Neutral Citation Number: [2014] EWHC 271 (Comm)

Claim No: 2012-1105

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Commercial Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2014

Before: The Hon Mr Justice Simon

Between:

JSC VTB Bank	**Claimant**
and	
(1) Pavel Valerjevich Skurikhin **(2) Pikeville Investments LLP** **(3) Perchwell Holdings LLP**	**Defendants**

Mr Stephen Auld QC and **Mr Tim Penny** (instructed by **PCB Litigation LLP**) for the **Claimant**

Mr Graham Dunning QC and **Mr Iain Quirke** (instructed by **Messrs Fried, Frank, Harris, Shriver and Jacobson LLP**) for the **First Defendant**

Hearing dates: 18-19 December 2012

Judgment Approved by the court for handing down

Mr Justice Simon:

Introduction

1. This is the Claimant's application for summary judgment under CPR Part 24.2 against the First Defendant, Mr Skurikhin.

2. The Claimant (VTB) is the second largest bank in Russia. Mr Skurikhin is a Russian citizen, resident and domiciled in Russia. As Gloster J noted at an earlier hearing, *VTB Bank v. Skurikhin and others* [2012] WHC 3116 (Comm), at [4]:

> He is the founder and apparent controller of a group of companies called Siberian Agrarian Holding Group ('SAHO', which he established approximately 12 [now, 13] years ago. SAHO is a large group with a complex corporate structure. It operates in a variety of agricultural businesses including: pesticide production, grain production and processing, bread baking ... and the manufacture of bread making machinery.

SAHO also owns large tracts of agricultural land.

3. During the period 2007-2009, VTB made loans to 9 companies within SAHO ('the SAHO group borrowers') which were secured by guarantees from Mr Skurikhin. Both the loan agreements and the guarantees were subject to Russian law and to the jurisdiction of the Russian Courts.

4. Between December 2011 and February 2012 VTB began proceedings against the SAHO group borrowers for sums due under the loan agreements, and subsequently during 2012 against Mr Skurikhin under the guarantees.

5. Before any final and conclusive judgments had been obtained in the Russian Courts, VTB made a 'without notice' application for a freezing order in the Commercial Court against Mr Skurikhin and 2 English Limited Liability Partnerships (the Second and Third Defendants). On 16 August 2013, Hamblen J granted a domestic freezing order against Mr Skurikhin and a world-wide freezing order in support of the Russian proceedings against the 2nd and 3rd Defendants, pursuant to s. 25 of the Civil Jurisdiction and Judgments Act 1982. He also made disclosure orders. On 3 and 4 October 2012 Gloster J heard various applications by VTB, and in a judgment of 8 November 2012 (see above), so far as is material to the present application, she ordered Mr Skurikhin to give further disclosure.

6. Among her reasons for making the order, she noted [27(vii)]:

> In the exercise of my discretion I also take into account the fact that Mr Skurikhin has not in his evidence to date suggested that either he, or the relevant SAHO companies has any defence to VTB's claims under the guarantees or loans respectively. When asked during the course of argument what, in headline terms, were Mr Skurikhin's defences to the guarantee claims, [his then counsel] said he was unable to provide any explanation as to what such defences might be ...

7. There was a further hearing before Burton J in November 2012 to decide whether the freezing orders should continue. For the purposes of that hearing, Mr Skurikhin made his first witness statement, dated 2 November 2012. Although the primary purpose of the evidence was to address the extent of his beneficial ownership of the companies in SAHO, he also referred to matters relevant to a potential defence, which it will be necessary to return to later in this judgment.

8. In his judgment dated 4 December [2012] EWHC 3916 Comm at [12], Burton J noted:

> The following is common ground or, at any rate, was not disputed before me.
>
> (i) Russian judgments can be enforced in the English courts when they are final ...

9. There were 40 loan agreements in all. VTB has secured 16 separate judgments under the guarantees against Mr Skurikhin in the Russian Courts, which it now wishes to enforce against him by way of common law action.

10. On 28 June 2013, Flaux J gave VTB permission to amend the Claim Form to include claims against Mr Skurikhin based on final and binding judgments in existence as at that date; and on 22 August 2013, Andrew Smith J gave VTB permission to issue an application for summary judgment before the service of Mr Skurikhin's Defence.

11. On 13 September VTB issued the present Part 24 application, supported by the 3rd witness statement of Alevtina Guzanova (Head of the Project Group within VTB). Her evidence was that the 16 judgments were 'final, binding and conclusive' (see §§13 and 16); and that Mr Skurikhin had never suggested that the judgments were not final binding and conclusive (see §19). She also argued that, although the Russian judgments referred to 'penalties or fines', these were in fact recoverable and enforceable contractual penalties.

12. The defence to the claim was raised for the first time, at least in broad outline, in the witness statement of Mr Michaelson (of Fried, Frank) dated 15 August 2013 at §7.

> ... this case involves an acceleration of loan commitments by state-owned bank, VTB, over a valuable, strategically important business ... It bears all the hallmarks of similar activities of other state-owned banks in the Russian Federation involving strategically important businesses with valuable assets.

13. It was not until Mr Skurikhin's 2nd witness statement (dated 21 October 2013) that his defence was put before any Court. The witness statement runs to 50 pages and 169 paragraphs, and concludes:

> For the reasons set out above, I believe that the Russian judgments were obtained against me as part of a fraudulent scheme to seize control of the SAHO group of companies by illegitimate means, in proceedings opposed to natural justice

and/or that their enforcements would be contrary to public policy.

Summary Judgement

14. CPR Part 24.2 provides:

> The court may give summary judgment against a claimant or defendant on the whole or part of a claim or on a particular issue if -
>
> (a) it considers that -
>
> ...
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.'

