



Neutral Citation Number: [2026] EWHC 2550 (BP)

Case No: BL-2021-000049

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
BUSINESS LIST

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

Date: 8 October 2026

Before :

MR JUSTICE RAJAH

Between :

EAST-WEST UNITED BANK S.A.

Claimant

- and -

(1) VLADIMIR ALEKSANDROVICH GUSINSKI
(2) GSC SOLICITORS LLP
(3) BARRY SAMUELS

Defendants

Clare Stanley K.C. and James Walmsley (instructed by Distinction Law) for the Claimant
Andrew George K.C. and Marlena Valles (instructed by Clyde & Co LLP) for the Second
and Third Defendants

Hearing dates: 27 April 2026 – 8 May 2026

APPROVED JUDGMENT

Mr Justice Rajah :

1. This is my judgment after the trial of this claim.

The Parties

2. The Claimant, East-West United Bank S.A. (“**the Bank**”), is a bank incorporated in Luxembourg. The Bank is owned by Sistema, a Russian conglomerate which was (at times material to these proceedings) reputedly ultimately owned by Vladimir Evtushenkov. The First Defendant, who has been debarred from defending these proceedings, is Vladimir Gusinski. Mr Gusinski is a Russian businessman and the ultimate beneficial owner of the New Media Group (“**the Group**”). The New Media Group produced Free-To-Air television content for the Russian speaking market. GSC Solicitors LLP (“**GSC**”) was a firm of solicitors in London until its merger with another law firm on 1 April 2025 to become Seddons GSC LLP. During times material to this case it acted for Mr Gusinski and various New Media Group companies. Barry Samuels was a solicitor and consultant of GSC, with conduct of GSC’s representation of Mr Gusinski and his companies. Mr Samuels retired from practice at the time of the merger in April 2025.

Outline of the dispute

3. The origins of the current dispute lie with a loan facility that the Bank made available in 2013 to one of the companies in the Group and which was guaranteed by several other companies in the Group. The borrower defaulted, and in January 2018 the Bank demanded repayment of US\$9,596,920.60 from the borrower and guarantors which they did not pay.
4. In February 2018 the Bank filed a request for arbitration in London which was ultimately pursued against five of the guarantor companies. GSC acted for the guarantor companies and Mr Samuels had day to day conduct of the matter. The guarantor companies ultimately submitted to an award but no payment was made to the Bank. Mr Gusinski caused New Media Distribution Company SEZC Ltd (“**NMDC**”), the Group holding company incorporated in the Cayman Islands, to be placed into liquidation.
5. On 30 October 2018, before the arbitration hearing set for 27 November 2018, Marcus Smith J had given judgment for NMDC against a Mr Kagalovsky for a sum of about US\$5.2 million inclusive of interest. GSC had received the sums due into its client account for NMDC – these monies have been referred to as “**the Judgment Sum**”. None of those monies were paid to the Bank. A sum of approximately US\$4.75 million of the Judgment Sum was paid to NMDC’s liquidators on their demand.

Conspiracy

6. The Bank alleges that Mr Gusinski conspired with Group companies and their officers to use lawful and unlawful means to delay and ultimately avoid payment to the Bank of the

Judgment Sum or any of the sums due to the Bank under the loan facility or arbitration award (“**the Conspiracy**”). The Bank alleges that GSC and Mr Samuels joined the Conspiracy by January 2018 or some later date and claims that they are liable in unlawful means conspiracy.

7. The Bank relies on, amongst other things, a temporary moratorium in respect of the borrower company granted by the Swiss Court on 29 January 2018 which Mr Samuels and GSC assisted in having recognised in England. During its pendency substantial sums that were, under the terms of the facility, due to be paid into a Luxembourg account of the borrower held with the Bank, were not paid into that account.
8. The Bank also relies on steps taken in the arbitration. The Bank says that the respondents’ Defence and Cross-Claim, signed by Barbara Dohmann KC and junior counsel, was unarguable and only ever conceived as an instrument of delay. In the run up to the arbitration hearing, on 16 November 2018, the respondents dropped their cross-claim (and withdrew the related defence) but sought instead an award for staged payments. The Tribunal made a staged payment award dated 11 December 2018, albeit on different terms to that sought by the respondents. It provided for immediate payment of US\$4.75m, with the balance of the principal sum to be paid on or before 31 March 2019.
9. This was not paid and instead, without notification to the Bank or the Tribunal, NMDC was placed in liquidation and the appointment of provisional liquidators recognised in England. The Bank relies on the liquidation and steps taken to obtain it as further acts pursuant to the Conspiracy.
10. In addition the Bank relies on steps that have been taken by Mr Gusinski to put Russian companies into bankruptcy processes and also steps taken to resist enforcement of the arbitration award in Russian proceedings as forming part of Mr Gusinski’s scheme.

