.

1642. On 26 June 2013, Mr Worsley emailed Mr Yurov and Mr Fetisov (and others) stating:

"Update:
1) We still await the draft of the collateral document from Bank of China, and also for a draft loan document.
2) BoC want to know where "I" got the finance for the investment into Black Coast. I am suggesting that we ask Albert if we can disclose the original NBT loan.
3) We need to consider where the monies will be sent to. With Winter, we sent monies direct from Winter to other companies. With BoC we need to think more carefully, as they seem to be more rigid. Possibly into Black Coast's Swiss account and then out again.
4) Grisha and I will meet on Friday in order to go through a shopping list of deals that the money is needed for. This will in part answer point (3) above."

1643. Thus, as cannot but have been apparent to Mr Yurov and Mr Fetisov, the plan was again to use the cash for "balance sheet management". On 3 July 2013, Mr Worsley emailed Mr Yurov and Mr Fetisov again:

"Re Bank of China:
Taking into account the level of detail that BOC want about BW's activities, and the Black Coast project, we have to take a fundamental decision: Whether or not to tell BOC about the initial loan from NBT to Black Coast re this project.
Of course, we can screen it via the fact that Winter Bank made the loan, and try that route.
But that Winter route might easily break down if they ask for Winter loan docs and such other information, and then we would be forced to tell the truth.

> In other words, we have to decide whether to make up some huge story, and to see if it is accepted, or whether we are able to tell them the full facts if we have to.
> If we make a huge story, and they see through it and realise that it is not true, then the will likely refuse the loan.
> If we tell them the truth, at least we can make it look good. Let's consider the question."

1644. Whilst Mr Fetisov predictably (but not credibly) claimed not to have paid any attention to this email, Mr Yurov responded to Mr Worsley pointing out that, if BoC had Black Coast's accounts, it would know about its liabilities to the Bank. On 4 July 2013, Mr Worsley informed Mr Yurov that a *"large, over-arching presentation"* was being put together which would (falsely) represent Mr Worsley was the owner of Black Coast, the Billa properties and other businesses. A copy of this presentation was indeed sent to Mr Yurov and Mr Fetisov on 8 July 2013 which (falsely) represented that Mr Worsley was a wealthy investor who *"manages an investment and holding group based in Moscow, Cyprus and the UAE"*, that he was personally the owner of Black Coast, which was said to employ *"a team of traders, lawyers, analysts and accountants in Moscow and Cyprus in order to run its investment"* and that he was also the owner of Taransay (which was said to have a Euro 70 million bond portfolio), the Billa property portfolio (said to have a market value of US$180 million) and Moscow River.

1645. This did not provoke any adverse reaction from Mr Yurov or Mr Fetisov who, I am satisfied, were prepared to go along with such lies, a stance entirely consistent with my assessment of them in Sections C.3.1 and C.3.3 above. Mr Worsley prepared a draft covering email to BoC which was shared with Mr Yurov and Mr Fetisov on 9 July 2013 and this was duly sent to BoC on 10 July 2013. The covering email contained the further falsehood that "*I confirm that I am the sole UBO of Black Coast*" and mispresented that the purpose of the proposed transaction was for Mr Worsley to make property investments via Black Coast. Again the use of such subterfuge produced no adverse reaction from Mr Yurov or Mr Fetisov.

1646. In the event, the BoC requested board resolutions from the Bank recording that cash was being provided to BoC by way of security for a loan to the borrower (as Mr Worsley reported to Mr Yurov and Mr Fetisov on 9 July 2013) which would, of course, have revealed the lending of the bonds, and 22 July 2013, BoC indicated that they could not proceed with the transaction, and Mr Worsley informed Mr Yurov and Mr Fetisov. The relevance of the BoC episode is that it reveals both Mr Yurov's and Mr Fetisov's knowledge of such schemes, and willingness to go along with such schemes and associated misstatements.

1647. Mr Belyaev was also clearly well aware of what was going on with Bank Winter. In this regard on 25 July 2013, Mr Worsley wrote to Mr Belyaev at his private email address in relation to Winter Bank in these terms:

> "Winter Bank want to make our portfolio more varied. IE some R30, some OFZ. Maybe others too.
>
> **They say this will make things less 'obviously' a back to back trade.**

Ideas pls on the list of securities to buy?" (emphasis added)

1648. Meanwhile, the CBR was continuing to probe the Winter Bank arrangements, and it is clear that Mr Worsley was concerned that the CBR would ask questions of FIMA (the Austrian banking regulator) about Bank Winter, and as a result of such concern consideration was being given to a new deal with the Russian financial group Aton to replace the Winter Bank deal, at least for a short time. In this regard, on 6 August 2013, Mr Worsley emailed Mr Vartsibasov stating:

> "Looking at the Winter situation, I reckon it's very serious.
> If WB refuse to send the info, CBRF will ask FIMA.
> Then FIMA will ask WB, then WB will give the info.
> I reckon we have one week to sort this out.
> I suggest that:
> 1) We finalise all Aton KYC etc.
> 2) We prepare the deposit that we will make to Aton.
> And that we are ready .....
> Then, if so needed, we can use Aton deal to give securities to WB .....
> Then get a WB statement.. ...
> Make sense?"

1649. Similar sentiments were expressed in a further email from Mr Worsley to Mr Vartsibasov on the same day which stressed the urgency of getting an Aton deal up and running. On 26 August 2013, Mr Worsley wrote to Mr Yurov and Mr Fetisov referring to the fact that there was a new CBR specialist *"sniffing around"* at the Bank and causing problems. These problems included not being able to make *"the deposit into Aton that we need to close Winter Bank deal"*. By 3 September 2013, Mr Iskandyrov had come up with an elaborate scheme with some 20 stages for getting US$57 million to Black Coast to allow it to repurchase bonds subject to repos (a scheme that involved SiberianKD an admitted Shareholder company). In another email on 9 September 2013, Mr Iskandyrov stated: *"ATON/WINTER: after today's meeting with Katya, Grisha and shareholders we need to recalculate scheme…."*. There was, in fact, a deal involving transferring bonds to Aton in late 2013 which is considered in the context of the Edenbury Transaction.

1650. However, it is apparent from Mr Davidson's evidence that what actually happened in relation to Bank Winter, was as follows. On 15 August 2013, LBCS borrowed RUB 1.075 billion from the Bank (part of the Bank's pleaded Transactions). The second tranche of this loan (RUB 690 m) was used by LBCS to purchase Russian government bonds. On 5 September 2013, these bonds were repo'd and the proceeds were converted into US$ and "loaned" to Drenville, another company in the offshore network. Drenville used these funds (US$27.56 m), in combination with funds obtained from other companies, to make a loan of US$56.4 m to Black Coast. On 6 September 2013, Black Coast used these funds to acquire 61.5 million Russian Government bonds. These bonds were then used to "repay" three of the extant bond lending agreements with Bank Winter.

1651. The effect of all this was that the Black Coast Transaction was refinanced in September 2013 using funds from the Bank itself, and during September/October 2013, all existing transactions with Black Coast/Bank Winter were closed out and superseded

by a single further transaction in respect of bonds with a nominal value of US$61.5 million, which were to be returned by Black Coast in September 2015.

1652. In terms of the closing out of the existing transactions in September there are a number of emails involving Mr Worsley. On 10 September 2013, the Bank and Bank Winter entered into a new "Trusteeship Agreement" relating to bonds with a nominal value of US$61.5 million. By a confirmation dated 13 September 2013, Bank Winter agreed to lend bonds worth US$61.5 million to Black Coast said to be returnable on 14 September 2015. On 20 September 2013, Mr Worsley asked Mr Iskandyrov to summarise his "*thoughts*" on the Russian government bonds stating, *"It's for Sergey"* (which is clearly a reference to Mr Belyaev). Mr Iskandyrov summarised the position including the 61.5 million of Russian government bonds with Bank Winter.

1653. On 17 October 2013, Mr Yurov approved the sale of the Russian government bonds that Black Coast had purchased back from Alfa Capital in September 2013. The money raised from this sale was used to close out one of the existing repos in relation to US$48.5 million of bonds. Mr Fetisov and Mr Belyaev were given an update on the sale of the bonds and the closing of the repo on 17 October 2013 and Mr Fetisov asked for further details, which were supplied by Mr Iskandyrov. These updates included details of an alleged "profit" of US$500k made on the bonds (calculated by reference to the purchase/sale prices and the fees and repo interest paid to Bank Winter), but this did not take account of the US$10 million fee paid by Black Coast to Bank Winter and the end result of the transaction as a whole was that the Bank lost bonds worth US$51.2 million.

1654. I have set the chronology of events in 2013 in some detail as it is clear from that each of the Shareholders was aware of the Bank Winter transaction, what it entailed and what its purpose was.

R.6.4.3 The Bank's Loss

1655. In terms of the Bank's loss, Mr Mylnikov addressed in his evidence the Bank's efforts to recover the bonds from Bank Winter. The evidence is that Bank Winter does not have the bonds and therefore cannot return them to the Bank. Accordingly the Bank's claim is for the market value of the bonds deposited with Bank Winter but never received back. It is agreed in the List of Issues that the market value of the bonds was US$51,226,302 as at 31 December 2015.

1656. I am satisfied that this represents the Bank's loss. This is the loss suffered by the Bank arising out of the Bank Winter Transaction. I reject the Shareholders' submission that the Bank has suffered no loss. It is necessary to follow through all the transactions concerning the bonds with Bank Winter including that on 13 September 2013, and that transaction does not amount to a break in the chain of causation or mean that the loss is caused by that transaction rather than the initial Bank Winter Transaction. The loss suffered flows from the initial (wrongful) Bank Winter Transaction which was the direct and immediate cause of the loss. I have already addressed why the evidence does not demonstrate that the Bank Winter Transaction was designed to lend Stivilon funds (and in any event the Shareholders' submission ignores the fact that all loans to Stivilon were for the benefit of the Shareholders as ultimate beneficial owners, as were the transactions involving Black Coast, of which the Shareholders were also the ultimate beneficial owners).

R.7 STROYECOLOGIYA

R.7.1 Common Ground

1657. StroyEcologiya was undertaking or attempting to undertake a construction project near Glukhovo village in the Moscow region. Yeleran acquired 60% of StroyEcologiya on 27 May 2010. The remaining 40% was owned by Wiltshire International Ltd, which the parties understand to be connected to Peresvet Bank.

1658. Save that the Bank says these were loans and not investments, the Bank does not dispute that (as contended by Mr Yurov and Mr Fetisov), "*in 2007, the Bank (together with Peresvet Bank) [invested] in StroyEcologiya through the issue of CLNs of Amelside Comnet Ltd which, in turn, had been used to arrange the issue by Credit Suisse of certain senior and junior loan notes (which were held by the Bank as at December 2008); and Oil Group had previously entered into a Participation Agreement by which it had assumed the obligation to make the payments due to the Bank under the Amelside Comnet CLNs*" (see Issue 121). The relevance of this is disputed between the parties. The Bank says that the relevance of these matters is to emphasise the obvious and close parallels between WR/RCP and StroyEcologiya and that these were Shareholder and not Bank Companies, whereas the Shareholders submit that they demonstrate that the Shareholders did not benefit personally from the StroyEcologiya Loans and that the Bank has suffered no loss on either Loan.

1659. The first impugned loan to StroyEcologiya, made on 16 March 2010, was a syndicated loan of US$88 million provided by the Bank and Peresvet (the Bank's share being US$58 million). It was approved by the CC, chaired by Mr Yurov. The CC approved various amendments in relation to this loan. On 12 May 2010 (chaired by Mr Yurov, with Mr Fetisov also stated to have voted in favour *in absentia* but this is not admitted by Mr Fetisov) when it was decided to extend the term for signing and notarising the purchase of 60% of the shares in StroyEcologiya by Yeleran. On 24 November 2010 (chaired by Mr Yurov) when it was decided not to exercise the Bank's right to require early repayment despite a breach of the terms of the first loan. On 8 June 2011 (chaired by Mr Yurov) when it was decided that the Bank should forbear from exercising its contractual rights, and a further extension of time was granted for StroyEcologiya to comply with the terms of the loan. On 23 January 2013 (chaired by Mr Yurov, attended by Mr Belyaev) when the date for repayment was extended by 2 years, the interest payment schedule was deferred and it was decided that the Bank should refrain from exercising its contractual right to early repayment, extending the deadline for obtaining a construction permit. The loan was drawn down on 29 March 2010 and, on the same day, the funds were transferred to Sapkont. Approximately US$30 million was then transferred to Oil Group.

1660. The second loan, on 24 September 2010, was for RUB 60 million. It was approved by the CC, chaired by Mr Yurov. Subsequently, the date for repayment was extended by three years, and corresponding changes were made to the interest payment schedule, by the CC (chaired by Mr Yurov, attended by Mr Fetisov).

1661. The loans were secured by a pledge of StroyEcologiya's rights under a lease of the land plot at Glukhovo Village.

1662. Mr Yurov was at all material times aware of StroyEcologiya and the StroyEcologiya loans and had attended two presentations by architects in the initial stages of the project. Mr Fetisov was aware both of the company and the loans, and had participated in the

negotiations with Bank Peresvet and the former shareholder of StroyEcologiya. Mr Fetisov and Mr Popov signed, on behalf of the Bank, an investment contract with StroyEcologiya dated 28 September 2011.

1663. StroyEcologiya defaulted on the loans shortly after the Bank had gone into rehabilitation. None of the principal had been repaid.

1664. The Bank subsequently assigned its claims against StroyEcologiya (including the loans and under the investment contract) to Ms Anna Solomshyuk for a cash payment of RUB 1.2 billion.

R.7.2 Discussion

1665. The short answer in relation to StroyEcologiya is that in relation to the loans, the Bank was only ever a lender, and StroyEcologiya was, as I have found, a Shareholder company beneficially owned by the Shareholders initially through Yeleran (through which their majority (60%) stake in StroyEcologiya was held). There are striking similarities to the Shareholders' acquisition of the Billa properties through WR/RCP: both projects began with a structured Loan issued by the Bank shortly before the financial crisis (in the case of WR/RCP a loan of US$125.5 million made through the issue of CLNs of RTM, in the case of StroyEcologiya a loan of US$71.1 million made through the issue of CLNs of a SPV, Amelside Comnet) – the only difference being that WR/RCP was profitable and kept, whilst StroyEcologiya was a total failure – which is no doubt why the Shareholders disavowed their interest in it.

1666. In contrast to their assertions in relation to many other Borrowers each of the Shareholders has little choice but to admit knowledge of StroyEcologiya, and the StroyEcologiya loans. In this regard Mr Yurov admits that he was *"at all material times aware of Stroyecologiya and the Stroyecologiya Loans"* and Mr Fetisov was aware both of the company and the loans and had *"participated in the negotiations with Bank Peresvet and the former shareholder of Stroyecologiya"*. He also signed, on behalf of the Bank, an investment contract with StroyEcologiya (as addressed below). As for Mr Belyaev, he actually attended a CC meeting at which a decision was taken to make a series of amendments to the terms of one of the loans (without any commercial justification and to the detriment of the Bank as addressed below).

1667. The ownership position is also clear. At all material times, the Shareholders were the beneficial owners of 60% of the shares in StroyEcologiya through Yeleran, which acquired its stake on 27 May 2010. The remaining 40% in StroyEcologiya was owned by Wiltshire – according to Mr Iskandyrov's oral evidence, this was held by the shareholders of Peresvet. Whilst the date of 27 May 2010 is after the date of the first loan on 16 March 2010, it was a condition subsequent of the credit facility that there be the purchase of 60 per cent of the shares of StroyEcologiya by Yeleran, prior to 30 April 2010. As from 6 August 2009, the shares in Yeleran were held on trust by Totalserve (a CSP) for TIBH, a company owned by the Shareholders. Subsequently a different nominee was introduced, a Ms Pelekanou, who held the shares on trust for the Shareholders personally, in the usual proportions (3:2:2). The administration of Yeleran was transferred to Vassiliades in September 2011, with the Letter of Engagement (*"to act for ourselves and always upon our instructions and or authorization"*) and accompanying Deed of Indemnity being signed by each of the Shareholders personally. The mandate of the previous CSP

(Totalserve) was terminated by a formal letter of instruction signed by each of the Shareholders in their capacity as *"[b]eneficial owner"* of Yeleran.

1668. In December 2012 one of Mr Worsley's "nominee UBOs" was interposed in the shape of Mr Laing (apparently the runner of a tour operator in Cirencester) adding an additional layer of opacity to the ownership structure in circumstances where the Shareholders retained their joint beneficial interest in the ownership structure. The change was implemented by the Shareholders' signing "transfer" documents in their capacity as the beneficial owners of the "transferred" companies. The net result was to transfer the shares to a BVI company, Tranaro Holdings Ltd ("Tranaro"), which was itself held by Mr Laing on trust for Brora, one of the Shareholders' BVI vehicles. Then in September 2014 it would appear that a further "restructuring" was carried out when Yeleran came to be nominally owned by Dianthi – the entity through which the Shareholders owned other companies, including Willow River, RCP and Black Coast – and Tranaro's shareholders became Ushant Investments Ltd and Mr Tunmer, another appointee of Mr Worsley's.

1669. It is clear that the opaque ownership structure successfully concealed the reality from the CBR. The CBR Audit Report for 2012 noted that StroyEcologiya was owned by Yeleran and Wiltshire but that *"[t]here is no information about the ultimate beneficiary"* whilst the CBR Audit Report for 2014 stated that *"the beneficiary owners of Stroyecologiya LLC are: a citizen of the Republic of Cyprus Nota Pelikanu and a citizen of Ukraine Grebennikova Natalia Viktorovna"*, whilst it was noted that according to the Bank's accounting data, the borrower was not related to other borrowers of the Bank (of course it was most certainly related to the numerous borrowers in the offshore network owned by the Shareholders).

1670. As has already been seen with other Borrowers, StroyEcologiya's financial statements were routinely falsified, as shown by the fact that the "chief accountant" of StroyEcologiya noted in February 2014 that the company's financial results were poor and its accounts were due to show a loss of about RUB 35 million for 2013. As a "solution" she proposed:

> "Please clarify if it is possible that Yeleran will transfer a promissory note of the third party to StroyEcologiya in the amount of about 35 million rubles.
> In result of this transaction StroyEcologiya will not have an additional profit tax.
> **The second owner of StroyEcologiya will approve the transaction as well**.
> The similar operation was carried out in the end of 2012."
> (emphasis added)

1671. The "second owner" was in fact Peresvet, as a result of which it is apparent that Peresvet was, at the very least, willing to go along with the taking steps to improve the apparent financial position of StroyEcologiya (thus somewhat undermining the Shareholders' reliance on the involvement of Peresvet as an indicator of the viability of StroyEcologiya or appropriateness of lending to it). Mr Butylkov of Columba commented as follows on the "proposal" showing that a similar strategy had been adopted the previous year, "*We've already done the same last year (in March of 2013), so the scheme is worked*

out. Of course we need to check again all the documents (just in case). The purpose: to show StroyEcologiya's profit for 2013 to Postnov (CBRF).” (emphasis added).

1672. Following an exchange with Mr Worsley, on 26 March 2014, Mr Butylkov emailed people at Columba and Iona requesting documents necessary to implement the scheme to be signed:

> “StroyEcologiya LLC (60% owner is Yeleran) asked us to sign the attached documents. This is necessary to "draw" a beautiful FS requested by NBT. We did the same scheme last year. Let's sing [sic] the attached documents.”

1673. It is also clear from a statement lower down that same email chain that the scheme had been *“coordinated with the other party [i.e. Peresvet] and with the bank’s subdivision, for approval”.* This reinforces the impression that Peresvet was prepared to go along with such schemes.

1674. Turning to the loans themselves. The first loan was the US$ Loan 62-10/KL on 16 March 2010, in its original terms a syndicated loan of US$88 million provided by the Bank and Peresvet (the Bank’s share being US$58 million) at 9% pa. For no apparent commercial reason (other that no doubt an inability to pay, or a desire not to have to arrange other loans to pay) only 1/3 of the interest was required to be serviced on an ongoing basis with the principal and 2/3rds of the interest being due on 1 February 2013. StroyEcologiya was obliged to use the loan proceeds exclusively for the purpose of replenishing its working capital and/or its statutory activities. StroyEcologiya’s only asset was the lease over the Glukhovo land. However it is clear that relevant planning approvals had never been granted by the local authority and (even in 2015) there were still ongoing legal proceedings concerning title to the land with a “*high likelihood that third parties’ title to part of the Project land will be recognised*”. On any view there was no proper justification for the value of the land used and Yeleran had purchased its stake in StroyEcologiya for US$18.5 million, which would imply a valuation of US$30 million for 100% of the share capital.

1675. The approval was given at a CC meeting on 11 March 2010 chaired by Mr Yurov. There was the special condition imposed that, “*The Credit Agreement shall include the Creditor’s right (NBT) to require an early repayment if the sale agreement for the 60% stake in the authorised capital of OOO StroyEkologiya executed between the company CYPRESS ENTERPRISES LIMITED and the company YELERAN HOLDINGS LIMITED is not executed prior to 30 April 2010*.” Yeleran was, of course, owned by the Shareholders, yet there was no disclosure of the Shareholders’ beneficial ownership of Yeleran through which they were about to acquire a majority interest in StroyEcologiya. Various revisions were made to the Bank’s standard terms without appropriate reason or justification, including removal of the Bank’s right to early repayment inter alia in the event of a cross-default, or if there were negative changes in the operational activities, assets, income etc. of the borrower, or upon the occurrence of other events jeopardising its ability to meet its obligations. Such changes were very much in favour of the borrower and not in the best interests of the Bank.

1676. The loan was clearly not in the best interests of the Bank on the basis of such terms and in circumstances where StroyEcologiya had no means of servicing or repaying its debt

(it did not even have a construction permit). It was a speculative venture and a highly risky loan. The making of it was not in the best interests of the Bank as I am satisfied would have been readily apparent to the Shareholders.

1677. Thereafter entirely unjustified variations to the lending were countenanced – on each occasion without any disclosure of Shareholders' interests. Thus at a CC meeting on 12 May 2010 (chaired by Mr Yurov and attended by amongst others Mr Fetisov) it was decided to extend the term for signing and notarising the sale by Cypress Enterprises Ltd of 60% of the shares in StroyEcologiya to Yeleran – it is difficult to see how this benefitted anyone other than the Shareholders themselves in a blatant exercise of self-interest. At a CC meeting on 24 November 2010 (chaired by Mr Yurov and attended by amongst others Mr Fetisov) it was unanimously decided not to exercise the Bank's right to require early repayment under cl. 9.4 despite an established breach by StroyEcologiya of the terms of the first loan in failing to secure a construction permit by the contractual deadline (this was only two months after the CC again chaired by Mr Yurov extended an additional credit facility of RUB 60 million to StroyEcologiya: see below).

1678. The same theme continued – thus when StroyEcologiya's default continued, the Bank forbore from exercising its contractual rights and granted a further unjustified extension of time for StroyEcologiya to comply with the terms of the loan in a resolution dated 8 June 2011. Despite StroyEcologiya's history of breaches, lack of liquid assets, and fictitious "profits" to cover up real losses, the terms of the loan were further varied in favour of the borrower (and the Shareholders) pursuant to a resolution of the CC (chaired by Mr Yurov and attended amongst others by Mr Belyaev) on 23 January 2013. The same pattern of inappropriate variations continued with the extending of the date for repayment by two years to 2 February 2015, the granting of a generous extension for the payment of interest (and deferring a significant proportion of it until 2 February 2015), the causing of the Bank to refrain from exercising its contractual right to early repayment; and the (yet further) extension of the deadline for obtaining a construction permit – all to the benefit of the Shareholders. There is no evidence whatsoever of any proper due diligence being conducted by the Bank in respect of the project or the borrower's prospects of repaying or servicing the loan in relation to any of the CC meetings, and indeed Mr Yurov could not recall seeing any documents by way of due diligence or credit reports or risk memoranda.

1679. The overall picture, I am satisfied is of an initially uncommercial loan, the terms of which were subsequently, and repeatedly, softened for the benefit of the Shareholders. None of this was, I am satisfied, in the best interests of the Bank. All this was set against a backdrop of the continuing failure of the project to secure a final construction permit.