15. The principles which apply have been set out in many cases, are summarised in the editorial comment in the White Book Part 1 at 24.2.3 and have been stated by Lewison J in *Easyair Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], approved subsequently (among others) by Etherton LJ in *A C Ward & Son v. Caitlin (Five) limited* [2009] EWCA Civ 1098 at [24]. For the purposes of the present application it is sufficient to enumerate 10 points.

(1) The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v Hillman* [2001] 2 All ER 91, 92. A claim is 'fanciful' if it is entirely without substance, see Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [95].

(2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472.

(3) The court must avoid conducting a 'mini-trial' without disclosure and oral evidence: *Swain v Hillman* (above) at p.95. As Lord Hope observed in the *Three Rivers* case, the object of the rule is to deal with cases that are not fit for trial at all.

(4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without analysis. In some cases it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents, see *ED & F Man Liquid Products v. Patel* (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.

(5) However, the Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17].

(6) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No. 5)* [2001] EWCA Civ 550, [19].

(7) Allegations of fraud may pose particular problems in summary disposal, since they often depend, not simply on facts, but inferences which can properly drawn from the relevant facts, the surrounding circumstances and a view of the state of mind of the participants, see for example *JD Wetherspoon v Harris* [2013] EWHC 1088, Sir Terence Etherton Ch at [14].

(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

(9) The overall burden of proof remains on the claimant,

> ... to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial,

see Henderson J in *Apovodedo v Collins* [2008] EWHC 775 (Ch), at [32].

(10) So far as Part 24,2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see *Miles v Bull* [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were reasons for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), Henderson J at [55]-[56].

VTB's claim in summary

16. VTB contended that the Russian judgments which it seeks to enforce are final and conclusive judgments and were given by Courts of competent jurisdiction. In addition, Mr Skurikhin was resident and/or present in the jurisdiction in which the judgments were given, was duly served with the proceedings and submitted to the jurisdiction of the Courts in the proceedings in which the judgment was given. It followed that, subject to specific and limited defences in English law, the judgments are enforceable by claim, see *Dicey, Morris & Collins, The Conflict of Laws (2102) 15th Ed.* rules 41 and 42. Mr Auld QC submitted that, on proper analysis, none of the defences raised by Mr Skurikhin had a real prospect of success or gives rise to any other compelling reason for a trial.

The Defence case in summary

17. Although it was accepted that the Russian Judgments were, on their face, 'final, binding and conclusive', Mr Dunning QC submitted that there were five objections to enforcing these judgments which have a real prospect of succeeding at trial. First, the judgments were obtained by fraud (see rule 50 in *Dicey*). Secondly, it would be contrary to English public policy for the judgments to be enforced (see rule 51 in *Dicey*). Thirdly, they were obtained in a manner that was contrary to natural justice (see rule 52 in *Dicey*). Fourthly, there were 'compelling reasons' why this case should not be disposed of without a trial, within the meaning of Part 24.2(b). Fifthly, the Court should not enforce the judgments in so far as they included sums which represented penalties.

The law

18. A foreign judgment for a definite sum, which is final and conclusive on the merits, is enforceable by claim, and is unimpeachable (as to the matters adjudicated on) for error of law or fact, see *Dicey* rules 41 and 42.

> Closely parallel to the rule that a foreign judgment is conclusive is the rule that the defendant must take all available defences in the foreign court, and that, if he does not do so, he cannot be allowed to plead them afterwards in England (*Dicey* at 14-124)

19. There may be an exception when the evidence relied on is new and could not for that reason have been deployed in the foreign trial process, but the principle is otherwise clear: a party cannot deliberately hold back arguments which he could have taken and then seek to deploy them later. If he does so, clear and persuasive explanations must be advanced.

20. This general common law rule as to the conclusiveness of a foreign judgment is subject to four material exceptions. It may be impeached (1) for fraud, (2) on the grounds that its enforcement would be contrary to public policy, (3) if the proceedings in which the judgment was obtained were contrary to natural justice and (4) if the judgment is in respect of a fine or other penalty.

(1) Fraud

21. The common law is conveniently set out in *Dicey* at rule 50:

> A foreign judgment relied upon as such in proceedings in England, is impeachable for fraud. Such fraud may be either
>
> (1) fraud on the part of the party in whose favour the judgment is given; or
>
> (2) fraud on the part of the court pronouncing the judgment.

22. There are a number of points to note in the context of the present application.

23. First, the first aspect of the fraud exception is part of the general policy of the common law that a person should not be entitled to take advantage of his own

wrongdoing, see for example Sales J in *Gelley and others v. Shepherd and another* [2013] (CA) at [50]:

> ... an operative fraud should be taken to unravel a legal step taken on the basis of it and to override the general policy favouring finality in litigation and conclusiveness of foreign judgments, and that a person should not be permitted to take advantage of his own wrongdoing.

24. This is an application of the broad principle that 'fraud unravels all', see *HIH Casualty v Chase Manhattan Bank* [2003] UKHL 6, Lord Bingham at [15].

> It also reflects the practical basis of commercial intercourse. Once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever', *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712, per Denning LJ. Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal.

25. Secondly, fraud in this sense includes every kind of fraudulent conduct, *mala praxis* as well as *mala fides*. Thus a default judgment following threats of violence if a defendant were to attend court would give rise to a triable issue as to its enforceability, see *Jet Holdings v. Patel* [1990] 1 QB 335 (CA).

26. Thirdly, in principle, a foreign judgment can be impeached for fraud irrespective of whether newly discovered evidence is produced and irrespective of whether the fraud was alleged in the foreign proceedings, see *Owens Bank v Bracco* [1992] 2 AC 443 (HL), at p.485-6; and *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, at [109]. The party alleging the fraud can also rely on it even if it were known to him, and therefore could have been raised in the foreign proceeding, see *Syal v. Heyward* [1948] 2 KB 443 (CA) Cohen LJ at 449. However, if the fraud is not newly discovered, and could have been raised in the foreign proceedings, the Court is likely to want to know the reason why it was not.