1680. Furthermore, far from the funds being used to replenish StroyEcologiya's working capital or to invest in the Glukhovo development (as contemplated and required), the loan proceeds were immediately dissipated elsewhere. On 29 March 2010, the very day that StroyEcologiya received US$58 million from the Bank almost all the loan was transferred to Sapkont, another Shareholder company, and the following day, Sapkont paid on US$30 million to Oil Group, another Shareholder company.

1681. Indeed, per Mr Fetisov, the loan proceeds *"… were overwhelmingly used to fund/refinance the acquisition of Stroyecologiya and for the cancellation of its previous loan notes"* – the reality being therefore that (contrary to what was referred to in the

minutes), the monies were used to fund their acquisition of a 60% stake in the Glukhovo project (through Yeleran).

1682. Turning to the second loan (RUB Loan 30/K/0269) on 24 September 2010, some RUB 60 million at 9%, repayable on 24 September 2013 (again together with 2/3rds of the interest). StroyEcologiya was obliged to use the loan proceeds exclusively for the purpose of replenishing its working capital and/or purchasing promissory notes. The loan was secured on the same valuation of the lease of the Glukhovo land for which there was no proper justification, and which was clearly an over-valuation. The terms were approved at a CC meeting on 22 September 2010, chaired by Mr Yurov. Yet again there was no disclosure of the Shareholders' ownership of StroyEcologiya (as there clearly should have been). The term of the loan was extended by three years to 23 September 2016, with corresponding changes being made to the interest payment schedule. The amendments were approved at a CC meeting on 24 September 2013 (chaired by Mr Yurov, with Mr Fetisov in attendance). Yet again there was no disclosure of their interest, and the variations were all in the interests of StroyEcologiya, and so the Shareholders.

1683. Whilst there has been no tracing by Mr Davidson of what happened with the loan proceeds, StroyEcologiya was clearly in need of money to service the first loan, and indeed some RUB 50 million of the second loan was used to make interest payments on the first.

1684. A time did come when the Bank made an investment in StroyEcologiya on 28 September 2011 when the Bank concluded an investment contract with StroyEcologiya whereby it agreed to invest RUB 900 million in the project in exchange for 6% of the square footage of the completed premises. Self-evidently (at best) this was a speculative investment as it assumed that the project would be completed (and StroyEcologiya had not even obtained a permit to start the work). It is difficult to see how the investment could be in the Bank's best interest. It was in reality a cash injection for the benefit of the Shareholders' company, with the contract being signed by Mr Fetisov without any declaration of self-interest. Mr Fetisov accepted that this was a "*big deal*", and that "*possibly*" it had been agreed with Mr Yurov and Mr Belyaev. I have no doubt that such a substantial investment (for the benefit of the Shareholders), would have been discussed and agreed between them. This very investment, of course, is inconsistent with the suggestion that StroyEcologiya was the Bank's project or that StroyEcologiya was a "Bank Company". Prior to this the Bank's relationship with StroyEcologiya was purely that of lender/borrower.

R.7.4 The Bank's Loss

1685. StroyEcologiya did not have the ability to service its own loans as it did not have the resources to do so, and in consequence funds for interest payments were sourced through the product of "balance sheet management" loans from amongst others Baymore and SiberianKD, with StroyEcologiya's liabilities being funded through multiple transactions executed on a single day at Piraeus Bank with individuals in Mr Worsley's team assigned to the "*development of the scheme*" which involved recycling cash from the Bank to give the appearance that StroyEcologiya, and many other Borrowers, were solvent when they were not, with a raft of documentation being created to purportedly evidence chains of transactions, and to facilitate the execution of payments involving various offshore vehicles.

1686. Predictably, in circumstances where StroyEcologiya had no income from its operations (given that the Glukhovo development had not got off the ground), it is hardly surprising that very soon after the Bank collapsed in December 2014, and the sources of funds from other companies in the offshore network had dried up, StroyEcologiya defaulted on the loans. The position was accurately summed up by the DIA:

> "At present, the prospects of Stoyekologiya LTD successfully completing the residential complex construction project near Glukhovo, Moscow Oblast, are zero. The Borrower owns no liquid assets, and its business doesn't generate cash flows. Given that the likely result of the factors described above is long-term insolvency and bankruptcy of the borrower …"

1687. StroyEcologiya had but one asset, the Glukhovo land, and the relevant approval had still not been obtained, with hurdles to be overcome impacting upon any prospect of asset growth. As the DIA also noted, as of December 2014, no relevant approval had been obtained from the Moscow Oblast authorities, significant asset value growth would only be possible after such approval had been obtained, there were "*several ongoing cases involving the Borrower's land plot*" and there was a "*high likelihood that third parties' title to part of the Project land will be recognised. This will require changes to the existing site design, which will cause a serious delay in review of approval of the site design by the MO Government*" and the value of the Glukhovo land had been "*significantly inflated*" and did not correspond to the current market value.

1688. It also appears that in addition to the lack of planning approval and the risks identified by the DIA, there was (perhaps unsurprisingly) a lack of interest amongst developers to purchase the land plot. In this regard it was also noted that:

> "… the talks held with large developers working in the Moscow region residential real estate market revealed a lack of interest among developers in purchase of the land plot, particularly due to lack of an approved [site design] and the court cases involving the plot."

1689. As noted in the DIA Report there had been an appraisal of the value of the land in 2013 of RUB 4.8 billion. Mr Yurov submits that the Bank should give credit for this figure. However, this was an historic figure and so of course did not take into account the current economic crisis and the lack of interest in the land by developers. The valuation pre-dates the severe economic crisis in Russia which took place in 2014. As such I do not consider that it is a reliable guide or reference point in relation to values post such crisis, which is the relevant period for the purposes of evaluating recoveries.

1690. It also appears that it was an overvaluation. As the DIA noted:

> "In our view, given the current economic situation, the market value of the land and collateral value based thereon are <u>significantly inflated and do not correspond to the current market level</u>."

1691. It is also to be borne in mind that what had been valued was the land lease itself. This does not represent the value of the Bank's security as the lease also secured Peresvet's interest.

1692. It appears that the Bank had been in negotiations to sell its rights to the project with MDM (a Russian private bank), to buy the receivables of StroyEcologiya for 60 percent of their nominal value for RUB 2.2 billion but as Mr Mylnikov explained when cross-examined, these came to nothing after MDM was purchased by Binbank, and the new managers were not interested in purchasing the rights.

1693. Equally, whilst it appears that Bank Peresvet was also willing to sell its share in the project for 50 percent of the nominal value of the debt, around RUB 1.1 billion, as Mr Mylnikov also explained, the Bank was not interested in buying another stake, it wanted to sell its existing stake. Ms Dolenko's view was that *"The loan is not devaluated, there is no reason to sell with such discounts. PFO is not approved, i.e. while the debt is worth a nominal"* and that was not an unreasonable view. It is suggested that the MDM and Bank Peresvet proposals should have been accepted, but the MDM's interest seems to have withered on the vine and the Bank wanted to sell its interest (not increase it by buying Bank Peresvet's stake).

1694. There had been a valuation of the Bank's rights against StroyEcologiya by a third-party on 8 June 2015, which valued the Bank's claims against StroyEcologiya at RUB 870 million. These were in fact assigned for RUB 1.2 billion as appears below. One difficulty was that the Bank was not able to commence litigation because that would have risked termination of the lease, which would itself have impacted upon any value in the project.

1695. Mr Mylnikov also explained that the managers involved in selling the assets did contact all the major developers in the Moscow region that could have been interested in the project but no one showed any interest in what was (as he described it), a "*difficult project*".

1696. In the event the Bank assigned the Bank's claims against StroyEcologiya to an Anna Solomoshchuk for RUB 1.2 billion. It appears that she had some connection with Bank Peresvet and could have been its nominee (per Mr Mylnikov's witness statement at para 6). I do not consider that such decision was unreasonable or amounted to a failure to mitigate in relation to what was a failed project, with very uncertain prospects, in a difficult economic climate, and in circumstances where significant further investment would have been required for any speculative return.

1697. It should also be noted that the List of Issues identifies no issue for determination in relation to the value of the lease, or the value of the Bank's recoveries in respect of StroyEcologiya, or the reasonableness of the steps it took to mitigate its loss. If such points had been taken at a proper stage then no doubt expert valuation evidence would have been available to address such matters. In any event, even if the point had been open to the Shareholders (which it was not as an unpleaded point), I do not consider that there was any failure to mitigate.

1698. I am satisfied that in the circumstances I have identified, the Bank had no reasonable commercial alternative to the course that was ultimately taken, namely, to cut its losses by assigning its claims against StroyEcologiya for a cash payment of RUB 1.2 billion.

1699. The accountancy experts have agreed that the outstanding principal on the StroyEcologiya loans is US$58 million and RUB 60 million. After giving credit for the recoveries listed in 1-Allen Schedule 1 **(**which are based on an allocation of the RUB 1.2 billion due under the assignment agreement) I am satisfied that the Bank's loss is US$44,511,781.

1700. The Shareholders again submit that the Bank has suffered no loss. However, this is predicated on the basis that StroyEcologiya was a Bank company with the project being held and run for the benefit of the Bank (which it was not as already addressed), and on the basis that funds were returned to the Bank (via Oil Group), which is wrong in principle, and no credit stands to be given. Sections N.2.2 to N.2.9 are repeated.

R.8 PRIANGARSKIY, BUSINESS GROUP AND SIBERIANKD

R.8.1 Common Ground

1701. It is agreed that SiberianKD owned 100% of Business Group, that Business Group owned 85% of Priangarskiy and that the Shareholders were the beneficial owners of SiberianKD. Priangarskiy itself was developing a timber project in Siberia.

1702. As to Business Group, on 10 March 2010 the Bank entered into a RUB 1.3 billion credit facility agreement with Business Group. This loan was approved by the CC on 25 February 2010 chaired by Mr Yurov; Mr Fetisov was also recorded as having voted in favour of the loan *in absentia*, but this is disputed by Mr Fetisov. The loan agreement was amended a number of times including by extending its term by three years. On 2 December 2014, the CC (recorded as chaired by Mr Fetisov, but this is not admitted by Mr Fetisov) voted *in absentia* to extend the loan until 30 June 2023.

1703. The entirety of the funds loaned to Business Group were transferred to LLC Jermanta, which used US$35 million to make a loan repayment to the Bank in respect of a loan dated 17 April 2009. None of the loan principal had been paid back at the time at which the temporary administrators were appointed on 22 December 2014.

1704. As to Priangarskiy, the Bank advanced five loans to Priangarskiy as summarised in the table at paragraph 13 on page 156 of the Bank's skeleton argument. Each of the five loans was approved by the CC chaired by Mr Yurov (save for the fifth, which was chaired *in absentia* by Mr Fetisov). The repayment date of the first two loans was extended and none of the loans had fallen due for repayment when the temporary administrators were appointed on 22 December 2014.

1705. As to SiberianKD, the Bank entered into two loan facility agreements with SiberianKD on 3 April 2013 and 23 July 2013 respectively. Both loans were approved at a CC meeting chaired by Mr Yurov. No collateral was provided in respect of these loans. The funds advanced to SiberianKD were used for "balance sheet management" (although Mr Yurov and Mr Fetisov say that they did not know this, and they should not have been). On 24 March 2015, Lismore Trading Limited (the registered owner of the SiberianKD shares) entered into an SPA to sell 100% of the SiberianKD shares to a BVI company called Tigerfeeld. Each of the Shareholders were aware of, and approved, the sale.[29] The purchase price of the SiberianKD shares was US$1 million but, on 23 June 2015, the SPA was amended to reduce the purchase price to US$1,000.

R.8.2 Discussion

1706. These three companies are in the same ownership structure with SiberianKD owning 100% of Business Group, which in turn owned around 85% of Priangarskiy, and both Mr Yurov and Mr Fetisov admit that these were "Personal Companies" beneficially owned by the Shareholders whilst Mr Belyaev admits that he had an "economic interest" in the Priangarskiy project. I am satisfied that the Shareholders were the beneficial owners of each of these companies.

[29] Mr Belyaev's case is that he believed that there was a sale of the underlying economic interest in the Kodinsk project and his agreement to the common ground is without prejudice to his case in this regard

1707. The companies are associated with a genuine underlying business project, namely a timber project in Siberia. The Shareholders acquired their interest in this project around 2004, long before the financial crisis, although Mr Fetisov, at least, accepts that he never put any of his personal money into the project.

1708. More specifically (at least as per the evidence of Mr Yurov and Mr Fetisov), in or around 2001, a company called TechTransStroy acquired the rights to a forest in the Krasnoyarsk region of Siberia, and the Bank (along with other banks) advanced loans to it to fund the construction of a timber mill in the forest. The project was developed by Rogue Forest Industry Consulting (Finland), a leading Finnish forestry consultant, who had a preferential lease over 452,000 hectares of forest land and a processing capacity of 300,000m of timber per year. It was designated by the Ministry of Regional Development of the Russian government as a priority investment project within the timber industry which employed up to 850 people. Mr Fetisov described it as a *"big, big project, with local government of Krasnoyarsk region involved, with the Federal Government of Russia involved to supervise the usage of the timber plantations allocated to it*." In or around 2004/2005, TechTransStroy ran into financial difficulties, and (per Mr Yurov and Mr Fetisov) the Shareholders took over the project, and in October 2010, Priangarskiy was set up to hold and continue progress on the project.

1709. Despite the Bank advancing large sums of money to it (as addressed below), according to the DIA report the project was, as at April 2015, "*in the investment phase*" and "*is currently loss-making*". Following the collapse of the Bank in December 2014 the loans went into default (evidencing that it had been receiving its funding through the continued use and the survival of the offshore network).

1710. However not all loans to companies in the ownership structure of the Priangarskiy project were used for that project. In this regard there is a distinction between the transactions between the Bank and Priangarskiy, and the transactions between the Bank and Business Group and SiberianKD. As to the former it appears that the loans between the Bank and Priangarskiy were used in connection with the timber project (and/or to refinance or service previous loans). Some security was provided to the Bank (albeit inadequate since the Bank has been left with a significant loss having taken various steps to enforce that security and to extricate itself from this project). After credit for recoveries, the Bank is owed RUB 1,586,320,353 by Priangarskiy (principal only).

1711. As to the loans between the Bank and Business Group and SiberianKD and despite the fact that Business Group was the majority owner of Priangarskiy, the Business Group loan advanced in March 2010 was not used for any purpose connected with the underlying business of Priangarskiy. On the contrary Business Group immediately loaned the entirety of the funds received to another Shareholder company, Jermanta LLC, which used those funds to make a partial repayment to the Bank of a loan that it had received from the Bank in 2009 – i.e. the loan was used for (inappropriate) balance sheet management. None of the principal amount of the Business Group Loan was ever paid back and I am satisfied that the Bank's loss on the Business Group loan (net of recoveries) is RUB 1,159,181,621.

1712. The SiberianKD loans, advanced in 2013, were also used for (inappropriate) "balance sheet management" purposes and none of the money was used for the underlying investment in the timber project. The funds received by SiberianKD were used to buy bonds that were then repo'd, with the proceeds being transferred to various other

companies in the offshore network (some of which transfers have already been referred to). The outstanding principal is the very substantial sum of RUB 2,012,797,349 (in the context of the absence of any collateral for the loans), which reflects the Bank's loss. Whilst leaving the outstanding losses to the Bank the Shareholders sold their shares in SiberianKD in the summer of 2015. The purchase price for that sale was US$1 million (which Mr Yurov confirmed the Shareholders received), but it was stated to have been reduced to US$1,000 (which can only have been to conceal the fact that the Shareholders had received the larger sum of US$1m).

1713. The Shareholders said little about the Business Group Loan in their witness statements. For example Mr Yurov says nothing about how the funds were used, and when cross-examined denied any real knowledge of the loan claiming that he "*presumed*" that the Bank had satisfied itself that this was a proper loan to make. Mr Fetisov, whilst acknowledging that Business Group was the parent company of Priangarskiy, asserted that he could not *"recall the purpose for which the Business Group loan was made, and may not even have known about it at the time…*" omitting to address that he was on the CC that made the March 2010 loan in 2010 and subsequently extended the repayment date to 2023 (as addressed below). For his part, Mr Belyaev makes no mention at all of Business Group in his statements (notwithstanding that he was party to a CC decision on 20 June 2014 as addressed below). I have no doubt that the reason for the Shareholders' coyness in regard to the loan to Business Group is that (1) it does not fit with their case as to the distinction between "Bank Companies" (involved in "balance sheet management") and Shareholder Companies (involved in their projects) – and, of course there was none, as addressed in Section F.6; and (2) the loan was not used for the Priangarskiy project, but rather was rapidly dissipated in its use for (inappropriate) "balance sheet management".

1714. The loan to Business Group consisted of a credit facility agreement dated 10 March 2010 between the Bank and Business Group whereby the Bank made a RUB 1.3 billion credit facility available to Business Group with an end date of 7 March 2013. The purpose of the loan was described as follows "*The Borrower shall utilize the Loan exclusively for the following purposes: working capital replenishment, repayment of loans, buyout/ redemption of own promissory notes, provision of loans*" (see clause 2.3). Some security was provided in the form of pledges over land and property connected with the timber business (albeit it has transpired that the security was inadequate).

1715. Approval was given by the CC on 25 February 2010, at a meeting chaired by Mr Yurov, at which Mr Fetisov was also present and voted in favour of the transaction. There is no evidence that any disclosure was given of the Shareholders' admitted interest in Business Group. Once again there is no evidence of any due diligence being carried out and the minutes are as bland as the agreement itself in terms of the description of the loan.

1716. As a loan that was clearly designed from the outset to be used for (inappropriate) "balance sheet management" it was not in the best interests of the Bank as the Shareholders knew (see Sections G.3.1 and G.3.2). Mr Fetisov was keen to attempt to distance himself from this loan as with many others, memorably claiming (for the first time in cross-examination) that he had not been in Moscow when it was approved driving rally cars in Eastern Russia. This rather missed the point that as it was approved *in absentia* he could have been anywhere. This new evidence was inconsistent with the fact that only days earlier it had been agreed by Mr Fetisov's lawyers that, *"Mr Fetisov was also present and voted in favour of the loan"*. I am quite satisfied that Mr Fetisov gave his

approval well knowing that a company he beneficially owned was receiving a loan that was to be used for "balance sheet management" purposes.

1717. The loan was subsequently amended so as to defer a substantial portion of the interest, to extend the term of the loan by three years, and to convert the loan from roubles into US$, and then back into roubles again, all at meetings chaired by either Mr Yurov or Mr Fetisov and Mr Belyaev was also present at, and voted in favour at, the 20 June 2014 meeting. There was no attempt to justify the commercial rationale for such changes or why they were in the Bank's best interests. Given that the proceeds were not even used for the Priangarskiy project, any suggestion relating to Priangarskiy would not have worked. The reality, I am satisfied, is that these amendments (like the original loan) were not in the best interests of the Bank.

1718. The final amendment is, perhaps, the most blatant example of self-interest – on 2 December 2014, shortly before the collapse of the Bank, the CC (chaired by Mr Fetisov) agreed to extend the term of the loan by nine years until 30 June 2023. This was, self-evidently, in no one's interest other than the Shareholders, the other Shareholders no doubt having been consulted in that regard (as it would make no sense for one Shareholder to act unilaterally in this regard). I am quite satisfied that Mr Yurov's oral evidence in which he claimed that the management of Business Group had approached the Bank with a request for an extension was untrue, there is no documentation in support as one would have expected there would be, and in any event, Business Group was nothing more than a shell company, and most certainly did not have any independent managers. Mr Fetisov's evidence was that he was not in Moscow when this extension had been approved, but he could, of course, have approved it from wherever he was. The effect of the amendment, and the associated lengthy extension, is that none of the principal of the Business Group loan was ever paid back.

1719. It is common ground (as reflected in the expert accountancy evidence) that none of the funds drawn down by Business Group under the March 2010 credit facility agreement was passed on to Priangarskiy for the purposes of investment in the underlying business project, rather (as is also common ground) that of the funds advanced to Business Group (RUB 1.3 billion equivalent to some US$43.95 million), almost all (some RUB 1.2978 billion) was transferred the same day to a Russian company called LLC Jermanta (bearing the same name as a Cypriot company) and LLC Jermanta used US$35 million of those funds to make a repayment to the Bank in respect of a loan it had received from the Bank on 17 April 2009 (No. 30/K/0164). This, of course, left Business Group with the Loan, and the principal remains outstanding representing the loss to the Bank on that loan.

1720. There was an issue on the expert evidence as to whether the Shareholders benefitted personally from this loan (in terms of linking the payment to Jermanta to a refinancing of the acquisition of the RTM retail properties by Willow River and RCP). Ultimately Mr Allen accepted that the payment from Business Group to Jermanta and the earlier purchase of the CLNs which went to finance Willow River and RCP could not necessarily be linked. The Shareholders did, of course, benefit more generally as Business Group, and other companies in the offshore network, were beneficially owned by the Shareholders.

1721. Turning to the Priangarskiy Loans, between August 2011 and November 2014, NBT entered into five loans with Priangarskiy which can be summarised as follows:-

Loan	Date of loan agreement	Amount (RUB)	Date for repayment
1/KL	30 August 2011	1,569,600,000	30 August 2013
2/KL	1 November 2013	394,000,000	1 November 2016
30/K/0446	21 March 2014	150,000,000	2 April 2018
30/K/0448	24 April 2014	1,650,000,000	24 April 2020
30/K/0469	26 November 2014	1,700,000,000	26 November 2021

1722. All of these loans were approved by the CC, chaired by Mr Yurov or Mr Fetisov. There was no disclosure of the Shareholders' admitted beneficial ownership of Priangarskiy in relation to any of the loans. It is self-evident that if any member of the CC had a personal interest in a company it should be disclosed – yet there was never any declaration of interest by the Shareholders. Even if (as the Shareholders allege) individuals within the Bank had an awareness as to Shareholders' interest in Business Group and SiberianKD and the Priangarskiy project itself, that was no excuse for not declaring an interest in writing so that the same could be recorded and be taken into account by all CC members. For loans to be approved for the benefit of the Shareholders without proper declaration of the Shareholders' interest in Priangarskiy was not in the best interests of the Bank – there was an obvious conflict of interest that needed to be recorded and considered.

1723. In such circumstances it was all the more important that proper due diligence was undertaken in respect of the ability of Priangarskiy to pay back the loans and as to the adequacy of the security, but there is no evidence of proper due diligence having been carried out in that regard. All that has been identified is a report dated 8 April 2014 from the Bank's Corporate and Market Risk Directorate (after three of the loans had already been made), and a document in October 2014 (when most of the lending had already been made). This does not amount to appropriate due diligence, and had such due diligence been undertaken I am satisfied it would have been revealed on disclosure.

1724. There is no explanation or justification given for the very sizeable lending in 2014 on uncommercial terms whereby no repayment was due for many years which cannot possibly have been in the Bank's best interests (not least given the financial position of the Bank which itself required a regular inflow of cash to the Bank – which was not achieved by the terms of the loans to the Shareholders' own company).

1725. Once again the Shareholders sought to distance themselves from the lending in circumstances where they were party to the approvals of loans to their own company. For example Mr Yurov suggested that he had not even spent "*a single hour*" trying to understand the business of Priangarskiy despite the fact that he knew he was one of its owners and had given his approval to the lending of billions of roubles to it by the Bank. If his evidence were true (and I am satisfied it is not) he would hardly have discharged his responsibility to assess the business that he was being asked to consider lending substantial sums to, on his own evidence. The reality, I am satisfied, is that he knew

perfectly well that the lending was furthering the interests of the Shareholders in preference to those of the Bank. Mr Fetisov suggested in his witness statement that the loans to Priangarskiy were "*independently approved"* but there is no documentation evidencing any such independent approval, and the approvals given by Mr Yurov and Mr Fetisov, without disclosure of their personal interest, were anything but independent.