27. Mr Dunning also drew attention to the recent case of *Royal Bank of Scotland v. Highland Financial Partners LP and others* [2013] EWCA Civ 328 and the judgment of Aikens LJ at [106] in the context of setting aside a domestic judgment on the grounds of fraud.

> The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence,

> action, statement or concealment was an operative cause of the court's decision to give the judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.

28. There was no real issue that these were the broad principles which applied.

(2) Public policy

29. Again, it was common ground that the law on the public policy exception was correctly stated in *Dicey* at rule 51.

> A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy.

30. Two points may be noted. First, the ambit of the public policy exception is not capable of precise definition. Since rules which rest on the foundation of public policy are not rules of fixed customary law, they may change (either by expansion or contraction) over time, see for example, *Maxim Nordenfelt v Nordenfelt* [1893] 1 Ch 630, Bowen LJ at 665, see also, more recently, *Blaythwayt v. Baron Cawley* [1976] AC 397, Lord Wilberforce at 426.

31. Secondly, the rule may extend to a refusal to recognise or enforce judgments which offend universal principles of morality, see *Kaufman v. Gerson* [1904] 1 KB 591, Sir Stephen Henn Collins MR at 597-598 (the enforcement of a judgement to enforce a contract, enforceable under French law: but which had been procured by means which were found to be unjust and immoral).

32. Some of the cases which were relied on as examples of the application of the public policy rule can be viewed as applications of the rules relating to Natural Justice and Penalties. There is in any event a degree of overlap.

(3) Natural Justice

33. The editors of *Dicey* set out the principle in rule 52:

> A foreign judgment may be impeached if the proceedings is which the judgment was obtained were opposed to natural justice.

34. The Court's view of what may be inconsistent with natural justice, and the related concept of 'substantial justice' emerges clearly in the judgment of Sir Nathaniel Finlay MR in *Pemberton v. Hughes* [1899] 1 Ch. 781, 790:

> If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice.

35. The focus is likely to be on the regularity of the proceedings, since it is clear that a foreign judgment cannot be impeached on the basis of the English court's view of the overall merits of the claim which led to the order, see *Dicey* at 14-163 and *Adams v Cape Industries Plc* [1990] Ch 433 at 497.

36. The Court's view of natural and substantial justice will now take into account the right to a fair trial. It was in this context that Mr Dunning referred to *Merchant International v Natsionalna* [2011] EWHC 1820 (Comm), where it was contended that a default judgment of the Ukraine courts should not be recognised because it involved a breach of the claimant's rights under article 6 of the ECHR; and that consequently its enforcement would be in breach of English law rules of public policy. At [31] David Steel J accepted the principle.

> It is well established that a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy: Dicey & Morris: The Conflict of Laws, 14 Ed. Rule 44. Accordingly, if the recognition of a foreign judgment would be contrary to the Convention, recognition will in principle be refused. Indeed, this outcome is not so much driven by considerations of public policy as by the terms of Section 6 of the HRA.

37. In *Aeroflot Russian Airlines v. Berezovsky* [2012] EWHC 3017 (Ch), Floyd LJ at [53] considered that an objection to enforcement on the basis of an infraction of article 6 was a free-standing objection rather than a species of rule 51 or 52. However, for present purposes the distinction may not matter.

(4) Penalties

38. As stated in *Dicey* at §14-022,

> The judgment must ... be for a sum other than a sum ... in respect of a fine or other penalty ... A penalty in this sense means a sum payable to the State, and not to a private claimant, so that an award of punitive or exemplary damages is not penal. But it is possible that an award of multiple damages, e.g. in an anti-trust actions, might nevertheless be regarded as penal at common law ... If the foreign judgment imposes a fine on the defendant and also orders him to pay compensation to an injured party ... the latter part of the judgment can be severed from the former and enforced in England.

39. At §14-146, under rule 51 (the public policy exception) the editors state,

> The question whether enforcement of a judgment may be refused on grounds of public policy when the judgment is for exemplary, punitive, or manifestly excessive damages remains undecided.

40. In *S.A. General Textiles v. Sun & Sand Ltd* [1978] 1 QB 279, the Court of Appeal was concerned (among other matters) with the enforceability of a sum awarded as part of a judgment of the French Court in respect of *résistance abusive*. Although the sum would not have been awarded by an English court, the Court of Appeal held that an award of damages which represented loss 'beyond mere interest on capital' should be recognised as representing damage which flowed from a party's failure to pay in accordance with its obligations, see Shaw LJ at 309E. In *Lewis v Eliades* [2004] 1 WLR 692 at [50], the Court of Appeal recognised that the *S.A. General Textiles* case was (albeit not binding on the Court) support for the proposition that the enforcement of an award of exemplary damages would not be regarded as contrary to public policy; although, on the facts, the judgment which included an award of multiple damages could not be enforced by reason of s.5(1) of the Protection of Trading Interests Act 1980.

41. The contrary argument is supported by a decision of the New South Wales Supreme Court in *Schnabel and others v. Lui and others* [2002] NSWSC 15 where Bergin J held that if damages were 'punitive' in the sense that they were imposed for the purpose of penalising a party, they would amount to a penalty even although the sums were not payable to the State. If that is right then it is open to argument that, for example, the award of exemplary damages would be unenforceable.