1726. These loans were also amended on numerous occasions, and in respects that benefitted Priangarskiy and its beneficial owners rather than the interests of the Bank. For example the repayment date under the first loan was extended first to 27 February 2015 and the CC (chaired by Mr Fetisov) voted to extend it again to 30 August 2016 (which was a matter of days before the Bank's collapse, at a time when Mr Yurov knew the Bank was in need of a bailout). Such amendments were clearly not in the best interests of the Bank, but were clearly to the benefit of the Shareholders. Whilst Mr Fetisov claimed in his cross-examination that this extension had been requested by the "director" of Priangarskiy, there is no other evidence of that, and the extension clearly benefitted the Shareholders and not the Bank. The consequence is that none of the Priangarskiy loans had fallen due by the time the Bank collapsed. Whilst some security was provided (including a worthless guarantee from its parent (shell) company Business Group, also owned by Shareholders) it was not adequate, and the Bank's loss as of 30 April 2017 was RUB 1,586,320,353 after giving credit for all recoveries.

1727. As for the loans to SiberianKD, these were typical (inappropriate) "balance sheet management" loans, with large sums being advanced without any security whatsoever being provided, and as soon as the loan proceeds were received, after they were converted into bonds and repo'd, they were remitted to other companies in the offshore network. In fact this admittedly Shareholder company was only ever used for balance sheet management (telling the lie to the alleged distinction between Bank and Shareholder companies). This led Mr Yurov to deny both knowledge of the matter and say if this is what was done it should not have been done and that he did not benefit (despite SiberianKD and other companies in the offshore network being beneficially owned by the Shareholders). I have no hesitation in rejecting his alleged lack of knowledge of what the loans were being used for (that he approved), and his alleged lack of benefit:-

> "The use of the SiberianKD Loans is outside my knowledge but it appears from what I was told by Mr Fetisov that the Loans to SiberianKD appear to have been made for the purposes of managing the Bank's balance sheet. I was not aware of this at the time. If this is what happened, the Bank and Mr Worsley should not have used SiberianKD for this purpose, since it was a Shareholder Company and not a Bank Company. However, if it was used for this purpose, then the Loans were made in the Bank's own interests, not mine, and I did not benefit from it".

1728. Equally I have no hesitation in rejecting Mr Fetisov's evidence about his own alleged lack of knowledge as to the use to which SiberianKD, a company beneficially owned by the Shareholders, was put, which defies belief:

> "I was aware of SiberianKD at the material time, as it was part of the holding structure of Priangarskiy. I therefore understood it to be a shareholder company, rather than part of the Bank's operational structure. I was not involved in making the loan to SiberianKD which is the subject

> of these proceedings. I first learned about it in early 2015, when Alexei Zalaevsky (project manager for the Priangarskiy project and a board member of Business Group and/or Priangarskiy) told me that SiberianKD had amounts outstanding under loans made by the Bank. I raised the matter with Mr Vartsibasov (whose later role at Columba I describe below). He told me that he had decided to involve SiberianKD in the Bank's bond trading because he needed to transfer some bonds off the Bank's balance sheet as a matter of urgency, and SiberianKD was the only company available which had a satisfactory credit rating at the time. I was not consulted about the loan in advance and was annoyed when I found out about it. SiberianKD was a shareholder company and should not have been involved in the Bank's liquidity transactions."

1729. Mr Yurov approved both the SiberianKD loan agreements. The first, made on 3 April 2013, provided for SiberianKD to borrow up to RUB 900 million for the purposes of "*acquisition capital issues*" it being approved by the CC on 13 March 2013 in a meeting chaired by Mr Yurov. The second agreement was entered into on 23 July 2013 and provided for a further RUB 1.12 billion to be made available to SiberianKD being approved at another meeting chaired by Mr Yurov. In respect of both loans, the CC minutes provided that the purpose of the loan was "*purchase of securities*" and (contrary to what one expect of loans of this size and duration) there was nothing by way of security. The reference to the use of the loans to "purchase securities" would have made it obvious to Mr Yurov that the loans were intended to be used for "balance sheet management", albeit that he said he had no specific recollection, and thought that the loan was going to be used for the timber project (though there was no support for such suggestion).

1730. SiberianKD did, indeed, use the funds received from the Bank to purchase Russian government bonds. It then repo'd the bonds via a brokerage company called BCS. The funds obtained from the repo transactions were then used to repay the First SiberianKD Loan, only for it to be reissued (i.e. re-granted to SiberianKD) and never paid back and then transferred through a series of offshore companies via a series of purported loan agreements. From Mr Davidson's summary table at the end of App 7, it is apparent that the funds advanced to SiberianKD were received by the likes of Alfa Capital, Stivilon, CRR BV, IFC Trust, Yaposha, Zosimal, Black Coast, StroyEcologiya, and BCS.

1731. As is apparent from the evidence of Mr Davidson, SiberianKD was also involved in funds being lent by the Bank to Erinskay being passed through SiberianKD, as well as SiberianKD also receiving funds from Baymore. SiberianKD also received funds borrowed by LBCS and LLC5. There can be no doubt that the Shareholders knew that SiberianKD was being used for "balance sheet management". There can be no doubt that both Mr Yurov and Mr Fetisov knew this. Thus, for example, on 28 December 2011, Mr Iskandyrov emailed Mr Fetisov and others (copying Mr Yurov) referring to the need to finance the discount on the bonds position and suggesting the use of *"existing companies"* LBCS, SiberianKD, Wave and TIB Equities. It is inconceivable that Mr Belyaev was not also aware of the use of SiberianKD for (inappropriate) "balance sheet management" in the context of his beneficial ownership of SiberianKD and relationship with the other Shareholders.

1732. In mid-2015, the Shareholders sold their shares in SiberianKD to a BVI company called Tigerfeeld. In this regard, the first meeting between Mr Popkov and the

Shareholders took place in London on 13 February 2015. At this meeting, the parties discussed the transfer to the Bank of various companies owned/controlled by the Shareholders, but they made it clear that they wished to retain certain companies including SiberianKD, Business Group and Priangarskiy. Shortly thereafter the Shareholders (with the assistance of Mr Worsley) negotiated the sale of SiberianKD.

1733. In this regard, on 13 March 2015, Mr Worsley forwarded a draft SPA to the Shareholders' personal email accounts, and later the same day, commented:-

> "At the moment, you are selling a firm that has a loan to NBT, in the current situation where NBT has been taken over. You are asking that NBT do not get info on this deal.... Additionally, the 'seller' is a nominee.... If I allow this deal to go ahead without an Indemnity, I am personally taking the risk of all of that. I need something in writing. Draft to follow. Basically, as UBOs you need to instruct me to procure the sale of the asset via the nominee to the buyer. Nothing more than that. Make sense?"

1734. On 22 March 2015, Mr Worsley emailed the Shareholders asking them to sign an email asking Mr Worsley to procure the sale of SiberianKD to Tigerfeeld. Each of the Shareholders (including Mr Belyaev) sent such emails, and it was recorded that by 23 March 2015 Mr Fetisov had "*approved the deal*". On 24 March 2015, a Seychellois company called Lismore Trading Limited (another Shareholder company and the owner of the shares in SiberianKD) entered into a share sale and purchase agreement with Tigerfeeld to sell the shares in SiberianKD for US$1 million. There were delays in closing the transaction, and on 7 April Mr Worsley updated all of the Shareholders. On 23 June 2015, Lismore and Tigerfeeld entered into an addendum to the SPA in respect of the SiberianKD shares which recorded that the "*financial position of the company has been re-considered*", that SiberianKD "*has considerable outstanding liabilities*" and that the purchase price was reduced to US$1,000. It is clear that this was a sham, Mr Yurov explaining in his oral evidence that the Shareholders had actually received US$1 million (which was also Mr Fetisov's evidence). Notably this all took place whilst SiberianKD was the subject of the Isle of Man trust structure – albeit that there is no evidence of the involvement of the trustees. Such structure was thus in place to conceal the beneficial ownership of the Shareholders, but such structure did not prevent the Shareholders from controlling the assets.

R.8.3 The Bank's Loss

1735. The loans remained unpaid. This represents the Bank's loss that it is entitled to claim. The Shareholders' case that the Bank suffered no loss ignores the fact that the loans, which remain unpaid, represent the Bank's loss. The fact that loan proceeds went to repay loans of other offshore companies and that payments were thereby made returning money to the Bank or other entities is collateral and is not relevant. Sections N.2.2 to N.2.9 are repeated.

R.9 BELENFIELD
R.9.1Common Ground

1736. On 10 June 2014, the Bank entered into a credit facility agreement with Belenfield (a Cypriot company) by which the Bank made RUB 2.3 billion available to Belenfield for a five-year term. The Belenfield loan was approved by the CC *in absentia* on 6 June 2014 chaired by Mr Yurov; Mr Fetisov was also recorded as having voted to approve the loan, but this is disputed by Mr Fetisov. The loan was advanced so that Belenfield could purchase the rights to a retail loan portfolio held by Baltica Bank.

R.9.2 Discussion

1737. This is an odd loan that makes little sense and cannot have been in the best interest of the Bank. At the time, RUB 2.3 billion was worth around $50-60 million, and so at this time this was a major loan to be granted by the Bank, not least given the true financial state of the Bank at the time. Most obviously uncommercial was that no principal was repayable until June 2019 which makes no commercial sense, and cannot have been in the Bank's best interest. Belenfield was, as I have found, another company beneficially owned by the Shareholders.

1738. The Belenfield Loan was approved by the CC on 6 June 2014 at a meeting chaired by Mr Yurov, at which Mr Fetisov was present and voted in favour of the loan. The loan was advanced so that Belenfield could purchase the rights to a retail loan portfolio from another Russian bank, Baltica (or Baltika) Bank. The Bank's security was a pledge over the loan portfolio (albeit that this was not required to be provided until up to three months after Belenfield had obtained the loan).

1739. The commercial terms of the loan made little sense – in particular there was a complete mismatch between the supposed commercial purpose of the transaction (to enable Belenfield to buy a retail loan portfolio for six months before selling it back to Baltica Bank) and the term of the loan granted to Belenfield, which did not require any repayment of the principal for five years. In this regard the agreement between Belenfield and Baltica Bank imposed no obligation on Baltica Bank to repurchase the portfolio after six months.

1740. It appears that the loan was arranged with some haste for no apparent reason. Even Mr Worsley was suspicious about the loan. In a series of emails, sent or copied to Mr Yurov, he stated:

> "Obviously, NBT is in shape to be buying loan portfolios for fun. So I am guessing that this is a consultants type deal, or a variant of a new 'winter bank' type deal, and that Baltika will lend the monies back to NBT…. We will need a clear explanation of the deal.
>
> We have been given no description of the documents, for parameters for acceptance/checking of the documents, no time lines for the results, no indication as to how/when/if we will 'accept' the docs as being valid. If, one day before the deal, we do not know any of this, how can we possibly define parameters…?.
>
> There is clear some underlying 'story' as to why the loan is being made (unless NBT's balance sheet is now so healthy that we make USD57M

> loans to third parties for no particular reason other than a loan margin…?). I know that you like to keep deals private, and I know that previously, you even asked Ilya for permission not to disclose deals to me….."

1741. The reference to checking the documents is a reference to the checking of the underlying documents evidencing the actual mortgage portfolio that Belenfield was purchasing. There is no evidence that the Bank did any proper due diligence on the portfolio. In a March 2015 email to Mr Worsley, Mr Manko stated that:

> "I had written: For example: last transactions in Dec 14 between TIB Inv & SiberianKD and TIB Inv & LB Collection and TIB Inv & Erinskay – this is really fraud!!! These funds must be returned back to the account of the company before closing positions without issuing any claims – I can do it. Plus for this period for payment Belenfield – without any document…. even when these deals were made Artemis said it was laundering… "

1742. The documentation in relation to the transaction simply disappeared at the time of the Bank's collapse as explained by Mr Popkov in his evidence. In an email to Mr Yurov and Mr Libson in September 2015, Mr Worsley noted that those documents had been "*last seen*" in the office of Mr Vartsibasov at the Bank. In the same email Mr Worsley set out his belief that the money from the deal had been *"re-cycled and used to pay off Russian Government officials. I know this from a recording I have of Vartsibasov speaking… This implies that BB did a back to back deal, took a fee, and paid the cash out to Vartsibasov, who likely took a hefty percentage, and then paid out to Government"*. Whether there is any truth in these allegations is not clear and the truth as to what was done with the money from the deal will probably never be known.

1743. What is clear is that as soon as the Bank collapsed Baltica stopped paying Belenfield. After some recoveries, the Bank was owed RUB 1,748,819,656 approximately US$27 million. Despite approving the Belenfield Loan on the CC, Mr Yurov and Mr Fetisov feign a lack of recollection of the Belenfield loan and its purpose. Aside from making the (untrue) statement that Belenfield was a Bank Company (as opposed to being beneficially owned by the Shareholders), Mr Yurov claimed that he had "*no specific recollection"* of the Belenfield Loan (or the Belenfield Transactions) although in the same breath he says (somewhat inconsistently) that the transaction sticks in his mind because Mr Plyakin of the CBR called him to support the transaction. Why a CBR official would do so is left unexplained. Mr Fetisov alleges that he did not actually attend the CC meeting approving the transaction and that *"I only became aware of the transaction with Bank Baltika in or around late 2014"*. Mr Belyaev did not address the Belenfield Loan in his witness statements and denied any knowledge in his oral evidence.

1744. I am satisfied that all three Shareholders knew perfectly well that this loan was being made to their company Belenfield, and that they would have known the purpose of the loan whatever it was. Given that they were discussing at the time the possibility of a *"corporate event"* (which I am satisfied was a reference to the Bank's collapse and not as Mr Yurov submits a possible takeover whether involving BIN Bank or otherwise) they cannot possibly have considered that the loan (given its term) was in the best interests of the Bank.

1745. Belenfield was part of the offshore network. It was incorporated by Vassiliades on 13 March 2012 and had Cypriot nominee shareholders. Those nominees held the shares on trust for a BVI company called Lanwood Investments Limited. On 18 October 2013, Ms Chloe Vos, one of the "nominee UBOs", signed a Declaration of Trust in relation to the shares in Lanwood in favour of Arlingham (one of the holding companies in the offshore network). It was a Shareholder Company. Tellingly in 2015, the temporary administrators of the Bank wanted the Bank to buy Belenfield from the Shareholders for the token sum of one Euro and the Shareholders refused to sell it (the reason the temporary administrators were interested in the Bank buying Belenfield was so that they could pursue Baltica Bank). In March 2015, Mr Worsley, asked the Shareholders if they approved the execution of powers of attorney that would allow the Bank to start proceedings against Baltica Bank in the name of Belenfield. Thereafter on 26 August 2015, Mr Worsley emailed all three Shareholders stating:

> "NBT want to buy Belenfield, ASAP. EUR 1. It's the company that was involved in the Baltika transaction. They wish to buy it so that they can negotiate directly with Baltika. May I have your OK to go ahead and sell it please?"

1746. Mr Yurov's replied that he was *"not OK with any deals with NBT fit* [*sic*] *1 Euro without full and unconditional indemnity"* and no sale in fact took place. This all rather tells the lie to Shareholders' claim that Belenfield was a Bank Company. I reject the suggestion that this was just Mr Yurov being reluctant to do any deals with Otkritie on the advice of his lawyers (as he said in the preceding sentence) – Belenfield was clearly a Shareholder company.

1747. It is notable that on 30 June 2014, at a meeting of the Supervisory Board attended by all three Shareholders, they voted for a resolution specifying how the Belenfield debt was to be accounted for regulatory purposes (under CBR Regulation 254-P). It appears that the purpose of this was to limit the extent to which the Bank would need to make provisions in respect of the Belenfield loan.

1748. The evidence suggests that Belenfield was used (artificially) to control the Bank's capital ratio in a way that cannot have been in the Bank's best interests or in good faith. In this regard Mr Iskandyrov said as follows:-

> "Q. I mean, we have looked at some examples. We looked at the Baltica loan. That was using Belenfield for the Bank. We have looked at this backdated securities transaction. That was using Belenfield for the Bank. We looked at the forwards that you remembered, and that was using Belenfield for the Bank. That was the purpose for which Belenfield existed, wasn't it?
>
> A. To use Belenfield in this particular case, yes. The previous market deal did not improve anything for the Bank, it was the purchase of the portfolio of the mortgage obligations and in this example we have a fake transaction, so that the Bank would not make worse the norms of the ratios, which will be included when calculating the capital, the adequacy of capital. Whether it's good --

Q. **<u>It may be a very bad thing to do</u>** but the reason it's being done is for what you perceived to be the interests of the bank, isn't it?

A. This is done so that the Bank in its reporting or accounting documents would be able to demonstrate that it has no breaches in relation to the capital." (emphasis added)

1749. A specific issue that arises is whether credit should be given for the actual and anticipated recoveries by the Bank under the Baltica Bank loan portfolio or only in the sum agreed (as between the Bank and Belenfield) to be credited against Belenfield's debt in the settlement agreement. If the former, what are the actual and anticipated recoveries?

1750. Mr Mylnikov explained in his witness statement that, after making limited recoveries, the Bank commenced proceedings against Belenfield in the Arbitrazh courts in Spring 2015. These proceedings resulted in a judgment of 19 October 2015 by which Belenfield was ordered to transfer the rights to the loan portfolio to the Bank. On 10 June 2016, the Bank entered into a settlement agreement with Belenfield and on 12 September 2016, the Bank acquired certain rights from Belenfield under that settlement agreement; The Bank recovered about RUB 344.5 million pursuant to the settlement. However, as a result of subsequent litigation in the Russian courts, the Bank was ordered to make certain payments (RUB 16.5 million) back to Baltica Bank and some of the underlying mortgage customers. Mr Allen's figure for the outstanding principal net of recoveries is RUB 1.7 billion.

1751. There is no evidence before me as to whether there are likely to be future recoveries. Nor is there any pleaded case in that regard. When Mr Mylnikov was asked about the settlement agreement in cross-examination Mr Mylnikov stressed that the Bank did not have the underlying documents actually evidencing the entitlement to the mortgage payments and that Belenfield was a shell company that was entirely unable to collect the debts itself and the settlement agreement placed that burden on the Bank. If the point was to be raised I consider that as the credits to be given against outstanding balances were within Expert Issue 1, the time to deal with any alleged credits was in Mr Davidson's reports but he did not address credits on the Belenfield transaction at all. There is no evidence before me that would justify the conclusion that there will be future credits to be credited against the sums claimed.

R.10 WAVE
R.10.1 Common Ground

1752. Wave was a pure "balance sheet management" company that was not associated with any underlying business and owned no real property. A loan of RUB 1.881 billion was drawn down pursuant to a facility dated 11 August 2011. It was approved by the CC, attended by Mr Belyaev. There was no collateral.

1753. The term of the loan was extended on several occasions subsequently (eventually to December 2016) and the interest payment schedule was also varied. The amendments were approved by the CC, chaired on each occasion by Mr Yurov (with Mr Fetisov also recorded as having voted *in absentia* on the last occasion, but this is not admitted by Mr Fetisov).

R.10.2 Discussion

1754. Wave has already been addressed in relation to various matters throughout this judgment including Section C.3.1 (Mr Yurov's evidence), Section F.6 (addressing the fact that Wave is a company beneficially owned by the Shareholders), and Section R.5.1 (in relation to LLC5). As noted above it is common ground that Wave was a pure "balance sheet management" company that was not associated with any underlying business and owned no real property. Wave shares similar characteristics to other balance sheet management companies and I will not repeat my associated findings about "balance sheet management" and the Shareholders' knowledge of the same (save by way of response to Shareholders' specific denial of knowledge as is addressed in due course below).

1755. As I have already found, Wave was a Shareholder company beneficially owned by the Shareholders at all material times. The registered shareholder was Profel Services Ltd ("Profel"), a Corporate Service Provider (CSP). Profel held the shares on trust for Plata River Holdings Ltd ("Plata River"), a Nevis company nominally owned by Mr Webb (one of Mr Worsley's nominee UBOs). Mr Webb, in turn, held the shares in Plata River on trust for Serrinson/Gingerson (which were themselves both Shareholder companies). Mr Yurov accepts in his Closing Submissions that the "*documents appear to support*" the Bank's analysis. Mr Yurov was told in terms that Mr Webb owned Wave "*as a nominee*".

1756. There is a considerable volume of correspondence, showing that the Shareholders were well aware of their beneficial ownership of Wave and of them acting in a way only consistent with them being the beneficial owners of Wave. Thus, Mr Yurov and Mr Fetisov were in correspondence with Mr Worsley with regard to Wave in July 2015, when Mr Yurov proposed to "*sell Wave for symbolic 1 USD*". I have already noted in Section C.3.1 that the Shareholders were involved in arranging a sale of a subsidiary of Wave – Alliance Development – to the Guriev family in 2015, which they could only have done if Wave was owned and controlled by them (as was indeed the case). This further tells the lie to the suggestion that Wave and Alliance Development were Bank Companies. Wave and Alliance Development were also included in Appendix 2 to the draft agreement (amongst the other (admitted) Personal Companies – prepared by Mr Popkov after his meeting with the Shareholders in February 2015).

1757. It is also clear that KPMG, as auditors of the Bank, were misled about the identity of the beneficial owners of Wave. In this regard:-

(1) On 23 May 2012, Mr Iskandyrov emailed Mr Worsley and Ms Bronina, stating:-

> "we need to prepare letter signed by director to NBT (reference requirements from KPMG) about disclosure info about UBO of: Wave Otterway Dunvegan use?difference?blank for every company"

(2) On the same day, Mr Iskandyrov sent a further email to Mr Worsley:-

> "Lets think about UBO
> tommorow i need to present letter from directors of the company about UBO to [NBT] (for KPMG)
>
> KPMG ask bank disclosure info about UBO of the following company Wave Property Development and Management Limited - Morgan Webb
>
> Dunvegan Investment Corporation Limited - Browne
>
> Otterway Holding Corporation Limited – Murphy … [in a subsequent email in the chain]…
>
> I think that we can change UBO by current date - not back date.
> We never disclosed before info about UBO for NBT or KPMG."

1758. I am also satisfied that Mr Fetisov must have known that KPMG were being deceived. In this regard on 13 June 2012, Mr Iskandyrov informed Mr Worsley that he was due to have a meeting that day with Mr Fetisov "*about KPMG*". This must have included discussion as to what KPMG were going to be told about the beneficial ownership of the various borrowers, and which nominee UBOs were going to be matched with which companies, so that it was possible to pretend that borrowers were owned by different people (so as to facilitate the evasion of CBR requirements concerning related party and concentrated lending). The overwhelming likelihood, I am satisfied, is that the Shareholders would also have known that KPMG were being deceived (given their own knowledge of the companies' beneficial ownership and why it was important that auditors and the CBR should not become aware of the true position).

1759. Turning to the loan in respect of which the Bank claims, RUB Loan 30/k/0331 on 11 August 2011. In its original terms it was a RUB 2 billion (RUB 1.881 billion drawn down) at the low interest rate of only 6% per annum, initially for only two months, until 10 October 2011, with interest payable at the end of the term. Wave was obliged to use the funds "*for the purpose of replenishment of its operating capital*". As is common ground there was no collateral. It was approved at a CC meeting on 9 August 2011, which was attended by Mr Belyaev (chaired by Ms Cherkasova) and, once again, there was no disclosure of the Shareholders' interests in Wave as there should have been. Whilst Mr Belyaev admits attending this meeting, he portrays matters as if there was a genuine commercial decision being made, when the reality was (as Mr Yurov accepts) that such approvals were "*largely a formality*" (said by reference to "Bank Companies" but clearly apposite in the context of what were actually Shareholder companies). The terms of the Wave loan were undoubtably favourable, and indeed Ms Podstrekha's evidence was that in the light of the favourable terms of the Wave loan (including the absence of any collateral or a loan feasibility study), she could not imagine that Wave was a "*real,*

genuinely independent company". She was right – it was not – it was a creature of the Shareholders.

1760. The term of the loan was repeatedly extended for no good reason, and without any legitimate justification, first until 15 December 2011, then until 14 December 2012, then until 13 December 2013, and finally 13 December 2016 (and the interest payment schedule was itself varied, also without justification). The amendments were approved at a series of CC meetings on 6 October 2011, 7 December 2011, 5 December 2012 and 10 December 2013, all of which were chaired by Mr Yurov and the last one attended by amongst others Mr Fetisov. As was par for the course, there was no disclosure at any of these meetings of the Shareholders' interests in Wave. There does not appear to have been any credit or risk report or any other due diligence (for his part Mr Yurov had no recollection of the same). Mr Belyaev suggested that the loan was not "*extended*" as this would lead to a higher level of credit risk provision on the Bank's balance sheet (which did not occur). However, the loan clearly was extended repeatedly so if this should have led to a higher level of credit risk provision it was a failing not to recommend extension only against such a provision (or to reject the application for an extension due to the associated consequences for the Bank).

1761. Certainly this appears to be something that was in the mind of the Shareholders because at a meeting of the Supervisory Board, on 21 October 2011, all of the Shareholders voted in favour of the following resolution (emphasis original):

> **"Second item.**
> Classification of the loan debt of Wave Property Development and Management Ltd.
> …
> In connection with the Bank Credit Committee's decision (extract from Polling Report No.26/2011 dated 06.10.2011), as of the date on which the time for repayment of the Wave Property Development and Management Ltd. debt under Contract No. 30/K/0331 dated 11.08.2011, not to consider this factor as degrading the quality of debt servicing and deem the quality of the debt under the contract good pursuant to section 3.10 of Bank of Russia Regulation No. 254-P "On the Procedure by Which Lending Institutions Form Reserves for Possible Losses on Loans and on Loan and Equivalent Debt"

1762. Of course even if this was the correct decision (i.e. not to degrade the debt) which is questionable given that extensions of loan periods are often symptomatic of an inability to repay the principal and characteristic of "putting off the evil day", such a decision can only have been reached if the Shareholders knew about Wave and what it was being used for (i.e. "balance sheet management"), and I am satisfied they were.

1763. It was indeed clear to the Shareholders that Wave was being used for "balance sheet management" and was also receiving funds from companies within the offshore network to service its interest. Thus on 2 December 2012, Mr Fetisov received an email from Mr Postnov, with the subject: "*Payment of interest by borrowers*" which provided, amongst other matters:-

> "Added below is a clause pertaining to Wave Property.
>
> In furtherance of the discussion, I propose arranging payment of interest

1. Lump sum at the end of December (or earlier)
on recent loans on which the borrowers have paid only the commission:
1.1. Otterway – it will take about $320,000.
1.2. Priangarsk LPK - 3 million roubles
1.3. Ukraine Estate - $50,000

2. Also a lump sum at the end of December – on "small" loans currently being issued to buy FLBs - Wave Property, SiberianKD, LB Collection – 1.5 million roubles for the three.

…

3. Extent the balance of Wave Property debt on 15/12 with payment of interest on the extension date and on terms of subsequent monthly payment. Alternative – "hand over" this loan, given that it is being repaid at when the audit us over. In this case, the "small" line now being issued might be hit with a limit of 300 million roubles"

(emphasis added)

1764. In such circumstances there can be no doubt that Mr Fetisov knew (as did the other Shareholders) that Wave was being used to borrow money from the Bank for "balance sheet management" purposes, and that Wave's (as well as SiberianKD's) loans were serviced through the offshore network (as part of "balance sheet management") not least in circumstances where (as is common ground) they were not carrying on any commercial activities and had no resources of their own. The same is equally clear from Mr Iskandyrov's email to Mr Fetisov on 22 May 2012 which provided, amongst other matters, "*Erinskay/Baymore financing to pay off SNPM/Wave*".

1765. Turning to the use to which the funds were put. Mr Davidson's tracing analysis shows that on the same day that the loan was drawn down, Wave purportedly entered into two assignment agreements for the rights to four other loans, paying RUB 1.88 billion in respect of the same:

(1) Agreement DK/Wave/013 with Doverie Capital Management LLC ("Doverie"), assigning the rights for consideration of RUB190 million to loan DK-Zos/001 with Zosimal dated 27 January 2011.
(2) Agreement KR/Wave/014 with Aurum Investment Management Company LLC ("Aurum"), assigning the rights to three loans for consideration of RUB 1.69 billion:
    - ZPIF/K/001 dated 25 September 2009 for RUB 1.28 billion, with Interregional Factoring Company Trust;
    - Tib/Zos-1/09 dated 16 November 2009 for RUB 160 million, with Zosimal; and
    - Tib/Mou-4/09 dated 16 November 2009 for RUB 250 million, with Mourija.

1766. It appears that Doverie was the trustee of CUIF Doverie Capital Creditny ("Doverie CC") which was itself a CUIF declared as a Bank subsidiary in its IFRS accounts, whilst it appears that Aurum was the trustee of CUIF Credit Resources, another CUIF declared as a Bank subsidiary in its IFRS accounts. Mr Yurov therefore submits that the funds from

the Wave Loan returned to subsidiaries of the Bank on the very same day and as such was a paradigm example of a "balance sheet management" scheme. It is then submitted that no loss was caused to the Bank as it is characterised by the Shareholders as merely (in economic terms) a transfer from a parent company to two of its subsidiaries. However this entirely misses the point. First, the effect of the loan was that Wave was indebted to the Bank in the amount of the loan, and remained so indebted, in the amount of the loan. That loan has never been paid back to the Bank – as such the Bank has suffered a loss in that amount. What Wave did with the monies under separate transactions is collateral. Secondly, and in any event, the payment to an entity other than the Bank (even if a subsidiary of the Bank) is not payment to the Bank and does not stand to be accounted for as such. Companies have separate legal identities.

1767. In Mr Yurov's Closing Submissions, and by reference to the 2012 CBR report, it is suggested that Aurum and Doverie paid the funds back to the Bank itself on the basis that:

(1) Aurum transferred RUB 1.026 billion of the loan funds to Doverie and RUB 664 million of the funds to Oldehove between 11 and 31 August 2011.

(2) Doverie transferred RUB 1.847 billion of the loan funds back to the Bank on 23 August 2011.

(3) Oldehove received RUB 2 billion from Aurum and other sources and transferred RUB 1.999 billion to the Bank on 31 August 2011, which was used to settle the obligations of CRR BV (the vehicle used by the Bank to issue CLNs).

1768. The alleged transfer back to the Bank was not considered by Mr Davidson in his Issue 3 report, nor did he make any suggestion that these funds were returned to the Bank or that the Bank benefitted from them in any way (see 3-Davidson 3.114-3.116). In any event, any funds that were received by the Bank were clearly received pursuant to separate independent transactions that are collateral and do not stand to be taken into account when quantifying the Bank's loss. Indeed this is illustrated by the 2012 CBR Report itself which shows that the transfer to the Bank constituted a *"Payment of Compensation to the Investment Unit Holder upon Termination of Close-End Unit Investment Credit Trust 'Doverie Kapital Kreditnyi"* – a classic example of a collateral matter. Accordingly to the extent that any funds were received by the Bank they were received pursuant to separate agreements, and no credit stands to be given against the loss suffered by the Bank on the Wave loan.

1769. The evidence also shows that there was a whole series of assignments as part of a recycling scheme, with the rights to the loans being "assigned" to another Shareholder company, Fernwood Trading Ltd, on 16 September 2011 (although Mr Davidson has been unable to identify any payment in exchange) with the loans being "re-assigned" to Wave on 21 December 2012. On the same day, Wave "re-re-assigned" the loans to two other Shareholder companies, Brean Trading Ltd and Sherbury Investments Ltd.

1770. This was all part of an elaborate (and inappropriate) "balance sheet management" scheme. It is clear, however, that there was an intention to create the impression that Wave was a genuine trading company making actual profits. To achieve this, back-dated fake agreements were created to give the impression of Wave making profits. For example, on

24 July **2013**, Mr Iskandyrov proposed for a set of assignment agreements to be signed dated 21 December **2012**, with that very purpose.

> "In order to upturn the Wave's balance we need to execute several backdated agreements by Wave. Please confirm the below explanation to Profel. During preparation of the accounts for 2012 we have conducted an analysis of the assets and liabilities on the balance of the company. As a result under NBT request we have decided to restructure the assets and liabilities to strengthen the financial stability and…performance of the company's activities. In order to do that we have conducted the negotiations with such counterparties as Fernwood and Brean, as well as buyers of certain company's assets were found (Sherbury). As a result of the negotiations the parties have agreed to date all of the operations of December 2012.
> We kindly ask you to execute the attached agreements for the reasons abovementioned." (emphasis added)

1771. Mr Worsley was keen to give the appearance that Wave was a real business, in the explanation that was to be given to Profel:

> "Why does it say 'Under NBT Request'.....??????
> This needs to talk about Wave, not NBT.
> Your email makes it sound as though NBT runs Wave"

1772. When Profel were asked to execute the agreements, they required an explanation for the backdating of documents and it was duly provided in the terms quoted above with the words "*As a result under NBT request*" deleted – thereby creating the (untrue) impression that Wave was a trading company conducting "*negotiations*" with its (supposedly independent) counterparties rather than as a vehicle to move money around the offshore network.

1773. It is also clear that Wave was used for particular purposes as well, specifically to hold Alliance Management, the company involved in the administration of tenancies on the Billa portfolio owned by the Shareholders through WR/RCP, and as a conduit for funds from the Bank into Taransay which, as already addressed, was the Shareholders' personal bond-trading vehicle (though it is not suggested by the Bank that the Wave loan was used for this purpose, albeit another loan from the Bank to Wave was). The relevant correspondence is identified in Schedule L of Volume 2 of the Bank's Closing Submissions. However, in circumstances where such other uses of Wave are not on the critical path of any claim by the Bank I will say no more about the use of Wave in relation to such matters in this Section.

R.10.3 The Bank's Loss

1774. Wave, being a shell company with no actual business, was, like the other "balance sheet management" companies, dependent on funds from other offshore companies to service interest, other payments, and the repayment of principal. This was well-known to the Shareholders. For example, in an email of 22 May 2012 Mr Fetisov approved a set of transactions involving Erinskay and Baymore for the purpose of repaying loans made to

Wave and SNPM, whilst Mr Grechishnikov (the friend of Mr Yurov) was responsible for implementing schemes for making interest payments on behalf of Wave.

1775. Mr Davidson said in his first report that Wave was *"balance sheet positive as at 30 September 2014"* but this can only have been an illusion, given that Wave's largest debtor, Sherbury, was a BVI company owned by the Shareholders whose "debt" arose as a result of the scheme, identified above, to manipulate Wave's accounts through backdated agreements, and Sherbury itself was yet another balance sheet vehicle that did not have a genuine business and lacked any premises or employees. As at 31 December 2014 its Piraeus bank account showed a balance of c. US$1,000 as at 31 December 2014. Mr Allen's evidence is that after excluding the sham transactions, Wave's accounts show that it was balance-sheet insolvent between 2012 and 2014 (3-Allen 8.25).

1776. The loan went into default in December 2014. A demand for repayment was made in February 2015, but no response was received. Wave held around RUB 6 million in cash at the Bank (for which the Bank has given credit) and a judgment was obtained by the Bank in the Russian courts, but this did not yield any further recoveries.

1777. The accountancy experts have agreed that the outstanding principal on the Wave loan is RUB 326,877,296, which I am satisfied represents the Bank's loss. I have already addressed why the Shareholders' submissions about funds which are said to return to the Bank's subsidiaries or the Bank itself are not in point. Sections N.2.2 to N.2.9 are repeated.

R.11 EDENBURY

R.11.1 Common Ground

1778. On 16 December 2013, Edenbury Investments and a BVI company called Barnuz Limited (a corporate vehicle controlled by Aton Capital) entered into a Securities Lending Agreement providing for (i) Barnuz to lend to Edenbury Investments bonds with an approximate value of US$91 million and (ii) those bonds or equivalent securities to be returned to Barnuz by 5 March 2014.

1779. Edenbury Trading was incorporated on 4 March 2014 and its original shareholder was Edenbury Investments. On 27 March 2014, TIBH became the registered owner of Edenbury Trading. By an agreement dated 7 March 2014, Edenbury Trading was appointed to provide custodial services to the Bank.

1780. On 11 March 2014 the CC chaired by Mr Yurov (with Mr Fetisov recorded as also voting in favour *in absentia*, but this is not admitted by Mr Fetisov) approved (with four of five members voting) the appointment of Edenbury Trading to provide depository and brokerage services to the Bank.

1781. On 12 March 2014, Edenbury Trading received the securities described in document D4/321.2/2 into a custody account of which the Bank was the named client. However, it is in issue how such securities came to be deposited with Edenbury Trading and their connection, if any, with the securities which the Bank had previously deposited with ATON.

1782. None of the bonds deposited with Edenbury Trading have been returned to the Bank. The market value of the bonds with Edenbury Trading was US$89,438,625 as at 31 December 2015 (although the Shareholders dispute the relevance of this date).

R.11.2 Discussion

1783. The Bank's claim, on the facts that are common ground, is a straightforward one. In March 2014, the Bank transferred a substantial quantity of Russian government bonds to a company called Edenbury Trading Limited (Edenbury Trading) which was, pursuant to an agreement dated 7 March 2014, to act as "custodian" of those bonds in behalf of the Bank. The CC, in a meeting on 11 March 2014, chaired by Mr Yurov but also attended by Mr Fetisov, approved the appointment of Edenbury Trading to provide *"depository and brokerage services"* to the Bank.

1784. Edenbury Trading was in fact beneficially owned by the Shareholders personally (confirmed by inter alia signed declarations provided by the Shareholders at the time) and, although it was a shell company incorporated in Bermuda, in order to deceive the CBR, fictitious documentation was created to suggest that it was a genuine bona fide business and had premises and employees.

1785. Statements for the Bank's "custody account" with Edenbury Trading showed that it was holding bonds of substantial value on behalf of the Bank. That was however a fiction as the bonds had been transferred away as part of an elaborate "balance sheet management" scheme. Thus, when, following the Bank's collapse, the Bank wrote to

Edenbury Trading requesting the return of the bonds, there was no response and the bonds have not been returned. Mr Yurov himself accepted that he had *"not any idea"* where the bonds have gone. The Bank therefore claims compensation the market value of the bonds as at 31 December 2015, namely US$89 million. I am satisfied that this represents the Bank's loss.

1786. It will be recalled that Mr Davidson did not address this transaction at all in his Issue 3 "tracing report" and accordingly it must have been a conscious decision on the part of the Shareholders not to serve any evidence in relation to whether any of the funds advanced pursuant to this transaction were *"returned to or used for the benefit of the Bank"* (Accountancy Issue 3 being *"how the funds paid by Trust Bank to the Borrowers identified in Schedules A to Q of the APOC in respect of the pleaded transactions were used, including (in particular) the extent to which those funds were (directly or indirectly) returned to or used for the benefit of the Bank"*).

1787. However, in closing Mr Yurov sought to advance just such a case, as already addressed in Section N.2.6.1, and as such Mr Yurov's case in respect of Edenbury falls within Category (2), an unpleaded point that should have been (but was not) considered as part of Expert Issue 3. I have already addressed in Section N.2.6.1 why, if the Shareholders had wished to advance the various matters now advanced, they should have been properly pleaded and then expressly addressed by both the experts in relation to Issue 3. It is inherently unsatisfactory for Mr Yurov to seek to pick and choose bits of evidence that it happens was given, when the matters were not fully or properly explored by the experts – which is unsurprising given that the points now sought to be raised were not properly pleaded out. I consider the Bank was right to categorise Edenbury as a particularly egregious example in this regard and for the reasons it gives.

1788. The reason why Edenbury is a particularly egregious example is because the experts never explored whether monies lent to Edenbury flowed through various companies including Maxfield and then passing those monies to Eligmur and from Eligmur to Maxfield again and then to Edenbury and from Edenbury back to Maxfield and then from Maxfield to Granbay and Granbay to Senworth and Senworth to Barnsten and so on – none of the experts attempted to show or establish what was actually happening through the documents and the bank statements and the underlying agreements that are described as netting agreements and loans and contributions to share capital. Yet this point is said to carry a US$90 million credit. As I have already concluded in Section N.2.6.1 if a litigant was allowed to pursue such points in closing that had not been properly foreshadowed on the pleadings or expressly addressed by both experts this would be trial by ambush of the worst sort. I do not consider that such matters are properly pleaded and as such they cannot properly be pursued in closing.

1789. However ultimately the point is academic as I am simply not in a position to reach the conclusions that Mr Yurov invites me to make, as I do not have sufficient evidence safely to reach such conclusions. That being the case the Shareholders have failed to prove such matters. In any event the general points already identified in Section N.2 (such as in relation to consideration being given for every contract in the alleged chain) would still apply. The long and the short of it is that Edenbury Trading has not returned the bonds to the Bank, and accordingly the Bank has suffered loss in the amount claimed.

1790. In his skeleton argument for trial, Mr Fetisov also advanced, for the first time, a new and unpleaded argument that the Bank had supposedly suffered no loss as a result of the disappearance of the bonds because, it was claimed, they would have been forfeited in any event under a prior transaction. As this argument was never pleaded there has never been any disclosure in respect of it nor any factual or expert evidence. I am satisfied that it is not open to Mr Fetisov to advance such a case. For what it is worth, and even based on what information is available, the point would also appear to be wrong in any event.

1791. In relation to the ownership of Edenbury, Edenbury Trading is a Bermuda company, incorporated on 4 March 2014. At the time of its incorporation, Edenbury Trading was 100% owned by a Seychellois company called Edenbury Investments Limited (Edenbury Investments). Edenbury Investments was a company in the offshore network with a nominee UBO purporting to be its owner (in this case a Mr Turk), but in reality, I am satisfied, another company beneficially owned by the Shareholders themselves. On 27 March 2014, a new shares certificate for Edenbury Trading was issued showing that the new shareholder was TIBH (the Cypriot holding company that was part of the structure through which the Shareholders held their interest in the Bank itself).

1792. Mr Worsley emailed the Shareholders and their personal assistants stating that "*TIB Holdings is buying a company called Edenbury Trading*" and that *"[t]he guys need to sign these forms please".* Each of the Shareholders signed a "declaration", requested by Conyers Dill, Bermuda for KYC purposes, on the basis that they were the beneficial owners of Edenbury Trading. It is therefore clear – beyond peradventure – that Edenbury Trading was a Shareholder company owned through their company TIBH.

1793. In relation to the Edenbury transaction itself, on 21 January 2014, Mr Worsley wrote to various staff at Columba stating: *"Colleagues, ASAP, we need to agree a scheme to re-pay the Aton deal. It's due at the beginning of March. It's a lot: Approx USD90M…."*. The reference to the *"Aton deal*" is a reference to the *"Securities Lending Agreement #1-BR"* dated 16 December 2013 between Edenbury Investments and a BVI company called Barnuz Limited. Barnuz was the BVI vehicle used by Aton Capital (a large Russian investment company) for the purposes of the transaction.

1794. The Securities Lending Agreement provided for Edenbury Investments to borrow a large quantity of Russian Eurobonds from Barnuz (with a total value of c. US$91 million) and for those bonds (or "*equivalent securities*") to be returned to Barnuz by 5 March 2014 (hence Mr Worsley's reference to repayment being due in early March 2014). It appears that the Edenbury Transaction was the scheme by which Edenbury Investments would repay Aton/Barnuz – in short bonds owned by the Bank were used to repay Aton the US$91 million but in such a way whereby it was possible to present to the CBR that the Bank still owned the bonds (and accordingly there is some similarity to the Black Coast transaction as it could be presented to the CBR that the Bank still owned those bonds). It is important to note that the evidence is that the debt to Barnuz was a real debt to an independent third party that had to be paid by transferring real value.

1795. The circumstances in which it could be portrayed that Edenbury Trading was retaining the bonds was complicated. First there was a "Custodian Agreement" between the Bank and Edenbury Trading dated 7 March 2014 by which Edenbury Trading was appointed to provide "custodial services" to the Bank including in relation to securities. The essence of this agreement was that Edenbury Trading would act as "custodian" of property owned

by the Bank (including securities) and would be responsible for its safekeeping and delivery up of that property on request. Then there was a "Custody Account Statement" initially produced by Edenbury Trading on 12 March 2014 which showed the bonds in Edenbury Trading's custody account. The Bank's official records thereafter showed that the bonds continued to be held in this custody account. False documentation was then prepared purporting to show that Edenbury Trading was a genuine business providing depository services. There is also a further agreement dated 12 March 2014 by which Edenbury Trading was to loan the bonds to Edenbury Investments for one year – the bonds being used to pay off Edenbury Investment's debt to Barnuz. As Edenbury Investments was itself a Shareholder-owned company it can properly be said that the settlement of that debt was a benefit to the Shareholders.

1796. As with other offshore companies false documentation was used to create the impression that Edenbury Trading had a genuine business. In this regard on 14 March 2014, Mr Iskandyrov circulated an email in Columba suggesting the creation of a website for Edenbury Trading, a separate email system, a rented office, staff with regular wage payments and a separate telephone number. Mr Iskandyrov noted that *"any info provided by the company can be checked by the CBRF"*. On 9 April 2014, Mr Worsley emailed Ms Petrova, apparently forwarding an email from "Dmitry" (Mr Postnov) referring to CBR questions about Aton and the necessity of being ready to provide *"comprehensive disclosure regarding Edenbury – its business, shareholders etc"*. This involved presenting Edenbury as *"a reliable depository company with proper operation capacity. Staff, adequate wages, internet site, rented office and so on".* On 12 May 2014, Mr Worsley emailed Mr Nicolaou at Iona stating: *"My feeling is that we simply need to cut through red tape, and to provide an address, and work contracts, etc etc etc etc for Edenbury, by the end of tomorrow. The CBRF will not likely check financial flows of salaries. I guess we can set up something that is immediate, and looks good".*

1797. On 20 May 2014, Mr Postnov (using the email account that Mr Worsley had arranged for him) wrote to Mr Worsley stating: *"We have received the CBR's request regarding Edenbury"* but that the situation was *"complicated"* because the CBR wanted more information about the *"upper level depository"* or *"ULD*", that is the "*depository where Edenbury has depo account and holds securities itself*". This led Mr Postnov to propose *"two basic options",* the first being to *"get a russian agency's rating for a ULD with some plausible story about its business model, investment strategy, assets etc."* or to *"emulate"* (i.e., falsify) *"some affiliation of ULD with a recognizable global banking group"* such as Credit Suisse. Mr Worsley responded that the second *"looks 'sexier', but like all sexy girls, it is far more dangerous"* and would require *"Shareholder sign off (due to the level of risks involved)"* since it might involve forging purported letters from Credit Suisse or Bank of America (although the scheme would be *"blown"* or *"exposed"* if the CBR asked for further verification). In further emails later in May 2014, it appears to have been ultimately agreed that false documentation would be prepared to window-dress the controlling shareholder of the depository.

1798. Exactly what became of the bonds cannot be established on the material before me (even if Mr Yurov had a properly pleaded case, which he does not, as addressed above). The short answer, however, is that whatever became of the bonds, Edenbury Trading no longer has them and so cannot deliver them up to the Bank. There is some material available as to how the bonds were transferred away, specifically a PowerPoint presentation sent by Ms Petrova to Mr Worsley on 27 February 2014; and an excel

spreadsheet emailed to Mr Yurov and Mr Fetisov by Mr Worsley on 28 July 2015. The Shareholders' attempted "tracing exercise" in relation to Edenbury showed the bonds and their sales proceeds ultimately disappearing into a series of question marks (where the trail goes cold at a stage of companies that appear to be associated with Aton, which is consistent with the Bank's case that the purpose of the transaction was to discharge Edenbury Investments' liability to Aton/Barnuz). More recently Mr Yurov has sought to follow the proceeds through a further series of entities as already noted, but I do not have expert evidence to assist me, and I am simply not in a position to make findings in relation to what is, in any event, an unpleaded point. Of course even had the exercise been demonstrable, any ultimate return to the Bank would be collateral, being based on a series of independent transactions, and so of no assistance to the Shareholders in any event.

1799. Whilst the Shareholders have denied knowledge of the activities of Edenbury Trading and the Edenbury Transaction, the pleadings and witness statements of Mr Yurov and Mr Fetisov overlook, and fail to address, the CC meeting on 11 March 2014 in which they personally voted to approve the appointment of Edenbury Trading as a provider of *"depository and brokerage services"* to the Bank, which was an essential step in facilitating the transaction. An email on 18 May 2014 by which Mr Pospelov told Messrs Yurov and Fetisov that the CBR had become *"seriously interested in the securities that are listed in our depository Edenbury",* that a meeting was *"currently under way"* and there was talk of *"creating additional reserves (up to 50%)*" but that the *"battle"* with the CBR would continue, did not provoke any response that suggested that they were unaware of what was going on. Edenbury was also one of the companies considered in the Shareholders' own tracing exercise, which took place in May/June 2015 and again there is no suggestion that this was all news to them. In the light of their attendance at the CC meeting, the sheer size of the transaction, the involvement of an entity beneficially owned by them, and their later lack of any expressed unfamiliarity with the Edenbury Transaction, I am satisfied that they must have known about, and approved, the Edenbury Transaction.