42. In my view the question of whether that part of a judgment represented by an unusually high rate of interest awarded by a foreign court is enforceable at Common law does not fall to be decided by the English Court's conception of the appropriate rate of interest, but rather on whether the approach of the foreign court to the award of interest runs contrary to domestic public policy. It is at least arguable that the award of a 'manifestly excessive' rate of interest would run contrary to this aspect English law public policy. The question is whether the award of interest in the Russian judgments in the present case arguably falls into that category.

The complaints underlying the Defence

43. Although it will be necessary to look at some of the points in more detail later, In summary Mr Skurikhin's case is that the present application, and the Russian Judgments which VTB is seeking to enforce, are part of a continuing illegitimate and fraudulent corporate raid by VTB against SAHO, designed to weaken it so as to enable VTB to gain control its business and assets.

44. The particular points relied on, and Mr Skurikhin's interpretation them, are set out in his 2nd witness statement, in which five complaints are made.

    (1) VTB refused offers made to repay SAHO's debt, including an offer made by another Russian bank (RSHB) to repay the outstanding debt in full (§§149-157).

(2) VTB also refused to recover SAHO's indebtedness by realising assets which had been mortgaged by SAHO, as security for the loans. Those (it is said) are worth around twice the value of the outstanding debt (§§158-160).

(3) VTB misled SAHO into pledging very substantial assets in VTB's favour, on the promise of entering into a restructuring with the Ministry of Finance State Guarantee scheme; and, when VTB pulled out of that restructuring (for no good reason), it refused to release the pledged assets. It is said that there is no legitimate basis whatsoever for VTB retaining those pledged assets; and SAHO's repeated requests for them to be released have been ignored or met by outright refusals. This has left SAHO with no unencumbered assets and no way of raising alternative finance (§§93-117).

(4) VTB refused to use independent valuations of the assets pledged to it, and instead purported to rely on internal valuations which vastly understated the value of the assets, in some cases by as much as 90%. In circumstances where (i) all the other banks were willing to use, and have used, the independent valuations, and (ii) VTB used independent valuations (and, indeed, the same valuation companies) for loans taken out initially in 2005, this conduct was fraudulent and dishonest (§§53-92).

(5) VTB applied punitive rates of interest in respect of SAHO's loans, increasing those rates from around 14% to 23% (far in excess of the rates charged by other banks lending to SAHO). In the period July 2008 to June 2010 alone, SAHO was forced to pay in interest a sum equal to almost 40% of the principal (§§29-52).

45. Mr Skurikhin's case is that these matters demonstrate VTB's ulterior intent, which was to use the legal proceedings in Russia ostensibly to vindicate its contractual rights, but in reality as part of an illegitimate and fraudulent corporate raid against SAHO, with a view to taking over the assets of the group, in particular its holdings of land. His reasons for not raising these points earlier are set out §11 of his second witness statement.

> That VTB would succeed in the Russian proceedings was a foregone conclusion, since there was no way that I could put forward a full defence. It is impossible for an entrepreneur like me to defend himself against a state-owned bank like VTB. It is not an exaggeration to say that, had I done so, both my commercial livelihood and my personal wellbeing would have been in very serious danger.

46. The five points, and the conclusion drawn from them, are denied by VTB in the 4th witness statement of Ms Guzanova.

(1) SAHO had banked with at least 4 other banks, and the VTB loans amounted to only 9% of the group's total borrowings. As a minority lender it is difficult to see how VTB's conduct alone could have had the effect on SAHO's business which Mr Skurikhin alleges (§§19-20).

(2) The interest rates reflected SAHO's financial position. It was in default of its loan obligations, and the interest rates charged were less than the contractual

default rates which could have been imposed (§§21-22). SAHO could have approached another lender if they objected to the rates (§23). A similar point is made about valuations: if it did not like VTB's valuations SAHO could have gone to another bank (§32). VTB was in favour of the restructuring through the State Guarantee scheme because it would have resulted in 50% of SAHO's debt obligations being guaranteed by the Russian Government (§24).

(3) VTB required more collateral because of the fall in the value of the pledged assets (§25). VTB reasonably required independent valuations: not least because SAHO's valuations contained a number of errors (§§27-29). In any event, once it received a valuation it applied its own list of discounts to market value in appraising the value of the security. This explains why its valuations were different to those of SAHO (§§30-31). Various valuations were produced to show that the security over SAHO's assets was not twice the debt, but half the debt (§33).

(4) The reason why the State Guarantee refunding scheme did not go through was nothing to do with VTB, it was due to the failure of the companies within SAHO to provide the necessary documents (§§35-41).

(5) There is a rather coy reference to commercial discussions between in VTB and SAHO in the context of acquiring SAHO, but it is said that the explanation for the delays in enforcing its security was not due to VTB's desire to drive SAHO to the wall, but because there was no commercial sense in enforcing its security, due to market conditions (§§42-46. In any case, VTB have never been in a favoured position to acquire SAHO's assets because the conduct of the Receiver is subject to the Court's approval (§§46-48).

The expert evidence

47. Mr Skurikhin has produced the evidence of two experts: Professor Richard Sakwa (Professor of Russian and European Politics at the University of Kent) and Drew Holiner (an experienced Russian Advocate and English Barrister). VTB has adduced a report from Professor Paul Stephan (Professor of Law at the University of Virginia, with expertise in Russian law and procedure). The three reports are from experienced and well-informed commentators on Russia, and (to a greater or lesser extent) the Russian legal system. In addition there was a further report (dated 15 November 2013) from Olga Rakitina and Marina Taratuta of Rappoport and Partners.

48. They were asked to answer 4 questions.

(1) Whether the 'rule of law' as applied in Russia is equivalent to the concept of 'the rule of law in England'?

(2) Whether a state-owned entity is treated differently by a Russian Civil Court to an individual such as Mr Skurikhin?