1800. As already foreshadowed above, in his skeleton argument, Mr Fetisov put forward a new and unpleaded argument that the bonds transferred to Edenbury would have in any event been forfeited by the Bank under the prior deal with Aton. The proper place for any such plea would have been in the schedule to Mr Fetisov's defence dealing with the Edenbury Transaction, but no such case is pleaded. In consequence there has not been disclosure or factual or expert evidence, and it is too late to advance such a plea at this stage.

1801. However, even if the point could have been pursued the point would appear to be wrong for the reasons given by the Bank at paragraphs 20 to 22 of the Bank's Closing Submissions. However given that the point was not pleaded, and given that there has been no proper investigation concerning the relationship between the Aton transactions and the Edenbury Transaction it would be inappropriate to investigate the matter further. The short point is that the Bank transferred real bonds to Edenbury Trading in March 2014 and those bonds have now disappeared, with the result that the Bank is entitled to be compensated in the value of the market value of the bonds at 31December 2015 i.e. US$89 million (see 1-Allen App 1.1).

R.12 OLDEHOVE AND CRYLANI

R.12.1.Common Ground

1802. These companies came to hold (directly or indirectly) the following real estate assets (or rights in relation thereto): (1) Oldehove: Pokrovka and Degunino (aka Otradnoye), (2) Crylani: Veshnyaki and Perevedenovsky.

1803. As to Oldehove, it received a loan of RUB 3.19 billion on 22 December 2008 (increased to RUB 4.225 billion on 18 March 2009). Although the funds were advanced by CRR BV, it was the Bank that effectively made the loan through the purchase of LPNs. Subsequently, on 17 August 2011, the CC (chaired by Mr Yurov) passed resolutions to fix a limit of RUB 3.35 billion in respect of Oldehove LPNs. The principal amount was later reduced (and the interest schedule varied, deferring a substantial proportion of accruing interest until the repayment date) and the repayment date was extended by five years to December 2018.

1804. On 18 June 2015, the rights and obligations of CRR BV were novated to the Bank. As of that date, all of the principal was outstanding, as well as RUB 884 million of accrued but unpaid interest. The loan proceeds were transferred to TIBI and Tactio (actually or purportedly) as loans, consideration for the debt and equity of Eurogroup, and consideration for TIBI's rights under a co-investment agreement relating to Pokrovka. At least RUB 2.3 billion of the proceeds were ultimately used to repay loans previously made by the Bank to TIBI through EWUB/Donau.

1805. After the Bank entered into rehabilitation, Oldehove defaulted in 2015 and enforcement proceedings were commenced in the Russian courts. The Bank concluded a settlement agreement with Eurogroup, dated 31 May 2016, valuing Eurogroup's rights under the Degunino investment contract at c. RUB 331 million (although this valuation is not accepted by the Defendants). The Bank holds unrealised collateral, valued by a third party at c. RUB 699 million (although this valuation is not accepted by the Defendants).

1806. As for Crylani, it received a loan of RUB 4.88 billion on 12 December 2008 (increased to RUB 6.45 billion on 18 March 2009). Although the funds were advanced by CRR BV, it was the Bank that effectively made the loan through the purchase of LPNs. On 30 July 2010, the principal was reduced by c. RUB 3.2 billion. The interest rate was reduced by an amendment to the terms of the loan made on 12 October 2010.

1807. On 28 November 2013, the CC (chaired by Mr Yurov) extended the maturity of the Crylani LPNs until December 2018 and fixed the risk limit on the Bank's exposure to the bonds at RUB 3.35 billion. The repayment date under the Crylani loan was accordingly extended by five years. On 23 October 2015, the rights and obligations of CRR BV were novated to the Bank. As of that date, the total amount due under the loan was RUB 3.4 billion. The loan proceeds were transferred to TIBI (actually or purportedly) as loans and/or consideration for shares in Royston and Morledge and an assignment of 'loans' previously made to those companies. At least RUB 4.9 billion of the proceeds were ultimately used to repay loans previously made by the Bank to TIBI through EWUB/Donau.

1808. Crylani defaulted in 2015 and enforcement proceedings were commenced in the Russian courts. Recoveries were made pursuant to the mortgages over Perevedenovsky

and Veshnyaki. The properties were valued by a third party at a total of c. RUB 1.7 billion (although this valuation is not accepted by the Defendants).

R.12.2 Discussion

1809. Some aspects of what underlies the Oldehove and Crylani loans is acknowledged by Mr Yurov. Mr Yurov acknowledges that there was substantial fiduciary lending through EWUB and VTB known as Donau, that the Bank was required to reduce the latter by November 2008 and that it was decided to structure asset-backed securities (in the form of LPNs) and to use the funds to reduce the lending. Mr Yurov characterises Oldehove and Crylani as SPVs used as "wrappers" for the issue of the LPNs with them receiving lending from the Bank via TIBI and using the loan funds to purchase the shares in the companies which owned the properties from TIBI. The LPNs were issued backed by pledges over the properties and the shares in the property holding companies. The LPNs were issued to TIBI, TIBI sold them to the Bank for the face value of the loans and used the funds to pay EWUB to repay the interbank lending issued by the Bank so it is said the funds returned to the Bank and that the overall effect was to repackage one form of lending (interbank/fiduciary lending) with another (LPNs secured against property interests). It is said that this did not change the Bank's net financial position and that the Bank has not suffered a loss. It is also said that the Shareholders were not involved in the making of the Loans or Transactions, and that the totality of their involvement was that Mr Yurov chaired two CC meetings which discussed Oldehove and Crylani 3 and 5 years after the event, and that these meetings did not cause any loss and if any loss was suffered it would have been caused by the original transaction, with the Bank having failed to prove any causal link between the Defendants and the loss claimed.

1810. There are, however, fundamental difficulties with the Shareholders' stance in a number of respects including as to events, the Shareholders' involvement (and interests) and the losses suffered by the Bank. First it is clear that the Shareholders knew of, approved, and were responsible for all that occurred (and that they acted in breach of duty in that regard). Secondly the Shareholders' stance ignores (and denies) the fact that TIBI, Oldehove and Crylani were all beneficially owned by the Shareholders, and most fundamentally of all, in the context of loss, it ignores the fact that the loans to the Shareholder companies Oldehove and Crylani have not been repaid and there is some RUB 4,156,460,408 (US$72,941,089 at 30 April 2017) outstanding in relation to Oldehove, and some RUB 3,442,108,340 (US$60,405,033 as at 30 April 2017) outstanding in relation to Crylani. In the circumstances set out below I am satisfied that such sums do represent the Bank's losses and that such losses were caused by the Shareholders' breaches of duty.

1811. The reality is that Oldehove and Crylani were Cypriot companies beneficially owned by the Shareholders and deployed in inappropriate "balance sheet management". Whilst they used finance from the Bank to purchase holdings in real estate assets, namely Pokrovka and Degunino (Oldehove) and Veshnyaki and Perevedenovsky (Crylani), they were not operating companies and the proceeds of the loans from the Bank were not invested in the underlying projects. Rather, most of the proceeds were routed to the Shareholders' other companies – principally, TIBI and used for their personal benefit in the refinancing of TIBI's debts to Donau and EWB that had been accumulated for a variety of reasons (all involving the Shareholders) including funding personal loans to the Shareholders, the acquisition by TIBI of the properties themselves together with their

refurbishment and other "*bad assets*" that ended up on TIBI's balance sheet. Shareholders' interests in the transactions were never disclosed.

1812. As for TIBI itself, the evidence shows that all the Shareholders were aware of its activities and that they beneficially owned it. They also were specifically asked to authorise the Oldehove and Crylani loans in December 2008, and clearly did so. They knew that TIBI (their company) was used to hold (in Mr Fetisov's own words) "*hidden assets and financings*" which is a reference to the loans made by the Bank through Donau and EWB, which were then used by TIBI for onward lending to the Shareholders personally and to acquire and refurbish the Degunino, Veshyaki and Perevedenovsky developments. TIBI's balance sheet included some RUB 3.4 billion of what Mr Drozdov called (in correspondence with amongst others the Shareholders) "*bad assets*". As explained in spreadsheets these, and other, loans could not be taken onto the Bank's balance sheet: the reasons included violation of the CBR's requirements and the extensive provisioning that would have been required. By the second half of 2008, it had become clear that the inter-bank facilities at Donau and EWUB had to be paid down or reduced, and that TIBI required a large amount of cash to do so. Consequently, a plan was conceived to inject about RUB 7.8 billion of the Bank's funds into TIBI, with the explicit objective being to "*close and hang on the bank all the costs on the purchase of the houses (RUB 4.3 billion) and bad assets (RUB 3.4 billion). TIB Inv will close Donau for a corresponding amount*". This necessitated Mr Drozdov and others at the Bank seeking valuations of the properties that would justify the size of such lending (rather than obtaining a true value of the assets).

1813. Contrary to the impression sought to be conveyed by the Shareholders, Mr Yurov and Mr Fetisov were specifically asked to authorise the Oldehove and Crylani loans in December 2008. In the context of the size of these loans (over US$250 million) and the Shareholders' knowledge of the involvement of their company TIBI (as well as Mr Belyaev's knowledge of, and involvement in, previous discussions concerning TIBI's balance sheet) I am satisfied that the Shareholders must have discussed matters with Mr Belyaev, and agreed to the transactions. As addressed in due course below, the loans were duly made in December 2008 with the proceeds being received by TIBI for the purpose of discharging its liabilities to Donau and EWB, with the funds of a further loan in March 2009 also being received by TIBI.

1814. The impression that the Shareholders continue to seek to portray (that this was all Bank lending to companies associated with the Bank rather than to companies beneficially owned by the Shareholders) did not even fool Ernst & Young. Soon after these events, Ernst & Young in their report dated 28 September 2009 reached the following conclusions:

(1) Under "Shareholders' Projects": "Financing of acquisition and maintenance of three buildings rented by the Bank for business operations. All the financed buildings are pledged in favor of the Bank".

(2) In the section on "Property in the Bank's ownership as of December 2009":

► Immovable property owned by the Bank:

Buildings of the regional network. 42 immovable property items in all regions of the Bank's business. The buildings were revaluated in 2008. Current market prices for similar property items are comparable with the book value of the Bank's buildings. Building in Kiev. Area of 5,070 sq. m The Bank rents the building out to OOO Trust Ukraine, a bank belonging to the Group of companies of shareholders of the Bank. The book value (revaluated cost) of the building – 510 million rubles.

► The Bank does not have its own property items in Moscow and rents 3 buildings for operating activities **from companies under control of the Bank's shareholders.** Acquisition and renovation of these buildings was financed through loans issued by the Bank. These facilities are rented by the Bank on a short-term basis (up to 1 year). Rental rates under these agreements immaterially differ from the market rates."

(emphasis added)

1815. Mr Yurov's contemporary response is telling. He did not deny that Oldehove and Crylani, and the properties they held, belonged to the Shareholders, albeit he was somewhat half-hearted about his admission:-

"Meanwhile, as far as other companies listed in Annex G concern, it should be noted that they are not affiliated with the Bank or its shareholders in terms of the Russian laws and their financial statements are not subject to consolidation into the Bank's statements in terms of the IFRS rules. However, **the opinion that the Bank's shareholders have operational control over the companies listed below is correct in general**, as the Bank arranges project financing through these companies.

1-1. 8. Crylani Trading Ltd - SPV (special purpose vehicle) is incorporated to invest
funds into real estate objects: Spartakovskaya, Perevedenosky, Veshnyaki.

1-1. 9. OLDEHOVE Holdings Ltd - SPV is incorporated to invest funds into real estate
objects: Kolpachny, Otradnoye, Pokrovka". (emphasis added)

1816. By the time of their evidence Mr Yurov and Mr Fetisov admitted that they knew about Oldehove and Crylani and the assets that came to be held by the companies though they continued to deny beneficial ownership. In contrast the stance taken by Mr Yurov in his Defence (supported by a statement of truth) was simply untrue when he denied knowledge even of the "*existence of Crylani*" (despite the contemporary correspondence demonstrating he had such knowledge). I have already addressed in Section C.3.1 the fact that Mr Yurov's evidence, was also wholly unsatisfactory when the central role of TIBI in the EWUB/Donnau scheme was explored with him, with him feigning a total lack of any recollection about TIBI, agreeing that his evidence was that he had a *"memory blank about that company"*, his evidence in that regard being, as I have already found, a lie as he knew perfectly well about TIBI and indeed had even referred to it in evidence when it suited him. Whilst Mr Belyaev did not address it in his evidence, he signed documents at the time confirming he was beneficial owner of Oldehove and Crylani, and the email

traffic from Mr Worsley to him shows that he was kept informed about developments relevant to the companies.

1817. The *modus operandi* of Oldehove was similar to other companies in the offshore network and provides illustrations of various matters which were clearly not in the best interest of the Bank including inappropriate "balance sheet management" with Oldehove's and Crylani's interest payments being financed through layers of offshore companies owned by the Shareholders utilising fuds loaned by the Bank. Another example is the manipulation (if not outright falsification) of Oldehove's accounts by falsely inflating "*property revaluation gain*" in order to "*improve profit from operations*" and "*make Q2 profitable*" (following which the relevant management report was sent "*to be signed by the director of the company*"). The evidence also suggests that *"Helpful"* valuers were used who were prepared to "*promise*" to insert a "*certain amount*" into valuation reports to enable audits to be finalised "*without qualification*". In such circumstances no reliance can be placed on the value of assets pledged or mortgaged by or for the benefit of Oldehove and Crylani. A similar pattern emerges with Crylani's accounts. Indeed such was the falsification of Crylani's accounts that it was described by Mr Worsley in an email to Mr Yurov as "*criminal action*" consisting in "*falsifying accounts of the Cypriot companies*", including amending the financial reporting figures "*manually, without any supporting paperwork*". In common with many other Shareholder companies they were audited by JIB who, it will be recalled, were described by Mr Worsley as "*dishonest*" (a viewpoint he shared with Mr Yurov).

1818. Turning then to the question of ownership itself. Oldehove and Crylani were incorporated on 4 November 2008 and 15 July 2006, respectively. I am satisfied that the Shareholders were at all material times the beneficial owners of those companies, although as with other companies owned by the Shareholders the ownership structure changed over time. By September 2008, Crylani was owned by Nikilin (another Shareholder company). The administration of both companies was moved from Totalserve to Vassiliades in September 2011. The letter of engagement and the accompanying indemnities were signed by the Shareholders personally, instructing Vassiliades and the nominee officers of the companies to "*act for ourselves and always upon our instructions and or authorization…*". Similarly, the letter terminating Totalserve's mandate was accompanied by transfer instructions signed by the Shareholders as "*the beneficial owner(s)*" of Oldehove and Crylani.

1819. As with other companies beneficially owned by the Shareholders individual Cypriot nominees were then inserted as the owners, and sole directors, of the companies, holding the shares on trust for the Shareholders personally, in the usual proportions (3:2:2). On 23 November 2011, the Shareholders signed application forms for opening bank accounts at Piraeus Bank. Par for the course, the nature of the business was falsely stated as "*investing in the emerging market securities and into property in Russia and the CIS"*, and the initial source of funds was identified as "*loans and clients fees*" (though Oldehove and Crylani had loans they most certainly did not have any "clients").

1820. In due course, and as addressed in Section F.2.6, Oldehove and Crylani were amongst the group of companies that had nominee UBOs, sourced by Mr Worsley, interposed in December 2012 to further conceal the Shareholders' beneficial ownership (and undertaken with the Shareholders' knowledge). Thus, as of 19 December 2012, and upon the express instructions of the Shareholders, Oldehove and Crylani were held by the BVI

vehicles of "nominee UBOs" provided by Mr Worsley, namely Cape Bay / Mr Morris (Oldehove) and Cedar Line / Mr Malko (Crylani). Those individuals in turn executed declarations of trust in favour of Brora (as a result of which the Shareholders remained the beneficial owners of the companies). This facilitated the pretence that they were not and, as already addressed at Section I.3, enabled them to lie to the CBR (including in the Bank's letter of 12 April 2012 in which the Bank disputed the "*assumption*" that Crylani and Oldehove and other "*clients*" of the Bank were "*related parties of its owners*" (when they clearly were)).

1821. In relation to the loans made to Oldehove and Crylani, it is convenient to address events chronologically. It is clear from the contemporary documentation that the Shareholders were each well aware of the purpose of the proposed loans, which was nothing other than to pay down the liabilities of their company, TIBI, to EWB and Donau.

1822. Thus on 6 August 2008, Mr Drozdov emailed all of the Shareholders (and others) stating:

> "Gist of the transactions.
> 1. Shareholders get a new loan from TIB Investments 2. Shareholders use the new loan to pay the old loan in favour of TIB Inv and make 6 payments to K. V. Mokhnachev, and I. S. Yurov pays %% in favour of TIB Holdings.
>
> All the details and calculations are in the attached excel file."

1823. It is clear, therefore (as was apparent to the Shareholders from the face of this document) that what was envisaged was for the Shareholders to receive the Bank's money, routed to them via their company TIBI, to discharge their pre-existing liabilities to TIBI and TIBH and buy out Mr Mokhnachev, a minority shareholder who had been part of the old management team. The spreadsheet attached to Mr Drozdov's email describes the purpose of the payments to be made to Mr Mokhnachev as being under a "*securities purchase-sale contract*". The use of Mr Drozdov in this regard is yet another example of the Shareholders using bank employees for their own personal purposes.

1824. On 2 September 2008, Mr Drozdov emailed all of the Shareholders, attaching a "*Non affiliates cos chart*" which showed, amongst other matters, that Crylani was then a wholly owned subsidiary of Nikilin (which was itself a Shareholder company), that Nikilin was also involved in "*[c]ross financing of OOO Filenta (building on Spartakovskaya) and Royston (Veshnyaki building)*", that Eurogroup, the vehicle for the Otradnoye/Degunino development, was owned by the Shareholders personally through Tactio, "*the company of the shareholders*" (as addressed in Section R.13 Tactio was also used by the Shareholders to hold their interest in the Yaposha chain) and Open Joint-Stock Company Bank TRUST (Ukraine) was owned by the Shareholders personally in the usual proportions. As for Eurogroup, the Shareholders originally owned the shares personally, but had sold them to Tactio on 12 October 2007 for a total sum of RUB 21,000 (the associated SPAs were signed by each of the Shareholders personally).

1825. On 7 October 2008 Mr Fetisov sent an email to Mr Drozdov, with the subject line: "*decoding of commitments in DONAU-BANK AG and EAST WEST UNITED BANK*" and a second email to Mr Drozdov (copying Mr Yurov and Mr Belyaev), with the same subject line, proposing a meeting between them all: "*suggest we meet at 16:00 at Ilya's office to*

go over it. we need to know exact numbers and have total clarity by the end of day today!". Each email had two attachments in materially the same form. They showed that the Shareholders had derived extensive benefits from personal loans made to them by TIBI, using the Bank's money routed through Donau and EWB. The purposes of the loans included purchase of Mr Mokhnachev's interest, refinancing of old debt under the management buy-out, the Shareholder' investment into the Ukrainian bank, as well as for (unspecified) personal use.

1826. The attachments also showed that the Shareholders' companies, TIBI and Tactio, held each of the development projects. These were ultimately "sold" (with a huge mark-up) to Oldehove and Crylani at the height of the 2008 financial crisis. Thus in relation to Royston (Veshnyaki) the total cost of acquisition and construction was RUB 659.7 million but it was sold to Crylani for RUB 1.4 billion (equity) and RUB 376 million (debt), whilst in relation to Morledge (Perevedenovsky) the total cost of acquisition and construction was RUB 876.9 million but it was sold to Crylani for RUB 1.52 billion (equity) and RUB 136 million (debt), and in relation to Eurogroup (Otradnoye/Degunino) the total cost of acquisition and construction was RUB 696 million which was sold to Oldehove for RUB 1.64 billion (equity) and RUB 838 million (debt).

1827. It was also apparent, as I am satisfied the Shareholders well knew, that the acquisition of these properties by the Shareholders' companies had not been funded by the Shareholders personally. In this regard Mr Fetisov accepted, when cross-examined, that both the acquisition and refurbishment costs were funded by TIBI through EWB and Donau.

1828. I am satisfied that at the meeting on 7 October 2008, and in the context of the correspondence I have identified, one of the matters discussed must have been how to reduce TIBI's liabilities to EWB and Donau. In the event this involved large sums being funnelled via Oldehove and Crylani to TIBI under cover of "sales" of the real estate assets at uncommercially high prices).

1829. On 14 October 2008, Mr Fetisov emailed Mr Eggleton attaching what he described as "*one more version of assets we hidden assets and financings*" (emphasis added) The "*hidden assets*" were, I am satisfied, loans seemingly made by TIBI, but in reality funded by the Bank through EWB and Donau, which were "*hidden*" (from auditors and the CBR) as they were made off-balance sheet and had been misrepresented in the accounts as inter-bank deposits with EWB or Donau and therefore as "*cash or cash equivalents*".

1830. Some of the items that had been covered in the attachment to Mr Fetisov's email to his co-Shareholders on 7 October 2008 (as addressed above) were also in the spreadsheet he sent to Mr Eggleton, *e.g.*, personal loans to the Shareholders (more than RUB 510 million) and the investments made by TIBI into the real estate development projects. The spreadsheet also showed a RUB 56 million loan to Mr Eggleton himself. However, there was also a list of loans with comments as to whether they could be included on the Bank's balance sheet. An example put to Mr Yurov was a loan of RUB 1.1 billion by TIBI to the Yaposha group in relation to which the commentary reads, "*Unstable financial situation, assumes provisioning of min 21%"*. Mr Fetisov agreed that this meant there was a "*certain likelihood*" that the accounting value of the assets represented by these loans would be 21% lower if the Bank had made the loans than if they were accounted for as "cash or cash equivalents" (and thus the value of this asset was inflated by 27% by reason of the

EWB scheme). There were numerous other impaired assets, the value of which was artificially inflated on the Bank's balance sheet, and many of the items would have to have been written off completely (*i.e.*, 100% provision). Amongst the "*[u]nacceptable assets*" were loans to the Shareholders from MC Trust and TIBI (total of RUB 1.25 billion) which could not be included on the Bank's balance sheet because of "*N6, N9, N10.1*", "*[F]acilitation payments*" made by TIBI in the form of "*non-returnable personal loans (Drozdov, Kuznetsov, Dikusar, Pavliuchenko)*" which would amount to a "*100% loss*" and various other "*[b]ad assets*" including those that were "*realised in order to reduce the reserves of NBT*" in 2003, 2004 and 2007.

1831. Mr Fetisov's email to Mr Eggleton and its attachment therefore shows the deliberate use of (inappropriate) "balance sheet management" to evade the CBR's norms and the applicable accounting rules for a wide variety of lending, including to the Shareholders personally and for the purposes of the real estate investments that were (at that stage) held through TIBI and Tactio.

1832. On 30 October 2008, Mr Fetisov received an email from Mr Iskandyrov, subject line "*Donau*", providing:

> "At the moment we have financing through interbank loans for 20 bln RUB, including through Donau for 8.15 bln RUB (236 mln. EUR)
> in addition, we need to increase the financing of TIB Eq for dividend payments, which
> were used for increasing of the profit under the Russian Accounting Standards for 9 months
>
> According to the latest information from VTB Austria:
> they require to close all ruble transactions until the end of November (4 bln RUB)
> reduce the amount of interbank operation through them to 100 mln EUR (2.4 bln RUB) by the end of the year
> Thus, we need to reduce the amount of interbank loans by 5.75 bln RUB
>
> It is impossible to increase the amount of interbank loans through East West United Bank, because their limit is 10% of the balance sheet total of our banks. Moreover, since in September - October, the balance sheet total of the banks reduced significantly, it is also highly probable that they will request the reduction of the amount of interbank loans.
>
> It is necessary to:
> 1. issue instruments that could replace interbank loans as soon as possible (CLN of Crylani for 3 bln RUB)" (emphasis added)

1833. This shows beyond doubt that Mr Fetisov knew (and I have no doubt would have discussed with the other Shareholders given the importance of the content, and their involvement as shown from previous and subsequent emails) that Donau (which Mr Fetisov accepted in cross-examination was used for onward lending to amongst others TIBI) required a reduction of RUB 5.75 billion in their fiduciary lending facilities, that that reduction could not be accommodated through EWB since the lending through EWB had already reached the limit and would also have to be reduced in due course, and that

the first step to refinance the Donau lending (as to RUB 3 billion) would be a loan to Crylani, to be structured as an issue of CLNs. Mr Fetisov confirmed when cross-examined that "*that was what was being discussed*" and "*at that time there was generally this plan*".

1834. It is clear, therefore, that the re-structuring that was needed was not anything to do with the TIBI real estate projects but rather with an urgent need to pay down TIBI's liabilities to Donau. This can also be seen in the fact that a memo entitled *"Regarding problem projects"* which was forwarded by Mr Yurov to Mr Belyaev and Mr Fetisov on 31 October 2008 did not mention any of the TIBI real estate projects.

1835. Each of the Shareholders was kept informed of the progress of the planning of the Oldehove and Crylani transactions. Thus, for example, Mr Iskandyrov's email on 10 November 2008 entitled "*Re: Mortgage CLN*", which was copied to all three Shareholders provided:

> "Regarding Pokrovka we need (to be unloaded to Donau] so that IBT receives as little money as possible for Pokrovka (for example, the price of investments [sic] + interest for the term of these investments), but not USD 30 million.
> Or we need to put somebody between IBT and SPV (TIB), which will hold onto all the profit from the sale of Pokrovka." (emphasis added)

1836. That is, in fact, exactly what happened with Pokrovka. Thus December 2008, TIBI paid the Bank RUB 170 million to acquire rights under a co-investment agreement relating to Pokrovka and the very same day, TIBI sold those rights to Oldehove for RUB 646 million as a result of which Shareholders' vehicle TIBI thereby made a profit of nearly half a billion Roubles – in fact for doing absolutely nothing other than acting as a conduit for the co-investment rights from the Bank to Oldehove. In Mr Iskandyrov's words, it held "*onto all the profit from the sale of Pokrovka*" with the explicit purpose of "*unloading*" Donau (that is enabling TIBI to discharge its liabilities to Donau, using the Bank's own funds routed to it under the pretence of a genuine transaction).

1837. Mr Iskandyrov attached a presentation, "*Mortgage LPN 275 mln. USD*" which detailed the proposed issues of notes i.e. what became the Oldehove and Crylani loans. In such circumstances the Shareholders clearly knew what was going to happen.

1838. The Shareholders were also aware from an email from Mr Drozdov on 10 November 2008 that he was struggling to obtain a valuation that was sufficiently high to justify transferring as much cash to TIBI as had to be transferred to "*unload*" Donau:-

> "I send a description of two issues of notes against the pledge of real estate. I did not manage to secure real estate at cost for the amount of RUB 7.8 billion even at the highest ceiling of the real estate valuation. The information from the CFO will come on Monday, we will need to adjust the parameters". (emphasis added)

1839. Mr Drozdov also forwarded to the Shareholders his previous email to various other recipients setting out the rationale for, and the parameters of, the Oldehove and Crylani transactions:-

> "URGENT ISSUE OF NOTES

Today I will also send a plan for two loan issue notes for RUB 7.8 billion against the pledge of real estate and rights to real estate, with the subsequent drafting of a pledge (mortgage) – all these notes will be on the bank's books

Kirill, Sasha (Buyanovsky), we will probably need the Orphan SPV that remained from the securitisation of IFC and another SPV that is not related to the bank.

Briefly, the plan will look something like this
- 2 SPV will receive loans for RUB 7.8 billion from the issue of the CRR BB notes, the notes will be bought by National Bank Trust
- Subsequently, the SPV will use the proceeds to buy the companies that own the real estate or the rights to the real estate and will then pledge the real estate or rights to the real estate against a loan, with the subsequent pledge of the real estate after its registration.
1) TIB Inv will [sell] the companies Royston, Morledge and Filenta (the repo on Filenta and Morledge will fold back),
2) Tactio will [sell] Eurogroup Development LLC and the pledge of rights under the investment contract for Otradnoe,"
...
- 2 note issues (I am waiting for the limits from the CFO):
I propose
First issue – for the finished properties of TIB Inv (Veshnyaki, Perevedenovsky, Spartakovskaya)
Second issue for semi-finished properties – Otradnoe, Kolpak, Pokrovka

The objective is to close and hang on the bank all the costs on the purchase of the houses (RUB 4.3 billion) and bad assets (RUB 3.4 billion). TIB Inv will close Donau for a corresponding amount." (emphasis added)

1840. It is clear, therefore, that as the Shareholders would thereby know, *"the objective"* of the Oldehove and Crylani transactions was to *"close and hang on the Bank"* the costs incurred by TIBI in acquiring the property ("*houses*") and also "*bad assets*" amounting to RUB 3.4 billion. Clearly, the collective valuation of the properties had to come out at no less than the sum total of those two elements, thereby enabling TIBI to "*close Donau for a corresponding amount*".

1841. This was, on any view, a dishonest scheme that was not in the best interests of the Bank but was very much in the best interests of the Shareholders who would benefit from it as the Shareholders would know and understand. First, the effect was that they acquired the properties (through TIBI) and retained them (through Oldehove and Crylani) at the expense of the Bank without contributing any of their own funds. Secondly, their company (TIBI) would be discharging its liabilities to Donau using the Bank's own money supplied through the circuitous and artificial route of supposed asset sales by TIBI. Thirdly as the valuation of the assets had to match the amount of cash required for TIBI it would almost certainly need to be (falsely) high, and fourthly the "*bad assets*" that had to be refinanced included loans made to the Shareholders personally, as well as other loans to their companies, which were now going to be "hung" on the Bank's balance sheet. Mr Fetisov

admitted that he gave this email "*some attention, definitely*" and I am satisfied that was true of all the Shareholders.

1842. Mr Fetisov was also aware of, and involved in, what was being done to obtain the necessary (higher) valuation. Thus an email on 5 December 2008 from Ms Bukashkina, copied to, amongst others, Mr Fetisov provided:-

> " Ruslan has already contacted Nikolay Viktorovich and is discussing the maximum amount that we can get with the appraisers.
>
> … [lower down the chain] …
>
> Because the numbers we got from Cushman were not quite what we were expecting, we have 2 options:
>
> 1) either, before the end of Friday, 5 December, we get confirmation from Cushman that the valuation for each property will remain no lower than the old one;
>
> 2) or within the next week we get a valuation from a less conservative company." (emphasis added)

1843. On 10 December 2008, Ms Bukashkina sent another email to, amongst others, Mr Fetisov, about the valuations and the final deal structure for the Oldehove and Crylani loans:-

> "Final deal structure.
> Offering 1 – Friday 12 December, offering 2 – later, before 19 December.
> The Spartak valuation is rough, we won't have the final before Friday (the previous one was increased by 150 million).
> On the second offering, there is no single confirmed value of the properties, so the amount was inserted totally virtually (7.8 minus offering 1)."

1844. This accords with Mr Drozdov's earlier explanation that the total loan amount was going to be RUB 7.8 billion, as this was what was required to cover the "*bad assets*" accumulated on TIBI's balance sheet i.e. it was contemplated that this is the amount that would be leant, and a valuation at that figure needed to be procured. In the event, and just before the Crylani loan, on 11 December 2018, Mr Fetisov was asked to approve a slightly smaller size of the transaction in case it did not prove possible for valuers to give a valuation of RUB 7.8 billion:

> "Please confirm that, if we still don't get a valuation for the buildings of RUB 7.8 billion, we can settle on a minimum valuation of RUB 7.2 billion. If you don't confirm this number, we'll put the larger amount into notes before the final agreement with the appraisers, which might lead to further default on the notes in April 2009 because the amount of security is not confirmed. If we continue to wait for confirmation of the final amounts, we won't manage to issue the notes in offering 1 tomorrow*."*

1845. It is beyond dispute that the same day both Mr Yurov and Mr Fetisov were specifically asked by Ms Krivosheeva to "*authorize*" the transaction which had now been split into two consecutive issues of LPNs:

> "We restructured into two offerings so that the Kolpachny, Pokrovka and Otradnoye sites are separate from the rest of the properties.
> **Please authorize the transaction** on the following schedule: first offering tomorrow, the second Wednesday of next week.
> There is a problem with the LPN structuring. The proposed draft contract transferring the Investor's rights with respect to Pokrovka involves tax risks.
> These is a risk that tax authorities will declare the deal transferring the Investor's rights (by TIB Bank TIB CRYLANI) a "tax payment optimization scheme".
> This risk stems from the closing of transactions to transfer the same rights at prices that differ many times over (the Bank assigns Investor rights for USD 5 million; TIB for USD 20 million) in a short time frame. At registration the ultimate beneficiary of title to the premises will file the agreement under which these rights were acquired. If the tax [inspectorate] analyses the prices in the agreements made within a short time frame, the transaction by the Bank will be deemed as made to gain an unjustified tax benefit, i.e.,
> to reduce tax payments. In favour of the tax inspectorate will be the fact that the deal is being made with a counterparty (TIB INVESTMENTS), that will be deemed interdependent to the Bank."

1846. Enclosed with Ms Krivosheeva's request for authorisation was a summary of both the Oldehove and Crylani transactions. It is therefore clear (and would have been clear to Mr Yurov and Mr Fetisov) what it was that they were being asked to authorise. Mr Fetisov even forwarded the email to Mr Yurov (even though he was already a recipient) stating: "*pls read it*". I am in no doubt that this was Mr Fetisov recognising the importance of the authorisation to be given, and requesting that Mr Yurov read the email. I have no doubt that he would have done so, and I also infer that the Shareholders would have discussed it amongst themselves (i.e. including with Mr Belyaev), and in consequence gave the approval sought (as the loans went ahead). As already identified, it is plain that the loans were in the best interests of the Shareholders, but not in the best interests of the Bank.

1847. I am also satisfied that from the emails I have identified the Shareholders had personal knowledge of all material aspects of the Oldehove and Crylani transactions. In consequence aspects of their evidence in this regard is simply untrue. I have no doubt the Shareholders have (unsuccessfully) sought to distance themselves from the loans and Oldehove and Crylani because of the dishonest scheme that was undertaken, and also given their denial of beneficial ownership (which was itself untrue). The following evidence of Shareholders is, on any view, untrue. First, Mr Fetisov's written evidence that he "*was not personally involved in the Oldehove Transaction*" and that it "*fell outside my area of responsibility*" as is his evidence that he had only "*limited knowledge of the Crylani Transaction itself at the material time*". Secondly the evidence of Mr Yurov's that he "*did not know about Oldehove's activities or its connection to those properties and*

was unaware of the details of the Oldehove Transaction until this claim", as is his similar evidence in relation to Crylani. Thirdly Mr Belyaev's pleaded case, supported by a statement of truth, that he did not even "*recognise the names of*" the Borrowers, which included Oldehove and Crylani, is itself untrue (see Section C.3.2 for further reasons why this statement was untrue).

1848. The reality that the Shareholders were the ultimate owners of TIBI and benefitted from them (which the Shareholders can hardly have been unaware of in any event) was actually driven home to them on 18 December 2008, soon after the Crylani loan and shortly before the Oldehove loan when Mr Drozdov emailed all of the Shareholders the Bank's holding structure and stated:-

> "I didn't say that TIB investments owns 60% of the shares of the 3Sistercos, since **you are the ultimate owners of TIB investments** in a ratio of 1:1:1.5 and, consequently, your direct+indirect ownership of the 3Sistercos doesn't change – they are 100% yours as well." (emphasis added)

1849. This did not lead to responses from the Shareholders disagreeing with the same, as they of course knew that this was the position, and that the Oldehove and Crylani transactions, which were happening at this very time, were designed to inject as much money as possible into their company, TIBI, to enable it to pay down its debts and refinance "*bad assets*", all for their benefit (rather than for the benefit of the Bank), given that TIBI was, as they had known all along, owned by them personally. It matters not therefore that there was no CC meeting at which they approved the loans. They were asked to give their approval, and did so, I am satisfied knowing that they stood to benefit from the loans, and that they were not in the best interests of the Bank. In such circumstances in giving such approval (and also in not declaring their interests, and therefore conflict of interest) they were in breach of their duties owed to the Bank.

1850. Turning to the loans themselves, there is much common ground as to how they were structured. The loans were structured through the issue of Oldehove and Crylani LPNs, which were acquired by the Bank. The sale proceeds provided the funds for the loan. As Mr Davidson explains, "[*i*]*n consideration for the LPNs purchased from CRR, TIBI paid over the loan funds to Crylani and Oldehove, instead of CRR loaning the funds to Crylani and Oldehove. The source of the funds was the payment received from NBT for the LPNs. In effect, NBT has made the loans to Crylani and Oldehove*".

1851. The loans were made in two tranches. On 12 December 2008, Crylani received a five-year loan of RUB 4.88 billion from the Bank (via TIBI), at an interest rate of 9.638% pa. The money was immediately transferred to TIBI in transfers disguised variously as loans, consideration for shares in two other Shareholder companies (Royston and Morledge) and an assignment of "loans" previously made to those companies. The amounts paid to, and the resulting windfall to, TIBI is summarised in the Table in Section E of Schedule O/P to the Bank's Closing Submissions. The effect was that TIBI got a multiple of what it had paid for the equity in Royston and Morledge and a separate payment for the debt of those companies – i.e. double-dipping – the object of which was to extract as much cash out of the Bank as possible, so as to enable TIBI to 'unload' Donau.

1852. This is precisely what happened – as Mr Davidson explained (at 3-Davidson App. 4, 12-13):-

"12-19 December 2008

12. Through a series of transactions, which are set out in Schedule 6, the funds from NBT to purchase loan participation notes issued by CRR BV (**underlying loan to Crylan**i) were used to repay short-term loans from EWB to TIBI for RUB 4,870.5m.

28 November 2008

13. **The short-term loans from EWB to TIBI were used by TIBI to repay short term loans from NBT and VTB (previously Donau), totalling RUB 4,177.0m and RUB 4,380.9m, respectively**, as set out in detail in Schedule 7. Further tracing is not possible in relation to the short-term loans provided by NBT because it is not known to what account the loan funds were paid into. Further tracing has not been undertaken at this stage in relation to the short-term loans provided by VTB."

1853. In relation to Oldehove, on 23 December 2008, a loan of RUB 3.19 billion was advanced for five years at 9.667% pa. The same day Oldehove transferred some RUB 2.9 billion to TIBI, of which at least RUB 2.3 billion (US$83 million) was used to refinance the EWB scheme. The remainder has not been traced beyond TIBI/Tactio.

1854. As with Crylani, the movements of money from Oldehove to TIBI/Tactio purported to be loans and/or consideration for Eurogroup's debt, equity and investment rights. The reality was rather different, the money was simply being transferred between two Shareholder companies, Oldehove to TIBI/Tactio. I am satisfied that there was no commercial justification for the large amounts transferred not only for the equity of Eurogroup but also its debt. The supposed supporting documentation was particularly badly prepared – for example the purported Oldehove/TIBI loan agreement is an amateurish document full of typos that in places does not even make any sense. The version used for a second "loan" on 20 March 2009 used the same template, as do the "loans" from Crylani to TIBI, from Crylani to Mourija, and from TIBI to Nikilin. The sentiments expressed by Mr Worsley on another occasion where he had sought to "improve" a similar form of draft in red pencil is apt: "[*t*]*he documents look short, and 'fake' … I have, in this instance, signed the documents, so as not to hold up the transaction. However, as discussed for the previous two years, please arrange for proper documentation going forward*".

1855. Turning to the second tranche of the loans, on 18 March 2009, the loans were increased, in the case of Crylani a further tranche of RUB 1.58 billion was made available, bringing the total lent to RUB 6.45 billion while, at the same time, reducing the interest rate to 9%, whilst in the case of Oldehove a further tranche of RUB 1.03 billion was made available bringing the total amount of the loan to RUB 4.225 billion, while the interest rate (and the coupon on the LPNs) was reduced to 8% pa. There does not appear to have been any CC meeting in relation to these further tranches, which I am satisfied must have been approved by the Shareholders (again without any

disclosure of the Shareholders' interest) without which I am satisfied these further tranches would not have been approved.

1856. The funds from the second tranche were again transmitted to TIBI purportedly as "loans" but also (supposedly) as further consideration for assets already acquired and paid for in December 2008. So far as Crylani is concerned RUB 710 million was transferred to TIBI as a "loan", RUB 438 million and RUB 429 million were transferred as "*second payments*" under the Royston and Morledge SPAs, respectively (according to Mr Davidson), however, neither of those SPAs provide for any "*second payment*" and this seems to have been a particularly weak attempt to provide a reason for such transfers, which were in reality simply funds sourced from the Bank provided to TIBI necessitated by the need to reduce or extinguish TIBI's liabilities to EWB and Donau.

1857. So far as Oldehove is concerned, RUB 255 million was transferred to TIBI as a "loan", RUB 158 million was the balance paid under the assignment Pokrovka co-investment agreement, RUB 619 million was, according to Mr Davidson, a "*second payment*" under the Eurogroup (Degunino) SPA, but the original SPA made no provision for a second payment and the asset was therefore acquired and fully paid for in December 2008. However, there was then a purported Additional Agreement created in January 2011 and backdated to March 2009 – this in itself speaks volumes. It appears that it was felt necessary to concoct, long after the event, a commercial rationale for the payment, when (it appears) no commercial rationale could be identified at the time.

1858. There also appears to be a total lack of justification for the further large amounts transferred to TIBI in March 2009 for the shares in Morledge, Royston and Eurogroup, at a time following the global financial crisis and the crash of Moscow property (as a result of which the value of the properties can hardly have increased).

1859. A summary of the relevant transactions, and the uses to which the loan proceeds were put, is set out in the Tables in Section E of Schedule O/P to the Bank's Written Closing Submissions.

1860. On 30 July 2010, Crylani bought back some of its CLNs from the Bank and the principal due under the loan was consequently reduced to RUB 3.3 billion (releasing some of the collateral at the same time). This circular transaction was funded by the Bank itself, with the proceeds travelling via a series of (purported) loans and other transactions involving SiberianKD, Filenta, Wave, and other Shareholder companies. The net outcome of this "refinancing" was to shift debt (after converting it to US$) onto the books of LLC5 – of which some $90 million (of principal) remains outstanding. The interest rate payable by Crylani was reduced by an amendment to the terms of the loan made on 12 October 2010.

1861. At a CC meeting on 28 November 2013, chaired by Mr Yurov, a resolution was passed extending the maturity of the Crylani LPNs until 12 December 2018, and fixing the risk limit on the Bank's exposure to the bonds at RUB 3.35 billion. There was no disclosure of the Shareholders' interest as there should have been. In accordance with the CC resolution, on 4 December 2013, the repayment date under the Crylani loan was extended by five years.

1862. Thereafter on 23 October 2015, the loan agreement and other finance documents were novated to the Bank. As of that date, the total accrued but unpaid interest was RUB 142 million (including overdue interest of RUB 82 million) and the total amount due under the loan was RUB 3.4 billion.

1863. Amendments to the terms of the Oldehove loan were made following a CC meeting on 17 August 2011 (chaired by Mr Yurov) at which resolutions were passed to fix a limit of RUB 3.35 billion in respect of the Oldehove LPNs, and to conclude a US$50 million forward trade with Oldehove. Again there was no disclosure of the Shareholders' ownership of Oldehove as there should have been.

1864. The principal amount was reduced on 21 January 2011. At the same time, the interest payment schedule was varied, deferring a large proportion of accruing interest until the repayment date. On 18 December 2013, the repayment date was extended by five years to 23 December 2018. The combined effect of these amendments was to defer both the repayment of principal and also the payment of a substantial portion of the interest (which was a softening of terms in the interest of the borrower, and not of the Bank).

1865. On 18 June 2015, the rights and obligations of CRR BV under the Oldehove loan agreement and related finance documents (as amended) were novated to the Bank. As of that date, it appears that all of the principal was outstanding, as well as RUB 884 million of accrued but unpaid interest.

R.12.3 The Bank's Loss

1866. I have already addressed why the Shareholders are wrong to say that the Bank has suffered no loss. Equally I am satisfied that the Bank's losses are directly caused by the Shareholders' breaches of duty in relation to the loans as identified above.

1867. In relation to Crylani, and after a demand for repayment was sent on 11 December 2015, the Bank did not receive any response from Crylani and began enforcement proceedings in the Russian courts. Recoveries were made pursuant to the mortgages over Perevedenovsky and Veshnyaki. The market value of those properties, in accordance with an independent valuation, is taken into account in Mr Allen's calculation. The outstanding principal, agreed by the experts, is RUB 3,442,108,340. Less recoveries, the relevant figure is RUB 1,681,135,464. I am satisfied that this represents the Bank's loss. Sections N.2.2 to N.2.6 are repeated.

1868. In relation to Oldehove, Mr Davidson's analysis suggests that Oldehove defaulted as early as 2013 (and again in 2014), but no attempt was made to invoke the contractual right to early repayment, and no enforcement action was taken. Following a default after the Bank's collapse, a demand for repayment was sent on 24 September 2015, but no response was received and enforcement proceedings were therefore commenced in the Russian courts. Some recoveries were made, in the form of Eurogroup's rights under the Degunino investment contract, valued at RUB 331 million in a settlement agreement with Eurogroup dated 31 May 2016 (the valuation was supported by an independent assessment). Mr Allen has accounted for the value of unrealised collateral (based on a third-party valuation), and the experts have agreed the outstanding principal at RUB 4,156,460,408. Less recoveries and the value of unrealised collateral, the relevant figure is RUB 3,125,382,815. I am

satisfied that this represents the Bank's loss. Sections N.2.2 to N.2.6 are repeated.

R.13 YAPOSHA GROUP

R.13.1 Common Ground

1869. The Yaposha Group owned and operated a chain of fast food sushi restaurants in Russia. The group holding company was NRT Holdings Limited ("NRT"), which owned a number of operating subsidiaries in Russia including Yaposha CITY.

1870. As at December 2009, NRT was owned as to 40% by a company called Ginza Holdings Limited ("Ginza"). The original owners of Ginza were Marina Ivanenko and Vadim Lapin (the "Original Owners"). On 15 July 2010, NRT purchased the entire share capital of Ginza from the Original Owners. In November 2010, the Bank acquired 19% of NRT from Ginza Holdings for US$19.4 million.

1871. In relation to NRT, by a loan agreement dated 24 November 2008, TIBI lent $21.1 million. On 11 December 2008, this loan was assigned by TIBI to the Bank; Such assignment was approved by the CC on 24 November 2008 in a meeting chaired by Mr Yurov. By an "Additional Agreement" dated 23 November 2012, the Bank agreed to extend the date for repayment by NRT to 23 November 2015 with the effect that none of the principal had been paid back when the temporary administrators were appointed on 22 December 2014.

1872. In relation to Yaposha CITY, between July 2012 and November 2014, the Bank entered into seven credit facility agreements with Yaposha CITY as summarised at paragraph 12 on page 188 of the Bank's skeleton argument. No security was provided by Yaposha CITY for the first, fifth, sixth and seventh loan agreements. Each of the loan agreements was approved by the CC chaired by one of the Shareholders (Mr Fetisov is recorded as having chaired only the poll *in absentia* on 3 September 2014, which is not admitted by Mr Fetisov).

1873. The Bank also advanced finance to a company called Yaposha Investments Limited ("YIL") as follows. Between May and September 2013, the Bank entered into three credit facility agreements with YIL as summarised at paragraph 14 on page 189 of the Bank's skeleton argument. These loans were approved by the CC on 6 March 2013 at a meeting chaired by Mr Yurov and were secured by a pledge over 1,100 shares in NRT.