(3) What would be likely to happen to an individual like Mr Skurikhin if he attempted to defend himself in the Russian Courts using arguments around '*systema* raiding' and similar concepts?

(4) Is VTB engaged in illegal '*systema* raiding' in this instance? On what basis do you reach your conclusions? Are you aware of similar '*systema* raiding' undertaken by state-owned banks or other enterprises?

49. The evidence was less helpful than the parties may have expected. Question (4) plainly depended on the experts' view of the facts. The answers to questions (2)-(3), were hedged with qualifications and also depended on the circumstances; and I was not persuaded that the answers to a question expressed as generally as question (1) yielded relevant insights.

50. The nature of Mr Skurikhin's expert evidence can be seen from some of the broad observations of Professor Sakwa, and the more measured observations of Mr Holiner.

51. At §29 of his report Professor Sakwa stated:

> On the basis of the matters set out in Skurikhin's second witness statement, I believe there is high likelihood that SAHO and Skurikhin are the victims of an on-going corporate raid in the present case.

In §34 he added:

> There is a considerable weight of publicly available information which suggests that VTB has a track record of raiding behaviour.

And at §36:

> There are a number of aspects of VTB's behaviour in the present case, as described in Skurikhin's Second Witness Statement, which are either typical of raiding or for which the only plausible explanation seems to be that VTB is not merely seeking to recover its lending, but is trying to take SAHO's assets in their entirety.

52. At §21 Professor Sakwa had addressed Mr Skurikhin's evidence that he was not able to put forward anything approaching a full defence to the Guarantee claims in Russia. He pointed out that VTB is the second largest bank in Russia, is largely state-owned and is politically well-connected.

> In my opinion, there is a high likelihood that in a case like the present, with significant economic value at stake and a highly politically connected party such as VTB on one side, the Russian courts would give preference to VTB's interests at the expense of Skurikhin's.

53. He dealt with Mr Skurikhin's fear of defending himself in the Russian proceedings at §25:

> Given the political situation in Russia, I can understand that Mr Skurikhin would feel inhibited from fully defending himself by

> alleging fraud or bad faith on behalf of VTB. It would be political suicide to do so.

54. In Professor Sakwa's opinion the consequences for Mr Skurikhin of defending himself on the basis of the material he had seen would have been very serious, see §26.

> ... if an individual like Skurikhin were to seek to challenge a huge and politically connected state-owned enterprise such as VTB - in particular if Mr Skurikhin were to allege that VTB was engaged in corporate raiding - there would, in my opinion, be a high risk of escalation and the consequences for Mr Skurikhin could be serious… Without significant political support - and even with it, as in the case of Khodorkovsky [a businessman recently released from a long period of imprisonment] - it would be next to impossible for an individual such as Mr Skurikhin to resist such pressure and he would put himself and his business in danger if he tried to do so.

55. At §11.5 of his report Mr Holiner expressed his views as follows.

> I concur with Professor Sakwa's view that raising allegations of serious impropriety in legal proceedings against influential members of its business and political elite places the person advancing such allegations at risk of serious retaliation, including extrajudicial reprisals. I have come across some of the most extreme examples of such retaliation in my own practice. Whilst the prospects of such a risk materialising obviously will depend on the character of one's opponent, the prevalence of such examples in the past decade has had a chilling effect that often renders any overt threats unnecessary.

56. It is common ground (see §§7-8 of the Rappoport report dated 19 November 2013) that the allegations made by Mr Skurikhin against VTB in his second witness statement give rise to several potential defences under Russian law. As Mr Holiner stated (in §15.1 of his report), these would include:

> … arguments that the Guarantees were void on grounds of oppression or fraud, or because they pursued the unlawful aim of appropriating his assets. Moreover, even if the terms of the Guarantees were held to be lawful and enforceable on their face, the facts alleged by the First Defendant could give rise to the defence that they are being invoked for abusive purpose and therefore enforcement should not be permitted.

57. There is compelling evidence on the other side from the experts instructed by VTB. However, a Part 24 application is not the place to resolve differences in expert views about the politico-legal background and the likelihood of abuse of the legal system generally or in this particular case; and I accept for the purposes of this application that abuse of the legal process in Russia can occur.

58. Mr Holiner concluded (§37 of his report).

> If the matters pleaded by the First Defendant are true, it is entirely credible that he may not have been able to secure justice in Russia.

VTB are entitled to answer this point in the way the Ephors of Sparta are said to have answered the demands of King Philip of Macedon. However, whatever view one takes of this evidence, it is necessary to consider not only the way in which the opinions are expressed, but their relevance to the matters in issue on this application.

Common Ground

59. It is convenient at this stage to summarise matters of further common ground on this application.

(1) The forms of the loan agreements and guarantees are not unusual. They are the type of documents containing the type of obligations commonly found in business between commercially sophisticated parties.

(2) The judgments of the Russian Courts which VTB wish to enforce are final and conclusive judgments. They are reasoned judgments; and it is clear that, on some of the points on which they had appealed, the SAHO group borrowers and Mr Skurikhin raised arguments which were successful.

(3) All the points now raised by way of defence to the Part 24 application could (as a matter of Russian substantive and procedural law) have been raised in the Russian proceedings.

(4) Mr Skurikhin and the SAHO group borrowers did not raise these defences; nor do they appear to be taking the points in any ongoing Russian proceedings.

(5) Although there may be an issue as to what conclusions can properly be drawn from this, Mr Skurikhin is clearly a sophisticated businessman, whose interests in SAHO are held by and through a complex corporate structure of offshore trusts and companies.

(6) Mr Skurikhin did not raise the points he now relies on in the English proceedings from August 2012 until August 2013.