R.13.2 Discussion

1874. A central issue concerning Yaposha is that of ownership. Whilst, as noted above, it is common ground that the Yaposha Group (which has since been liquidated) owned and operated a chain of fast food (sushi) restaurants in Russia including restaurants in Moscow and St. Petersburg ownership thereof is very much in issue. The Shareholders submit that it was a Bank investment project held for the Bank off balance sheet (i.e. that the Bank, an investment/retail Bank, had chosen to diversify into a joint venture with the Ginza Group a Russian restaurant operator) and that the Shareholders had no personal interest in it. The Bank submits that quite apart from the inherent improbability of such an activity on the part of the Bank, the Shareholders' submission is demonstrably false and that in fact the Shareholders were the majority owners of the holding company for the Yaposha Group. In such circumstances the question of ownership is addressed in some detail below.

1875. However, by way of overview, the Yaposha Group was made up of numerous entities, including (1) Yaposha CITY, incorporated in Russia; (2) Yaposha Investment Ltd ("YIL"), incorporated in Cyprus; and (3) NRT Holdings Ltd ("NRT"), also incorporated in Cyprus. NRT is the immediate parent company of the operating companies in Russia, including Yaposha City.

1876. The contemporaneous documents obtained from Mr Worsley clearly demonstrate that the Shareholders were the majority owners of NRT, the holding company for the Yaposha Group, through various offshore entities. One of these offshore entities was a Cypriot Holding Company called Ginza Holdings Limited ("Ginza Holdings"). Whilst (perhaps deliberately) the name of the company suggests that it was part of the Ginza restaurant group, Ginza Holdings was in fact acquired by NRT in July 2010 and thereafter became part of the offshore network held for the benefit of the Shareholders.

1877. Then, in November 2010, the Bank paid US$19.4 million to acquire 19% of NRT from Ginza Holdings. I am satisfied that this 19% stake in NRT (which was recorded in the Bank's audited accounts), was the Bank's only interest in the Yaposha companies with the Shareholders holding their continuing personal interest in NRT through layers of holding companies, nominee shareholders and directors and "nominee UBOs". The fact that senior Bank employees were involved in matters including the restructuring of ownership and debt and the like is yet another example of the Shareholders using Bank employees for their own purposes.

1878. As addressed in due course below, the Bank lent very large sums to the Yaposha companies in a series of loans, in relation to which there was (as usual) no disclosure of the Shareholders' interest in the Yaposha companies and the loans were documented and accounted for as arm's length commercial transactions. There was a lack of adequate security. It is also notable that the loans to YIL were clearly made for "balance sheet management" rather than for genuine purposes associated with the restaurant business. In the event the business ultimately failed, and when the Bank collapsed, a sum of over RUB 4 billion was owed by the Yaposha companies. Yaposha is therefore an example of a Shareholder project that ultimately failed (and so was accordingly abandoned by the Shareholders under the pretence that it was a Bank project). I have no doubt that the Shareholders would have claimed it for themselves had it represented a continuing profitable business.

1879. Turning then to ownership in more detail. As already noted, the most important company in the Yaposha holding structure was NRT, the immediate parent of the Russian operating companies. In September 2008, structure charts emailed to all three Shareholders by Mr Drozdov (who at that time was responsible for running the offshore network) showed the Shareholders as the beneficial owners of 60% of NRT through Tactio. Apart from the inherent improbability of the "*very accurate*" Mr Drozdov having got matters so fundamentally wrong as to ownership, this information did not provoke any howls of protest from the Shareholders. Given the clarity of the information Mr Belyaev even went so far as to resort to the obvious untruth that he deleted all of Mr Drozdov's emails without reading them – a matter already addressed above in Section C.3.2. I am satisfied that the Shareholders knew perfectly well that it was the Shareholders and not the Bank that owned Yaposha.

1880. An initial structure diagram sent to Mr Worsley in December 2009 shows a current holding structure for NRT whereby it was owned (a) 40% by Ginza Holdings; (b) 19% by Elis Trade; and (c) 41% by a company called Zosimal. There is also a proposed new structure for NRT whereby it would be owned (a) 40% by Ginza Holdings; (b) 19% by RSGR Management/YIL; and (c) 41% by RHT Management. Ginza Holdings originally had other owners but, in July 2010, its entire share capital was sold to NRT in a deal to which the Shareholders were parties with the result that Ginza Holdings came to be a Shareholder company as is shown by a letter from Mr Vassiliades to the Cypriot police and the indemnities signed by the Shareholders personally in which they declared themselves to be the beneficial owners of Ginza Holdings. Documents prepared in 2013 show that Ginza Holdings in due course had a "nominee UBO" inserted (Mr Creasey) rendering the ownership structure (deliberately) more opaque, in the usual manner. Elis Trade was also a Shareholder company, as addressed previously (including in Sections F.2.4.3, F.2.5.2 and R.6 above). YIL was another company in the offshore network. It was incorporated by Mr Vassiliades on 22 July 2010 with a Ms Jacqui Lowe (seemingly the owner of a primary school in Zimbabwe) being its purported owner and another of the "nominee UBOs" recruited by Mr Worsley to conceal the Shareholders' beneficial interests. It appears that at some point she was replaced by Mr Creasey as the nominee UBO of YIL (which was, or became, the parent company of Ginza Holdings).

1881. As for "Zosimal", there were two companies called "Zosimal", a Russian LLC and a Cypriot limited company. The Russian LLC called Zosimal was a subsidiary of Nikilin Investments Limited (itself also a Shareholder company). It was employed in some of the "balance sheet management" schemes. The Cypriot Zosimal was incorporated in 2005 and formed part of the offshore network. There can be no doubt that it too was beneficially owned by the Shareholders not least because the Shareholders personally signed indemnities declaring that they were the beneficial owners.

1882. As already addressed in Section F.2.5.2, RHT Management was the BVI company which was initially proposed to take over the Shareholders' personal interests in a large number of companies with Mr Worsley acting as a front or 'nominee' to disguise those interests and keep them secret.

1883. Thus, it will be seen that every company involved in the "current" December 2009 ownership structure of Yaposha and the proposed new structure either was, or in the case of Ginza Holdings, came to be, a Shareholder company. At this stage, the Bank itself had no ownership interest in the Yaposha Group at all. The evidence is also that prior to the loans in respect of which the Bank claims, Yaposha was one of the projects being funded through the EWB scheme, as is clear from Mr Fetisov's email about "hidden assets" on 14 October 2008 and its attachments showing that there was over RUB 1 billion of lending by TIBI to the Yaposha group. It was also explained in the attachments that such borrowing could not be included on the Bank's balance sheet because Yaposha had an *"Unstable financial situation, assuming provisioning of min 21%".*

1884. On 16 November 2010 the Bank entered into a share purchase agreement (referred to by the Bank as the "Ginza Transaction") with Ginza Holdings under which the Bank purchased from Ginza 950 shares in NRT for US$19.4 million (those shares representing 19% of the share capital of NRT). As the original owners of Ginza had been bought out in July 2010, this transaction did not represent the Bank acquiring a stake in NRT form its original owners, rather the Bank was paying US$19.4 million to acquire 19% of NRT

from the Shareholders. Clearly that being the case the Shareholders should have disclosed their interest but, as usual, no such disclosure was given. There is also a more fundamental point. If as the Shareholders now submit, the Bank already owned NRT the Bank would have been buying the shares from itself – which, of course, makes no sense, and tells the lie to the Shareholders' case. It appears from the documentation that this sale of shares by Ginza Holdings was actually a "back-to-back deal" with Elis Trade. In this regard, on 16 November 2010, Elis Trade and Ginza Holdings entered into a shares sale agreement by which Elis transferred to Ginza Holdings 950 shares in NRT in exchange for the money paid by the Bank to Ginza Holdings. Accordingly, Ginza Holdings transferred the majority of the US$19.4 million which had been paid to it by the Bank to an account at the Bank held in the name of Elis Trade on 18 and 19 November 2010.

1885. It is also apparent that NRT also came to have various small-scale minority shareholders who were Russian companies (and they may have been associated with the restaurant franchises, albeit that it is not clear who owned these companies). In any event, in 2013, the Shareholders' company, YIL, bought the shares of the various minority shareholders using money borrowed from the Bank, thereby further cementing the Shareholders' ownership.

1886. In the above circumstances there can be no doubt that the ultimate beneficial owners of the Yaposha Group were the Shareholders themselves. As appears below, and despite the obvious conflict of interest, this was never disclosed when the loans the Bank claims in respect of were made.

1887. Turning then to the loans that were made. TIBI (which was, of course a Shareholder company in the holding structure of the Bank) entered into a loan agreement with NRT dated 24 November 2008 by which TIBI lent NRT US$21.1 million. The term of the loan was until 23 November 2012. This loan was secured by way of a pledge over the share capital in Yaposha CITY. Given that involvement of TIBI in the EWB scheme, it is likely that this loan was funded via the EWB Scheme. On 11 December 2008 the loan was assigned by TIBI to the Bank by way of an assignment agreement. The assignment of the loan to the Bank was approved by the CC on 24 November 2008. The meeting was chaired by Mr Yurov and no disclosure was made of the Shareholders' interest in NRT (at this stage it appears they had a 60% interest in NRT). There is no evidence of any due diligence considering whether it was in the Bank's best interest to take over this loan (as there clearly should have been). By an "Additional Agreement" dated 23 November 2012, the Bank agreed to extend the date for repayment until 23 November 2015. There is no evidence of any justification for the same, or consideration whether the same was in the Bank's best interests. The loan had not been paid back at the time of the Bank's collapse.

1888. Between July 2012 and November 2014, the Bank entered into no less than seven credit facility agreements with Yaposha CITY: (a) 24 July 2012 (RUB 28 million); (b) 28 November (RUB 1.05 billion); (c) 27 March 2014 (RUB 110 million); (d) 21 May 2014 (RUB 100 million); (e) 7 August 2014 (RUB 50 million); (f) 10 September 2014 (RUB 150 million); and (g) 12 November 2014 (RUB 400 million). Only three of these loans were guaranteed by NRT (albeit such guarantee was itself of limited worth). No security or guarantees were provided for the first, fifth, sixth and seventh loan agreements. These loans were approved by the CC at meetings on the 27 June 2012, 17 October 2012, 25 March 2014, 25 April 2014, 4 August 2014, 3 September 2014 and 23 October 2014. Of those meetings, Mr Yurov chaired five out of seven. Of the two meetings that were not

chaired by Mr Yurov, the meeting on 4 August 2014 was chaired by Mr Belyaev and the meeting on 3 September 2014 was chaired by Mr Fetisov. In addition to the Yaposha CITY loans, the Bank advanced several smaller loans to other Yaposha Group companies. It perhaps goes without saying that the Shareholders' interests were not disclosed (as they should have been). There is no evidence of proper due diligence or consideration as to why they were in the best interests of the Bank (as opposed to those of the Shareholders).

1889. Between May and September 2013, the Bank entered into three credit facility agreements with Yaposha Investment Limited (YIL): (a) 20 May 2013 (RUB 300.3 million); (b) 4 June 2013 (RUB 358 million); and (c) 18 September 2013 (RUB 152 million). The loans to YIL were approved by the CC on 6 March 2013. Mr Yurov chaired the meeting. The loans were secured by way of a pledge over 1,100 shares in NRT. The loan proceeds were used for the purchase by YIL of shares in NRT from Ginza Holdings. Thus, the loan funds were being advanced by the Bank to enable one Shareholder company to purchase shares in NRT from another Shareholder company – this was all part of a "balance sheet management" scheme facilitating the individual Yaposha companies to service their loans with the Bank's own money (as is also shown in a PowerPoint presentation sent to Mr Worsley on 18 September 2013).

1890. Whilst the Shareholders in Mr Yurov's Written Closing seek to portray Yaposha as a profitable business, it is clear that there was a need for the interest obligations of the Yaposha borrowers to be funded by "balance sheet management" schemes, as opposed to out of revenue generated by the underlying restaurant business, as one would have expected had the business been truly able to support itself. The reality is shown by the contemporary documents. As early as January 2012 Mr Yurov and Mr Fetisov were copied on an email chain in which Ms Rusakova of Yaposha reported that: *"It is also obvious that the company does not have its own funds to independently finance the interest on the loans… If it does not get an overdraft, the company has no choice but to declare default…"*. Once the continuing stream of loans secured without declaration of the Shareholders' obvious conflict of interest dried up Yaposha went bust. Whilst Mr Fetisov claimed during the course of his cross-examination that Yaposha just experienced cashflow difficulties after Christmas because of seasonal trading variations and had revenues of over US$100 million there is no independent evidence of either (and of course the latter does not even mean the business was necessarily profitable), and in any event the evidence is clear – Yaposha needed a constant stream of loans to service its debt, and when they stopped it defaulted.

R.13.3 The Bank's Loss

1891. Mr Mylnikov addresses the Bank's efforts to enforce the security provided in respect of these loans, and loans to individual companies in the Yaposha Group in his evidence. Very substantial sums remain outstanding. As of 30 April 2017 (and taking all recoveries into account) the Bank was owed: (a) RUB 644,233,700 by NRT; (b) RUB 803,300,000 by YIL; (c) RUB 1,620,950,00 by Yaposha CITY and further smaller sums by the individual Yaposha companies (see generally C3/6A/5 and the Schedule to Steptoe & Johnson's 7 November 2018 letter.) I am satisfied that the sums claimed represent the Bank's recoverable loss – these are the amounts that remain outstanding out of the loans made with the approval of the Shareholders in circumstances where they were not acting in the best interests of the Bank in approving such loans. In addition due to the insolvency

of the Yaposha Group, the 19% stake in NRT that the Bank purchased from the Shareholders' company Ginza Holdings, is, I am satisfied, worthless, and that the Bank's loss is represented by the figure assessed by Mr Allen of €14,691,420.

1892. The Shareholders again make similar submissions on quantum as in relation to other Borrowers (at paragraphs 58 to 63 of Mr Yurov's Written Closing Submissions), about the Bank not having suffered any loss predicated upon the Yaposha project being a Bank project with ownership by the Bank (which I have found not to be the case), as well as similar points about funds returning to the Bank directly or via other allegedly Bank entities. For the reasons already given such points do not give rise to credits in the Shareholders' favour. Sections N.2.2 to N.2.6 are repeated. I am also satisfied that the losses claimed were caused by the Shareholders' breaches of duty in acting contrary to the Bank's best interests.

R.14 WILLOW RIVER AND RCP

R.14.1 Common Ground

1893. Willow River and RCP were beneficially owned by the Shareholders as an investment in their personal capacities. Willow River and RCP were not used for "balance sheet management".

1894. On 18 November 2010, the Bank entered into a US$81.5 million loan facility agreement with RCP and the funds were drawn down the same day.

1895. On 1 December 2010, the Bank entered into a US$31 million loan facility agreement with Willow River and the funds were drawn down on 21 December 2010.

1896. These loans were approved by the CC on 22 October 2010 chaired by Mr Yurov with Mr Fetisov also recorded as voting in favour *in absentia*, but this is not admitted by Mr Fetisov.

1897. On 8 August 2011, Mr Yurov and Mr Fetisov each received US$7,348,000 in their personal account at Bordier Bank in connection with Willow River/RCP.

1898. On 6 December 2013 (chaired by Mr Yurov with Mr Fetisov also voting in favour *in absentia*), 3 March 2014 (chaired by Mr Yurov with Mr Fetisov also voting in favour *in absentia*) and 26 November 2014 (chaired by Mr Fetisov *in absentia*), the CC approved various amendments to the Willow River and RCP loans including:

(1) extending the repayment dates to 2019 and, subsequently, to 2026 (for RCP) and 2028 (for Willow River); and
(2) releasing the Bank's pledge over 75% of the shares in Willow River and RCP.

R.14.2 Discussion

1899. The Bank does not bring any claim in respect of the Willow River and RCP transactions (although they do form part of its pleaded case). The Bank says that **t**he circumstances surrounding the loans made by the Bank to Willow River and RCP constitute admissible similar fact evidence in relation to those Borrowers where a claim is made. The three respects in which the Willow River/RCP Loans are said to reflect upon the Bank's claims are:-

(1) The Shareholders' failure to disclose their interests in Willow River ad RCP prior to the making of the Loans.

(2) The uncommercial amendments made to the loans.

(3) The transfer of the proceeds of the loans, and monies generated the transactions, into the personal bank accounts of the Shareholders (and/or their respective wives and/or corporate vehicles).

1900. I am satisfied that each of the above has been demonstrated on the evidence before me, and that the same supports the Bank's case in relation to the Shareholders' practice of not disclosing where they had a financial interest, of approving uncommercial amendments to existing loans, and concealing the transfer of funds to the Shareholders or to companies beneficially owned by them.

1901. In contrast to other Borrowers, Mr Fetisov takes the lead in his Closing Submissions in relation to WR/RCP whilst Mr Yurov adopts his submissions. Mr Yurov submits that far from supporting the Bank's claim they go to undermine it. It is submitted that the making of the Loans was very much in the interests of the Bank in that the Shareholders ensured that the Bank received full payment for distressed CLNs (in circumstances where they could, it is said, fairly have paid the Bank what is said to be the going rate of 34%), the Loans were not on "soft terms" but were commercial, the Loans were very well secured, and the Bank received substantial interest on the Loans each year.

1902. Mr Yurov's submissions rather miss the point. There is no doubt that Willow River and RCP were different – they related to valuable Russian retail properties leased to genuine third party businesses including Billa, a German owned supermarket chain operating in Central and Eastern Europe including Russia who paid significant sums in rent. The key point, however, is that the *modus operandi* of the Shareholders was similar to the other projects and other borrowings, with WR/RCP set up, administered and operated in the same way as the other offshore companies. WR/RCP (in contrast to other projects) were successful and made the Shareholders rich (albeit it was the Bank's money being used to make them rich), and they chose to receive the rewards in a manner designed to conceal the benefits they received. They also approved amendments which were self-evidently in their interest rather than the best interests of the Bank, all the more so as the Bank's collapse became imminent.

1903. The Shareholders were also remarkably coy about WR/RCP being set up and operated for their benefit (consistent with the stance in relation to the offshore network generally). For example, Mr Yurov, in evidence, claimed to have little recollection of the specifics of the transactions, nor as to how much rent the portfolio produced. He and the other Shareholders clearly should have declared their interest in WR/RCP before approving loans (see section M.8.4) and equally clearly did not do so. The Shareholders' coyness is, however, understandable – they had employed exactly the same techniques with WR/RCP as with the other companies beneficially owned by them to conceal their interest – the only difference is that on this occasion the project had come good, and so they reaped the rewards (via a remarkably circuitous route for which there would have been no need had they not concealed their beneficial ownership). The reality was that, as with the other offshore companies, there was nothing in the documentation on the Bank's files revealing their ownership, and as already addressed in Section I.3.3 positive lies had been told to the CBR as to beneficial ownership. To the very end, Mr Yurov would not accept that telling the CBR that Mr Laing, who ran a travel agency, was the beneficial owner of Willow River was a lie.

1904. Turing first to the acquisition of the Portfolio, this can be broken down into four stages. The first involved the lending of US$125.5 million to RTM. The Portfolio was initially owned by a Russian group known as RTM. In March 2008, the Bank lent RTM US$125.5 million through the issue of CLNs via TIBE and CRR BV. RTM's liabilities were secured on the Portfolio, valued as of 30 November 2007 at US$185 million. Between 2008 and

2009, the Bank sold 1,133 CLNs into the market, retaining the remaining 267 CLNs. The second stage was the acquisition of defaulted CLNs when, in 2009, RTM defaulted and TIBE re-acquired most of the now-distressed CLNs with further loans from the Bank, including via Oil Group. TIBE then transferred the CLNs to Sapkont (another Shareholder company) and Sapkont transferred them to Costells (another Shareholder Company as Mr Fetisov admitted in cross-examination), along with US$12 million in cash.

1905. The position therefore, as of August 2010 was that Costells, a Shareholder company held the majority of RTM's debt, which was secured on the Portfolio and which had been purchased using loans made by the Bank to other Shareholder companies – indeed this process was accurately described by Mr Fetisov in his first witness statement where he stated, *"Mr Yurov, Mr Belyaev and I decided that we would instead attempt to acquire a controlling majority of the RTM bonds ourselves. Between 2009 and 2010 we therefore set out about buying them up through corporate vehicles (the precise details of which I cannot recall). We did so using loans provided on commercial terms by the Bank."* Such an approach was, it will be recognised, similar to (and also involved the use of Oil Group) in relation to the acquisition of the Amelside Comnet CLNs in respect of the Glukhovo (StroyEcologiya) project.

1906. The third stage was that the acquisition costs were refinanced with further loans to Shareholder companies. Whilst it is not clear precisely how the refinancing took place (and Mr Fetisov challenges various assumptions made by Mr Allen) it appears that the loans from the Bank used to finance the purchase of the CLNs by TIBE and Oil Group were then in turn partly re-financed using further loans to other Shareholder companies, including (says the Bank) Jermanta and Business Group, Willow River and RCP themselves and StroyEcologiya. It matters not whether the precise approach adopted can be established.

1907. The final stage was that WR/RCP acquired the Portfolio using more loans from the Bank. By October 2010, Costells and RTM had established Vorsa (owned as to 5% and 95% respectively), which was to become the owner of the Portfolio. On 11 October, Costells agreed to purchase RTM's 95% stake in Vorsa in return for the 1,071 CLNs and US$12 million (from the Bank) and RTM then transferred the Portfolio to Vorsa. In December 2010, Vorsa sold the Portfolio to WR/RCP for US$112.5 million, financed by loans from the Bank secured by: (a) mortgages over the Portfolio; and (b) a pledge of 75% of the shares in WR/RCP. The Shareholders thereby became the ultimate beneficial owners of the Portfolio and WR/RCP became entitled to the rental income therefrom (which averaged US$22 million per year between 2011 and 2013 and which was used in part to service the interest on the WR/RCP Loans).

1908. The WR/RCP Loans, which were expressed to be repayable in May/June 2014, were initially approved by the CC *in absentia* in a vote in which Mr Yurov and Mr Fetisov participated on 22 October 2010. Whilst there is no pleaded case in this regard I simply note in passing that there would not appear to have been any urgency to hold a vote rather than a meeting and there is no reference to (mandatory) due diligence. What is on any view clear is that when Mr Yurov and Mr Fetisov voted in favour of the loans they did not disclose their interests in WR/RCP as they clearly should have done given they were, in effect, approving loans to companies beneficially owned by them.

1909. In terms of the ownership structure, WR/RCP employed the same techniques as with other offshore companies to conceal the Shareholders' beneficial interest. Mr Worsley purported to be the UBO of RCP, whilst Mr Laing was the "nominee UBO" of WR (through the usual convoluted series of offshore companies and trusts). Mr Worsley and Mr Laing, of course, actually held their interests on behalf of the Shareholders, as did the other "nominee UBOs". In common with the other offshore companies, the precise ownership structure of WR/RCP changed over time and the precise details do not matter. However, given that WR/RCP were producing money it was necessary to create a route to pay money to the Shareholders personally. This was done using Kuri Hills and private Swiss bank accounts that were set up for the Shareholders with Bordier Bank in Switzerland.

1910. In relation to Bordier, Mr Worsley liaised with Mr Doubrovkine (who was a Russian speaker at Bordier) through whom he had obtained Swiss bank accounts for each of the Shareholders. AML checks would be required when rental payments were transferred up to and through Kuri Hills' account using (sham) loan agreements. In this context, on 11 February 2013, Mr Worsley described the general structure (rental payments made to a Russian management company, then paid to Cypriot companies and then to their BVI owners; and finally, as a "loan" to Kuri Hills) and asked what documentation would be required. Mr Worsley then proceeded to collate the relevant documentation (including the *"full KYC chain up to Laing and myself for RCP and Willow River")* from Ms Bronina of Columba, and forwarded it on to Bordier (including a Deed of Trust dated 25 October 2012 whereby Nicholas Laing (one of the "nominee UBOs") declared that he was holding the shares in Ampney on trust for Brora, Brora being at the top of the Shareholders' ownership of the offshore network).

1911. That the Shareholders knew perfectly well that they were the owners of WR/RCP is also clear from their involvement in an attempted sale of WR/RCP to Billa (one of the lessees). Their plan was to sell the properties on to Billa and there were extensive negotiations with Billa over an extended period of time. Mr Fetisov was in charge of this process for the Shareholders; and Mr Worsley undertook negotiations on their behalf. Not content with reaping the rewards of any such sale the Shareholders wished to ring-fence themselves on any associated liability on sale warranties, and so the proposed sale was going to involve interposing the Bank between WR/RCP and the purchasers so that the Bank would be the party giving the warranties to the purchasers and thereby taking the financial risk associated with the same – *"("Summary: 1) NBT will be the seller to you, and will stand behind the warranties…"*

1912. Turning to the receipt of moneys by the Shareholders over the period from December 2011 through to the time after the collapse of the Bank. Out of the US$112.5 million lent in November/December 2010 by the Bank to WR/RCP, as already noted, these were first transferred to Vorsa, and then (as to $90 million) to Costells being supposed "dividends". Some US$69.5 million was transferred on to Sapkont and this left Costells with US$20.5 million. From the balance, on 29 March 2011 Costells "lent" US$15 million to TIBE, which passed through three different bank accounts in its name, before being "repaid" to Costells in July 2011. I am satisfied that the Costells-TIBE loan was not a real loan and was an obvious fake or sham designed to paper-up and disguise the movements of this money (it was expressed to have a term of one year at 5.75% p.a., with no security and no stated purpose, but in fact the sum "repaid" (after just 3 months) was a larger sum than the interest provided for in the document).

1913. On the same day, Costells transferred US$21.6 million on to Seilwood (another Shareholder company, with Mr Chadwick as "nominee UBO"), pursuant to a purported "Netting Agreement" dated 21 July 2011, which purported to provide for payment of such balance after setting-off sums due between Costells and Seilwood pursuant to (further purported -i.e. fake) "Securities Sale and Purchase" agreements dated 23 May 2011 and 11 July 2011. The reality is that drafts of all three agreements were prepared on 21 July 2011, backdated as necessary, and sent by email by Mr Grechishnikov to Mr Worsley with a request that he *"please sign attached documents and send scan copies".* Mr Worsley then forwarded them to Mr Vassiliades to be executed, who returned them duly signed and sealed on 25 July (not balking at the back-dating and the fact that the agreements were obviously faked).

1914. Seilwood then transferred the US$21.6 million on to Selsea (another company in the offshore network) on 1 and 4 August 2011, pursuant to more fake "loan" agreements, prepared by Mr Worsley himself, and signed by him on behalf of Selsea. US$20.6 million was then transferred from Selsea to Kuri Hills' account at Bordier a few days later. This just seems to have been regarded as a convenient (concealed) way of transferring money to Kuri Hills (ostensibly owned and controlled by Mr Worsley) and then on to the Shareholders' Swiss Bank accounts. Indeed, upon receipt, Mr Worsley immediately moved US$7.3 million, to Mr Fetisov, US$7.3 million, to Mr Yurov and US$5.9 million, to Mr Belyaev, in each case to their own private bank accounts at Bordier. The only possible purpose for this elaborate series of transfers is to conceal the very fact that the monies were going to the Shareholders personally. As the rental income received on the bank accounts of WR/RCP significantly exceeded the amount required to service the WR/RCP Loans, Mr Worsley regularly swept surplus cash from those companies, via Kuri Hills, to the Shareholders' Swiss bank accounts at Bordier. This whole approach is redolent, I am satisfied, with ensuring that the Shareholders' ownership of, and benefit from, WR/RCP was concealed. I am also satisfied that the Shareholders cannot but have known about receipt of these moneys and their origin (indeed Mr Worsley would inform Mr Yurov of these transfers by text or WhatsApp).

1915. Whilst the language of loans was used to transfer the moneys, the reality is that this was simply a method by which moneys were transferred to Shareholders as their "dividends". Thus, for example, on 12 and 15 December 2011, RCP purported to "loan" Kuri Hills US$1.09 million and US$1.25 million respectively. In this regard, Mr Worsley had told Mr Korneyev of Columba on 21 November 2011, *"I need loan agreements between Kuri Hills and RCP and Kuri Hills and Wave. Marat [Iskandyrov] will give you the details. The total is about 50M Rub. Please revert to me with the details, then make the agreements this morning".* Mr Korneyev replied that he had been provided with the details of the amounts and rates: a US$1.09 million loan from Wave to Kuri Hills at 5.25% for three years; and US$548,000 from RCP to Kuri Hills at 5.75% for three years. Mr Worsley agreed, asking that the agreements be drawn up as soon as possible – but interposing a further Shareholder company so that *"RCP and Wave will lend to Seilwood today. Seilwood will then lend to Kuri tomorrow or Wednesday. Thus you will also need the Seilwood to Kuri loan docs…"* {D2/6/1}. These were prepared accordingly. In the event direct "loans" between RCP and Kuri Hills were drawn up instead. These were purely notional agreements - a signed version of the first was sent to Piraeus Bank on 12 December 2011 and the further "agreement" was signed by Mr Vassiliades on 15 December. Each was for three years with no security, interest payable only at the end of

the term, and for the stated purpose of *"replenishment of… operating capital, granting of loans, acquisition of securities…"*.

1916. Mr Worsley's own spreadsheet of Kuri Hills' payments (as sent to the Shareholders' Swiss lawyer, Me Bonnant, and to Mr Yurov's and Mr Fetisov's private email accounts on 7 September 2015) (the "Kuri Hills Spreadsheet") shows: (a) the 12 December payment of US$1.09 million being transferred from Kuri Hills in two equal halves of US$503,500; and (b) the 15 December payment of US$1.25 million being mixed with another incoming payment before being split three ways (as to US$1 million, US$593,384 and US$593,384) – i.e. split between the three Shareholders before being transferred into their private Swiss bank accounts with Bordier. This is also evidenced by a text message sent by Mr Worsley to Mr Yurov on 22 December: *"By the way I sent u over 500k two days ago"*; and Mr Fetisov's analysis of his Bordier statements (prepared for/by Me Bonnant: the "Bonnant Analysis"), showing US$503,500 being transferred from Kuri Hills to Mr Fetisov's personal account on 15 December 2011; with another US$593,384 on 20 December 2011.

1917. In February 2013 there was a RUB 120 million payment by RCP to Lotus River, followed by a "loan" by Lotus River to Kuri Hills of RUB 119.99 million, a transfer of RUB 30 million by WR to Ampney, and a "loan" by Ampney of RUB 29.99 million to Kuri Hills, all between 14 and 18 February 2013. Mr Korneyev of Columba procured Mr Vassiliades' signatures to these "loans" on 15 February 2013, Ms Dadikina of Columba having organised the transfers through Piraeus Bank the previous day (these purported "loans" were for three years, with no interest payable until maturity, and with no security), and according to the Kuri Hills Spreadsheet, the Shareholders' shares of this money were accumulated and distributed later, along with various other sums (including payments in July 2013 referred to below).

1918. On 10 May 2013, RCP declared a dividend for 2012 of RUB 57.3 million, to be paid to Lotus River and stated to be derived from the 12 December 2011 RCP "loan" to Kuri Hills in the sum of US$1.09 million (along with the "value" of two shares in a shell company called Nelbay Enterprises, totalling RUB 20 million). A Deed of Assignment was executed on 31 May 2013, purporting to assign to Lotus River RCP's rights to the 12 December 2011 "loan" to Kuri Hills. There was the usual three way split to Shareholders on 15 May 2013. In the case of Mr Belyaev, a new account for him at Bordier, in the name of a BVI vehicle company, Flaxland Holdings Ltd, had just been opened in May 2013, as appears from Mr Worsley's email to Bordier.

1919. A similar scheme was employed in relation to transfers by RCP/WR of RUB 35 million and RUB 15 million respectively to Kuri Hills between 31 July and 2 August 2013. Thus, by email to Mr Doubrovkine on 1 August 2013 Mr Worsley sent copies of purported declarations of dividends by WR in favour of Ampney (RUB 15 million) and RCP in favour of Lotus River (RUB 35 million) dated 24 July 2013 and "loan" agreements dated 26 July 2013 showing Lotus River and Ampney "lending" the funds to Kuri Hills until 26 July 2016 (with no security and no instalments of interest due before "maturity"). The loan agreements were sent to Mr Vassiliades for signing on 29 July 2013 and returned the same day, whilst the following day Columba instructed Piraeus Bank to effect the chains of transfers.

1920. During August 2013, sums of US$678,000 and US$600,000 were received into Mr Fetisov's newly-opened account at Bordier in the name of his own new BVI company, Enton (held in trust for him by Boston). In fact Boston queried the origin of these receipts but Mr Doubrovkine of Bordier played a straight bat back stating*: "I believe that you should discuss these matters with the beneficial owners. As a bank we have no legal obligation to answer such questions."*

1921. In January 2014 there were sums transferred of RUB 174 million and RUB 54 million from RCP and WR respectively. Mr Worsley and his team at Columba arranged the transfers, initially planned to be by way of: (1) dividends to Lotus River and Ampney; followed by (2) "share rights purchase agreements" (SRPAs) between Lotus River/Ampney and Kuri Hills in relation to shares in (shell) companies incorporated in the BVI and the Seychelles (as is apparent from the plan for the scheme set out in Mr Korneyev's email dated 27 January 2014 and the "supporting paperwork for the payments" attached to Mr Korneyev's email of 28 January (the SRPAs signed by Mr Worsley for both 'purchaser' and 'seller')).

1922. However, Piraeus Bank's compliance department raised a flag about the value of the shell companies supposedly the subject of the SRPAs (they were obviously worthless), in response to which Mr Worsley candidly replied to a Ms Sycopetriti, "*We decided to use these companies rather than loans. However, there is zero tax implication in either way. Do you prefer that Ampney and Lotus make loans to Kuri?"* It is clear that the latter course was preferred so the next day (29 January) Columba had prepared and sent to Piraeus Bank purported "loan" agreements instead (again signed by Mr Worsley himself for both "lender" and "borrower"). The Kuri Hills Spreadsheet shows these moneys being split three ways and transferred out of Kuri Hills on 3 February 2014, as to US$2.2 million, US$2.2 million and US$1.76 million (in a ratio of approximately 7:7:6, which appears to be the usual way the Kuri Hills moneys were split). Again this was clearly a sharing out to the Shareholders.

1923. In April/May 2014 there were transfers to Kuri Hills of RUB 105 million and RUB 25 million between 28 April and 6 May. The "dividends" followed by "loans" was done by Mr Worsley "*in 30 minutes*" on 25 April. Per the Kuri Hills Spreadsheet these sums were converted to US$3.35 million before being split three ways: first as to US$500,000 each on 6 May 2014; and then as to US$695,000, US$695,000 and US$456,000 on 12 May (an overall 7:7:6 split overall). The Bonnant Analysis confirms that US$500,000 and US$695,000 were the sums received on Mr Fetisov's account.

1924. Then on 22 and 23 September 2014 there were transfers of RUB 28 million and RUB 12 million from RCP and WR respectively to Kuri Hills. In this regard Mr Worsley stated *"We need a solution to send the money to the parent companies. It does not 'have' to be a dividend. It can be any other tax free mechanism. All pls speak and find a solution ASAP*." This illustrates the obvious point that these elaborate (sham) methods were being used by the Shareholders not only to render their beneficial ownership and receipt of moneys opaque, but also to conceal any taxable benefit. In the event the transfers were done using "dividends" and "loans". The Kuri Hills Spreadsheet shows these amounts being converted into US$903,000 and US$75,000 before being distributed three ways: first as to US$320,000, US$320,000 and US$255,000 on 23 September 2014; and then as to US$27,000, US$27,000 and US$21,000 on 24 September (again a 7:7:6 split).

1925. Lastly, there were transfers of RUB 28 million and RUB 12 million from RCP and WR respectively to Kuri Hills between 17 and 22 December 2014. These were characterised as "loans" from RCP and WR to their respective parents (Lotus River and Ampney), supposedly for "*business expansion of the Borrower*", followed by further "loans" to Kuri Hills. As per the Kuri Hills Spreadsheet, Mr Worsley split this 7:7:6 and transferred the money from Kuri Hills to the Shareholders' private Swiss bank accounts. The Bonnant Analysis records Mr Fetisov receiving his shares of US$851,000 and US$212,000 on 17 and 22 December 2014 respectively only days before the Bank collapsed.

1926. It is also clear that it was recognised that remaining monies had to be moved out of WR/RCP following the Bank's collapse and it would be risky doing that through the Bank. Thus on 17 February 2015 (four days after the Shareholders had met Mr Popkov and others in London), Mr Worsley sent a text message to Mr Yurov stating *"Can U talk to Nikolay and tell him to tell Nazarov to empty Billa asap tomorrow…? It's the only solution…"* Mr Yurov's responded stating, *"Just off the phone with Mr F… He was on the phone with Nazarov, who told him that RCP and other company still don't have any other active accounts but with NBT… Can you please clear that with Mr F cause he told me in January that you told him that new accounts not in NBT are open and active…"*. The obvious plan being to get remaining monies away from the Bank and into fresh accounts.

1927. What the above series of transfers shows is not only that the Shareholders benefitted handsomely out of their (concealed) beneficial interest in WR/RCP, but that they went about their dealings with such entities, with the assistance of Mr Worsley, in the same opaque manner as with other offshore entities, and with a view to concealing their ultimate beneficial ownership, and ultimate receipt of very large sums from those entities (even if, as ultimate beneficial owners, they were potentially entitled to the same). Whilst they may have had ulterior (tax) motives for their *modus operandi* in relation to WR/RCP, it was nevertheless at one with the *modus operandi* of other entities beneficially owned by them in the offshore network, and as such supports the Bank's case in that regard.

1928. Turning to the amendments to the loans. Mr Fetisov submits that there was nothing uncommercial or contrary to the Bank's interests about those amendments. However, that submission does not bear analysis when the amendments themselves are considered. It is clear that those amendments were very much in the best interests of the Shareholders rather than the best interests of the Bank, and overlaying all such amendments was the Shareholders' failure to declare their own interest and the conflict of interest that that created.

1929. On 21 November 2013, Mr Worsley wrote to Mr Postnov, copied to Ms Krivosheeva, as follows:-

> "All,
> It was discussed with NBT that prior to the year end, we would agree on new loan structures for RCP and Willow River.
> <u>They need to be non recourse, and long term.</u>
> <u>This is a very urgent topic.</u>
> How shall we coordinate this please?
> I have CC'd Vlad, from my legal team, who can assist as so required"
> (emphasis added)

Mr Postnov replied:-

> "We have prepared the drafts for amendments to credit documentation.
> They extend the terms of the loans till year 2018 and eliminate most of the options available for the lender to accelerate debt repayment as well as the right to change interest rate.
> You or your colleagues may review the documents attached.
> We are looking for final approval from Nikolay Fetisov to proceed with further steps." (emphasis added)

1930. Mr Postnov then forwarded the message to Mr Fetisov, with the sign-off: *"We should do this ASAP"* (emphasis added). This is clearly Mr Postnov, not acting as a member of the CC in the best interests of the Bank, but in the best interest of the Shareholders – it is the Shareholders as the beneficial owners that benefitted from an extension *"of the loans till year 2018 and eliminate most of the options available for the lender to accelerate debt repayment as well as the right to change interest rate".* Each of these points is not in the best interest of the lender, but self-evidently benefits the Borrower. Mr Fetisov's answer was evasive and unbelievable saying that he did not understand what was meant by the reference to *"eliminat[ing] most of the options for the lender to accelerate debt repayment"* and that the proposed changes were merely *"bringing [the loans] in line with the market practice"* (for which there is no independent evidence, and would not be appropriate without articulated justification – of which there was none).

1931. It is apparent that Mr Fetisov did give his approval, because on 3 December 2013, Mr Worsley sent a (contrived) email to Mr Postnov and Mr Fetisov, stating:

> "I understand that National Bank Trust has agreed to extend and modify the loan terms for the loan that I have for RCP, and also for the loan that Nick Laing has for Willow River. I am keen to have the new agreements finalised by year end. Might this be possible please?" (emphasis added)

1932. Mr Postnov replied promptly in an equally contrived reply (copied to Mr Fetisov):-

> "Hereby I confirm the Bank highly appreciates the constructive and mutually beneficial cooperation it built with Retail Chain Property and Willow River.
> We intent to extend the loans provided to the companies and amend its terms as it was agreed. The texts of the agreements are on the final stage of the intra-bank review.
> I have no doubt it will be passed for signing before the date you mention so the deals will be closed by the year end."

which Mr Worsley in turn acknowledged, again copying Mr Fetisov, and so completing the charade.

1933. As Mr Fetisov admits that he and the other Shareholders were the beneficial owners of WR/RCP, he cannot but have known that Mr Worsley's email (and his reference to Mr Laing) was deliberately deceptive. I am satisfied that the request for an extension must have originated from the Shareholders as beneficial owners – the purpose of which was clearly to push out the payment obligation for as long as possible – for their benefit but not that of the Bank. There was, of course, no disclosure of their personal interest.

1934. Only 3 days later, the CC chaired by Mr Yurov and including Mr Fetisov, voted *in absentia* in favour of amendments to the loans to Willow River including to extend them to May/June 2019; to defer half of the interest thereafter falling due until the end of the loan period (i.e. halving the on-going loan servicing costs); and permitting the borrowers to take a six-month interest payment holiday – all points to the benefit of the borrower (and the detriment of the lender), and as always there was no disclosure of the Shareholders' interest. There was also no justification attempted as to why any of this was in the Bank's best interests (it clearly was not) or even why there was any urgency (from the Bank's perspective) that required an *in absentia* vote. There is no suggestion of any due diligence.

1935. Mr Fetisov's attempts to justify the amendments on the basis that the Bank was still *"over-secured"* and that it was *"absolutely normal"* to extend loans, *"the banks are fighting for clients like RCP/Willow River to lend to them money, securely at interest rate and steady cashflow. That's absolutely in the interest of the Bank"* does not begin to justify the amendments which were solely, and clearly, only in the interests of the Shareholders to the detriment of the Bank.

1936. Further amendments to the WR/RCP loans came before the CC on 3 March 2014, which was again held *in absentia* (again for no obvious reason) under the chairmanship of Mr Yurov and with the participation of Mr Fetisov. Again, the changes (which involved converting the currency of US$ loans into RUB, applying a rate of 7%, and deferring the requirement to pay half of that interest to the end of the loan period) were approved without disclosure of the Shareholders' interests and were clearly in the Shareholders' best interests rather than those of the Bank. There was no attempt to justify the amendments from the Bank's perspective. Mr Fetisov's attempted justification in his Defence makes no sense and is no justification:-

> "…These amendments reduced the risk for both the Bank and Willow River/RCP by seeking to ensure that the lease income would be sufficient to meet the loan repayments irrespective of any volatility in the USD/RUB exchange rate. The amendments were therefore in the best interests of the Bank as well as Willow River/RCP."

1937. There was no *"risk… for the Bank"* in the lease income not being sufficient to meet the loan repayments even if there was volatility in the exchange rate. As is readily apparent, any lease payments were very much less than the handsome profits that Shareholders were taking for themselves year on year. Furthermore in times of volatility it would, self-evidently, be in the Bank's best interest to be paid in hard currency. It also ignores the fact (strongly relied upon by the Shareholders) that the Bank had security worth very much more than the amounts outstanding. This was, and was obviously, nothing other than the softening of the loan terms for the benefit of the borrower (and so the Shareholders) as a result of which there was an obvious conflict of interest. To suggest otherwise is as brazen as it is misconceived.

1938. Then on 17 November 2014, Mr Iskandyrov requested Columba (copied to Mr Worsley) to arrange for the directors of WR/RCP to request a further extension to the maturity of the WR/RCP loans. The draft requests were prepared by the Bank itself, in the

form of Mr Buyanovksy, and amended versions were circulated later that day. These included:

> " …Having examined the results and forecasts of our companies' business, we consider it to be expedient to abandon our original plans to sell our items of property and to concentrate on the development of this project in the long term…
>
> …Long-term and fruitful cooperation with your respected bank allows us to invite National Bank TRUST as a partner in the development of this project, and we propose that you conclude a long-term contract to provide funding on pledge of the items of property belonging to us…"

1939. The very fact that the Bank was drafting this correspondence is, in and of itself, bizarre, were the relationship a genuine one of lender and borrower, but of course it was not – senior bank officials were doing the Shareholders' bidding, and acting in the best interest of the Shareholders rather than those of the Bank. Mr Fetisov, when cross-examined on the subject, could offer no coherent explanation why a lender would prepare correspondence purporting to be addressed to itself.

1940. The letters had been executed by the nominee directors by 19 November and on 26 November 2014, Mr Fetisov voted in a further *in absentia* CC resolution which approved various changes, including the extension of the RCP loan to December 2026 and the Willow River loan to December 2027, the (continued) deferral of half of the interest to the end of the loan period, and the termination of the pledge in favour of the Bank over the shares in Willow River and RCP. The consequence of the release of the pledge (benefitting only the Shareholders) was that the shares in WR/RCP could be transferred without the Bank's knowledge or consent. Indeed this was what the Shareholders sought to do in 2015 through the proposed sale to the PhosAgro group owned by the Guriev family. The Shareholders were only successfully prevented from doing so by an injunction granted by Burton J on the Bank's application in late January 2016 once this scheme had been revealed by the disclosure of documents by Mr Worsley in late 2015. It is clear that this was not an arm's length commercial sale but one designed to put WR/RCT beyond the Bank's reach, with the buyers' English solicitors (Brown Rudnick) stating that *"[t]his is not a normal commercial deal and that seems to be lost on their friend at Mishcon [the Shareholders' then English solicitors]"* {D6/155.1/1}. Mr Yurov's own description of the transaction was, "*not at all commercial for us, but one-sided",* involving the Shareholders *"giv[ing] 100% of a company with a rough value of 170 million dollars (including credit) for five years(!!!)…"*.

1941. The Shareholders' suggestion that the extension of the loans and the release of the pledge over the shares was in the Bank's best interests is obviously wrong and the purported explanation for these decisions in Mr Fetisov's Defence is no better. It is pleaded that:

> "(2) The Bank (with the support of Messrs Yurov, Belyaev and Fetisov) was seeking to procure the early repayment by WR and RCP of all or part of the WR/RCP loans so as to improve the Bank's liquidity given the difficulties experienced by the Bank as a result of the Russian economic crisis in late 2014.
> …
> (4) In order to facilitate and expedite a potential refinancing, the Bank arranged for the pledge… to be released…

(5) Even if (which is not admitted) the release of the pledge was unusual, it was justified and in the Bank's best interests in the circumstances prevailing in Dec 14 viz. (a) the need to obtain a voluntary early repayment of the WR/RCP loans, as quickly as possible, to assist with the liquidity issues facing the Bank…"

1942. A "*need to obtain a voluntary early repayment*" of the loans and an extension of more than twelve years into the future are uneasy bedfellows if not irreconcilable. Equally the alleged desire on the part of the Bank, *"with the support of"* the Shareholders, for such a sale is simply incompatible with the letters drafted by the Bank itself, but supposedly emanating from Willow River and RCP, whereby the borrowers told the Bank that they considered it *"to be expedient to abandon our original plans to sell our items of property and to concentrate on the development of this project in the long term",* and proposing to the Bank *"that you conclude a long-term contract to provide funding*…". The amendments were clearly not in the best interests of the Bank as the Shareholders well knew, and their attempts to justify the same are risible and only go to – the highlight why the amendments were in the best interests of the Shareholders and were not in the best interests of the Bank.

1943. Contrary to Mr Fetisov's Written Closing Submissions there was no need to find an alternative to immediate repayment – this was, in a very real sense kicking the loan obligations off into the long grass (and amortisation did not change that), and for the sole benefit of the Shareholders and most certainly was not (as Mr Fetisov alleges at page 146 of his Written Closing Submissions)*, "a proper and bona fide response by the management of the Bank… to the particular circumstances which presented themselves in November 2014"*, and the features that Mr Fetisov relies on (including amortisation and increased interest rate) do not begin to justify the amendments made which were, overall, in the Shareholders' interests and to the detriment of the Bank.

1944. In the above circumstances the Shareholders' failure to disclose their interests in Willow River and RCP prior to the making of the Loans, the uncommercial amendments made to the loans, and the transfer of the proceeds of the loans, and monies generated by the transactions, through a myriad of offshore companies designed to conceal the Shareholders' beneficial ownership and receipt of funds into their private Swiss bank accounts, all go to support the Bank's case.

S. CONCLUSION

1945. In the above circumstances the Bank's claims against the Defendants succeed in the respects identified herein. I trust the parties will be able to agree an Order, and any matters consequential on my judgment. In the absence of agreement, I will hear further argument on the handing down of this judgment.