60. Point (6) requires some further elaboration and qualification.

61. In §55 of his 1st witness statement (dated 2 November 2012) Mr Skurikhin stated,

> I see that at paragraph 8 Ms Guzanova acknowledges that the loan agreements and guarantees might not be valid as regards the amount claimed in respect of interest and penalties. For the reasons explained further below and without waiving privilege I am advised by my Russian lawyers and believe that I have other defences to the claims.

62. At §60 he referred to problems caused by VTB's decision to impose higher interest charges and to require additional security, on the basis that refinancing would take place through a special scheme set up by the Government of the Russian Federation,

> ... subsequently VTB did not proceed with the scheme, even though VTB by then had the benefit of the higher rates and the additional security which had been provided. It is also worth noting that, despite SAHO's request to release the pledges taken pursuant to the unissued loans, VTB continues unjustifiably to hold those pledges.

At §64 he added:

> ... my understanding, as I explain more fully below, was that VTB intended to use the Ministry of Finance State Guarantee scheme ... and that when it did so it would reduce the interest rates which it charged to something much closer to market rate. I believed that the higher rates of more than 23% would only be charged for about six months, pending completion of the proposed refinancing.

63. In the following paragraph, he described how VTB proposed using the State Guarantee Scheme as a way of refinancing the loans at a lower rate of interest.

> VTB then declined to proceed, and did not refinance the debt at the lower interest rates for reasons which have never been explained.

64. At §66, he explained that the schedule of pledged assets (RUB 2.35bn) exceeded the total sum outstanding at 30 September 2012 (RUB 2.12bn).

> Thus I believe that the credit portfolio of VTB in relation to the SAHO Group companies is more than covered by the pledges provided. I genuinely do not understand why VTB applied to the English Court without first making any attempt to recover the debt from the pledged Russian assets of the SAHO companies ... No attempt has been made by VTB to explain its conduct, whether in these proceedings or in Russia.

65. At §88 he criticised VTB's lawyers for failing to make an accurate presentation of the case on the without notice application to Hamblen J.

> I wish to make clear that I am not suggesting that VTB's lawyers knew about the above information and failed to mention it to the Court. Rather my point is that VTB must have known perfectly well about all the matters I have described above and yet chosen not to tell their lawyers about it ...

66. Burton J found that these criticisms of VTB were unfounded; but what is striking in the present context is that nothing was said about the complaints of a '*systema* raid'

by VTB or its fraudulent misrepresentations in the Russian proceedings which (on his case) had led to the Russian judgments, the enforcement actions and the injunctions.

Discussion

67. Mr Skurikhin's second witness statement asserted that the VTB's conduct in bringing the proceedings in Russia and then seeking to enforce the Russian judgments in this country was part of an overall scheme to acquire SAHO group's business, see §164.

> In summary:
>
> (1) I believe that the Russian judgments were obtained against SAHO and guarantors as part of the fraudulent ulterior motive of VTB;
>
> (2) It would put me in danger if I was to pursue the points referred to in this witness statement in Russia: I have genuine fears as to my livelihood and personal safety (and indeed I know of other entrepreneurs who have suffered this fate); and
>
> (3) In circumstances where VTB has pledges over SAHO property worth around twice the outstanding loan amounts (and has prevented SAHO from selling that property to pay off the debt). I believe that obtaining those Russian judgments was intended solely to enable VTB to take the whole of SAHO's business (which would be a windfall to it of many times the value of the outstanding loans).

68. This view of the matter was also advanced in §5(1) of the skeleton argument lodged on his behalf in the present proceedings.

> This application and the judgments which VTB is seeking to enforce are part of an illegitimate and fraudulent corporate raid by VTB against the SAHO group, of which Mr Skurikhin is the chairman. Professor Sakwa confirms (Sakwa report, para.29) that:
>
> > On the basis of the matters set out in Skurkhin's second witness statement, I believe there is a high likelihood that SAHO and Skurikhin are the victims of an on-going corporate raid in the present case.

69. The aim of the alleged corporate raid is said to have been to take over the entire business of SAHO by depressing the value of its assets and acquiring them at an undervalue.

70. The problem with the argument is that it is difficult to make commercial sense of the alleged corporate raid. The evidence shows that SAHO's debt to VTB represented approximately 9-10% of its overall indebtedness. Even allowing for the fact that the rates of interest which VTB charged may have increased this overall percentage, it is difficult to see how, from this platform, lending to only 9 SAHO group borrowers out of the 103 companies in SAHO and acting directly contrary to the interests of other

lenders (which included at least one other bank in which the State had an interest), VTB could have carried out a corporate raid of SAHO's business. There is a further problem: if VTB wanted to take over the assets of SAHO one might expect it to have taken steps to take over the assets. However, the complaint is not that they did so, but that they did not do so. Additionally the suggestion that this corporate raid is 'ongoing' when the judgments are still substantially unsatisfied adds to the general air of unreality about the part of Mr Skurikhin's case which seeks to ascribe some ulterior and unlawful motive for VTB's actions. In addition VTB is entitled to point out that by extending credit in the worsening economic climate, it was sustaining the value of the business rather than undermining it, as Mr Skurikhin alleges.

71. I turn then to the four specific contentions which are said to give rise to an arguable defence to the entire claim.

72. The first matter is that VTB refused offers to repay the debt, including an offer (in April 2013) by another Russian bank (RSHB) to repay the outstanding debt in full.

73. This point (referred to in §155 of his witness statement) is of no assistance to Mr Skurikhin. Quite apart from the lack of any supporting documentation, by April 2013 VTB had already secured 7 judgments against him at an appellate level. In these circumstances it is unnecessary to dwell on the evidence in Ms Guzanova's 4th witness statement (§44) that there were discussions with, but no formal proposal from, RSHB.

74. The second matter of complaint is that VTB refused to recover the outstanding debt owed by SAHO by realising the assets which had been mortgaged by SAHO, as security for the loans; those assets being said to be worth around twice the value of the outstanding debt.

75. The points are answered at §§25-32 of Ms Guzanova's 4th witness statement. There is plainly a difference of view about how VTB should have proceeded in the light of SAHO's financial difficulties, but the allegation that VTB was behaving in bad faith in not realising the security would not appear to have merit, even if it had been raised in the appropriate court at the appropriate time.

76. Mr Skurikhin's third matter of complaint is that VTB misled SAHO into pledging very substantial assets in its favour, on the promise of entering into a restructuring under the State Guarantee scheme; and that, when VTB pulled out of that restructuring (for no good reason), it refused to release the pledged assets. It is said that there is no legitimate basis whatsoever for VTB retaining those pledged assets; and SAHO's repeated requests for them to be released have been ignored or met by outright refusals. This has left SAHO with no unencumbered assets and no way of seeking alternative finance.

77. Again these points are answered in Ms Guzanova's evidence (Guzanova 4 at §§33-40). It is sufficient to note for present purposes, first, that there is an issue about whether VTB are secured for their lending; and secondly (and perhaps more significantly in the present context), to the extent that the parties have exhibited documents about the failure of the State Guarantee scheme, they support the evidence of VTB rather than Mr Skurikhin. Again, if the argument now relied on had merit, it could have been raised by him in the Russian proceedings. It is an argument based on

compliance with contractual obligations, as was the argument about the proper application of the interest clauses.

78. The fourth matter of complaint is that VTB refused to use independent valuations of the pledged assets, and instead purported to rely on internal valuations which vastly understated their value, in some cases by as much as 90%. In circumstances where (i) all the other banks were willing to use, and have used, independent valuations; and (ii) VTB used independent valuations (and, indeed, the same valuation companies) for loans taken out initially in 2005, this was fraudulent and dishonest.

79. There is a considerable overlap between this complaint and the second complaint, and Ms Guzanova's evidence contradicts these assertions (Guzanova 4 at §§25-32).

80. Although I have set out Mr Skurikhin's evidence in relation to these matters of complaint, it is important not to lose sight of the context: their relevance to the enforcement of the judgments.

81. It is convenient at this point to re-state some important features of the case. First, on their face, the Russian judgments (both at first instance and on appeal) appear to reflect a conventional claim by a bank against its customer and the guarantor of the customer's obligations. Secondly, at no point during the material period (between 2008 and mid-2013) did either Mr Skurikhin or SAHO raise any of the points which are now relied on by way of defence in the English action. Mr Skurikhin cannot point to a single item of correspondence between the parties which supports his allegations of fraudulent conduct by the Bank. On the contrary, the evidence shows that the parties dealt with each other as one would expect where a bank and its customer face difficulties which are likely to arise in a sharp recession. Thirdly, apart from some general background evidence from the experts about what has occurred in other cases, the defence (which ascribes motives to VTB's apparently unexceptional actions) is entirely dependent on the witness evidence of Mr Skurikhin. Fourthly, on Mr Skurkhin's case he must have known that he and SAHO had good defences to VTB's claims under Russian law. Yet it is implicit that, although he deliberately kept silent about these defences and raised other defences and cross-claims, VTB was bound to raise the defences on his behalf and acted fraudulently in failing to do so. Fifthly, at no point during the first 12 months of the English proceedings was either VTB or the Commercial Court told that there were defences to the entire enforcement claim; and that the defence was based on the fraudulent conduct of VTB in the Russian legal proceedings. Mr Skurikhin's 1st witness statement raised some of the points as factual issues but not in the context of a potential defence to the entire claim. Sixthly, despite there being no issue that the loans were made to the SAHO grouped borrowers, it is striking that Mr Skurikhin denies that any sum is due to VTB.

The fraud exception

82. In the course of his submissions Mr Dunning produced a summary draft Defence; and it is convenient to refer to this since it sets out how the factual assertions feed into the fraud and other defences, which I have identified as [a]-[g].

> [a] In the circumstances, [VTB] knew that [Mr Skurikhin] was not genuinely indebted to [VTB] because (i) they knew that their pursuit of the debtor companies within the SAHO group

> and of [Mr Skurikhin] was not bona fide and was in bad faith because they had refused offers to be repaid the indebtedness in whole or in part and had refused to allow the indebtedness to be discharged by selling assets pledged to them, which they had in bad faith undervalued, and/or (ii) they knew that the principal purpose of such pursuit was not to secure repayment of such indebtedness but was rather to acquire the business and/or assets of the SAHO group and/or [Mr Skurikhin] at a substantial undervalue, and (iii) they knew or were reckless as to the fact that, by reason of the matters aforesaid of which they had knowledge, [Mr Skurikhin] had grounds to defend the claims under Russian law.
>
> [b] Notwithstanding such knowledge, [VTB] expressly or impliedly made false and dishonest representations to the Russian courts that (i) they were acting in good faith, (ii) they were seeking to enforce a genuine indebtedness, and (iii) that [Mr Skurikhin] had no defences to liability. Further or alternatively, [VTB] dishonestly concealed the true position from the Russian courts and their suppression of the truth gave a misleading impression to the Russian courts.
>
> [c] The Russian judgments were procured by the said dishonesty and/or false representations and/or would not have been obtained if the true position had not been concealed from, but had revealed to the Court.

83. It is important to bear in mind that the fraud exception is 'a carefully delimited exception and is not to be given an expansive application,' see *Gelley v. Shepherd* (above) at [47]. In my view the contentions that VTB engaged in conscious and deliberate dishonesty, that it can be taken to have made any of the representations in the proposed sub-§ [b], that it was dishonest in doing so, that VTB concealed 'the true position from the Russian courts', and that the Russian courts were deceived, lack all reality.

84. The proposed defence proceeds on the basis that (a) both SAHO and Mr Skurikhin felt unable to articulate defences of which they were aware, (b) VTB were aware of the available defences despite the fact that they had never been told of them and dispute them now that they are aware of them, and (c) VTB's failure to articulate such defences on behalf of the adverse parties to the litigation resulted in the judgments being obtained by fraud. In my judgment the proposed defence is entirely without substance, it is an artificial construct erected to avoid the consequences of the true position, acknowledged before the Russian courts: that SAHO had no defence to what were straightforward claims in debt other than those that it raised there in relation to the claims for interest.

The public policy exception

85. Mr Dunning's draft pleading also set out the public policy defence, which depended on the assertions of fraud, but added that it would be contrary to English public policy for the judgments to be enforced, taking into account:

> [d] that if [Mr Skurikhin's] defences to liability under the guaranteed were not to be adjudicated upon by the English court, he would have been subject to the enforcement and related freezing order powers and processes of the English court, without having a fair trial of the issues raised by those defences either in the Russian court or the English court; and/or
>
> [e] that, in all the circumstances, it would be unconscionable and/or an affront to justice and/or morality for the English court to assist the Claimants, by allowing them to take the benefit of the Russian judgments and in particular by granting ... recognition or enforcement of the Russian judgments.

86. This way of putting the case, proceeding (as it does) on the factual assumption advanced under the fraud exception, does not give additional grounds for defending the claim. If the fraud exception fails, it is difficult to see why enforcement could properly be regarded as contrary to public policy, unconscionable, unjust or immoral. It is not suggested, for example, that VTB has brought improper pressure on SAHO or Mr Skurkhin in the litigation, or that it has interfered in some way with the court process.

The natural justice defence

87. Mr Dunning's draft Defence pleads that the natural justice exception arises, on the basis that enforcement does not accord with English notions of substantial justice since the judgments were the products of:

> [f] a fraudulent scheme and or dishonesty on the part of [VTB], as set out above, and
>
> [g] a legal process in which [Mr Skurikhin] reasonably considered that he could not raise the defences such as those of fraud and bad faith that were available to him under Russian law against [VTB], a state-owned entity, because if he did so he would be exposing himself and his businesses to substantial extra-judicial risks and/or he was unlikely to receive a fair and proper judicial determination so raised ...

88. Although the focus is on his state of mind, this potential defence also proceeds on the basis that VTB has acted fraudulently and that Mr Skurikhin's belief was reasonable. In my view, this way of presenting the argument does not avoid his difficulties. Even on a Part 24 application, an explanation as to why particular defences which are said to have been available were not taken in the foreign proceedings should be both consistent and coherent. Mr Skurikhin's explanation is neither; and, in these circumstances it is not properly arguable that enforcement would offend against English views of substantial justice.

89. The additional paragraph in Mr Dunning's draft which relies on article 6 of the ECHR and the right a fair trial in Russia adds nothing. This too relies on the reasonableness of not raising defences which were available to him.

The claim for interest

90. Mr Skurikhin's solicitors have prepared a schedule which breaks down the sums claimed under the Russian Judgments:

Principal	RUB 456,412,491.58	58.39%
Interest	RUB 166,070,280.69	21.24%
Penalties	RUB 158,360,333.81	20.26%

91. As can be seen from this calculation approximately 20.26% of the sum claimed by VTB in these proceedings comprises 'penalties', in the sense that it does not represent an actual loss or a genuine pre-estimate of loss, and is over and above the contractual interest. This amount was excluded from the freezing order. The sums are described as 'default interest' or 'penalties' in VTB's translations of the Russian Judgments. In effect they are obligations incurred for being in default of payment obligations under the loan agreements.

92. Mr Dunning's draft pleading puts the matter in the following way:

> ... it is in any event contrary to public policy for the Russian judgments to be enforced insofar as they are founded on penalty clauses that provide for payment of sums (a) that are over and above the principal and interest allegedly due and (b) that do not represent any loss suffered by the Claimants or any genuine pre-estimate thereof.

93. VTB's answer is that such claims were challenged in the Russian courts and on appeal, and that SAHO and Mr Skurikhin achieved a measure of success in their arguments. To the extent that they were unsuccessful VTB is entitled to recover these sums.

94. In my judgment Mr Skurikhin has an arguable defence that the sums of interest which have been identified as 'penalties' are not recoverable, on the basis that they are punitive in effect, albeit the sums do not enure to the benefit of the state.

Conclusion

95. In the light of the above, I have reached the following conclusions on VTB's Part 24 application.

(1) The reason why Mr Skurikhin's allegations of misconduct against VTB were not raised in the Russian proceedings, and were not dealt with by the Russian courts, was not due to (a) any false representation by VTB, or (b) Mr Skurikhin's belief that he was unable to raise the defences.

(2) SAHO and Mr Skurikhin had no defences to the claims they faced in the Russian proceedings beyond those which they raised there, and they are aware of this.

(3) Mr Skurikhin has not come close to showing an arguable defence to the enforcement proceedings based on the conscious, deliberate and material dishonesty of VTB in relation to the Russian proceedings, nor in showing an arguable defence based on principles of public policy or natural justice.

(4) The proposed defences have been contrived for the purposes of resisting enforcement proceedings and are entirely without substance.

(5) It follows that Mr Skurikhin has no prospect of successfully defending enforcement of the principal sums and contractual interest claimed in the enforcement proceedings; and since there is no other reason for a trial, it follows that there must be judgment for these sums.

(6) I have, however, concluded that there is an arguable defence to the claims which have been characterised as 'penalties', on public policy grounds.