Constructive trust or assignment

11. The Bank also brings claims against GSC for breach of trust and/or fiduciary duty in respect of its dealings with the Judgment Sum. In their pursuit of a staged payment award, representations and submissions were made by Ms Dohmann KC and GSC, as to the availability of a sum of US\$4.75m of the Judgment Sum held by GSC in their client account. The Bank says that by reason of these representations, the Bank acquired a proprietary interest in the Judgment Sum.

Consequential and other claims

12. The Bank brings further claims that (i) Mr Gusinski is liable for procuring breaches of contract by the borrower and guarantor companies (ii) Mr Gusinski is liable for dishonest assistance in breaches of trust and/or fiduciary duty by GSC or its Group company client in relation to its dealings with the Judgment Sum (iii) GSC is liable in knowing receipt for having received the sum of £103,000 for its own fees from the Judgment Sum and (iv) GSC and Mr Samuels are liable for dishonest assistance in breaches of fiduciary duty by NMDC in respect of the Judgment Sum.

The Defendants' position

13. All the defendants denied the claims but Mr Gusinski has since been debarred from defending the claims against him. An unusual feature of this case is that the Bank relies on acts undertaken pursuant to the Conspiracy between Mr Gusinski and various entities in the Group, that it is not alleged that GSC or Mr Samuels had any knowledge of or involvement in, and in relation to which Mr Gusinski is permitted to advance no defence. These are nevertheless relevant to the claims against GSC and Mr Samuels because it is this conspiracy they are said to have joined and furthered.

Procedural history

14. These claims were commenced on 15 January 2021 and were met with an application to strike out parts of the claim by the defendants which came before HHJ Keyser KC sitting as a judge of the High Court in November 2022. The Deputy Judge dismissed the defendants' applications; see *East West Bank United SA v Gusinski and others* [2022] EWHC 3056.
15. A short while before the hearing Mr Gusinski parted company with his legal representatives and he did not attend the hearing. That also marked the end of his participation in these proceedings. He was debarred from defending on 28 March 2023 for failure to comply with an unless order. He did not attend the trial.
16. An application to establish that no legal professional privilege applied in relation to the matters raised in this claim, on the basis that the iniquity exception was engaged, came before Deputy Master Scher. GSC and Mr Samuels adopted a neutral stance and the remaining respondents, including Mr Gusinski, either did not respond or said they did not wish to participate. The Deputy Master granted the application; *East West United Bank SA v Gusinski* [2024] EWHC 2223. The consequence is that there has been full disclosure of the privileged documentation in GSC's files and counsel's record, including communications between Mr Samuels, his clients, Ms Dohmann KC and junior counsel.

The Trial

17. The trial took place between 27 April and 8 May with some non-sitting days for judicial pre-reading and for the preparation of written closing submissions.
18. The Bank called Aleksey Stoliarov and Martin Pcola.
19. Mr Stoliarov was the Chief Legal Officer of the Bank from May 2016 to September 2024. He gave evidence at the request of the Bank, with his expenses paid and an agreement for remuneration for his time to be negotiated. He was an honest witness. He accepted without hesitation in cross examination that he and the Bank had not at the time of the Tribunal or its hearing had any notion that NMDC may have made an assignment of the Judgment Sum or part of it to the Bank. That is not the impression one gets from his witness statement;

e.g. paragraphs 94, 99, 101 and 102 (although when one checks, it is not inconsistent with the careful wording used). I accept the evidence he gave in cross examination as honest evidence but I treat with caution his witness statement which stood as his evidence in chief. This does not comply with PD 57AC. Large parts of it are commentary on documents which Mr Stoliarov has seen over the years and his submissions on them, arguing the Bank's case, as well as hearsay statements of things he has been told by others or found in his researches online. It is not clear at all what relevant evidence of matters within his personal knowledge Mr Stoliarov had to give.

20. Mr Pcola was the Chief Financial Officer of the Bank from 2013 to 2021 and then its Chief Executive Officer. He was also chair of the Executive Committee of the Bank with a veto and signatory right which meant that he had direct knowledge of the Bank's decisions at that level in relation to its dealings with the Group. His witness statement set out calculations of the amounts due to the Bank in respect of the loans it had made. Mr Pcola was an honest witness and I accept his evidence.
21. The Bank also relied on the unchallenged expert evidence of:
 - a. Tom Lowe KC on the relevant law of the Cayman Islands in relation to the duty of directors of a Cayman Islands company like NMDC – essentially that it was the same as English law;
 - b. Professor Dr Hans-Ueli Vogt on the relevant Swiss law relating to the duty of directors of a Swiss company like New Century Distribution GmbH ("NCD");
 - c. Dr Ilia Rachkov on the content and effect of a number of decisions of the Russian courts and on aspects of Russian law.
22. GSC and Mr Samuels called Mr Samuels, Barbara Dohmann KC, and Sebastian Stoj.
23. Mr Samuels gave evidence of his dealings with Mr Gusinski and the New Media Group. He struck me as an experienced and capable lawyer of the old school. He worked from hard copy files until his retirement. He was subjected in cross examination to heavy criticism of his conduct, his professionalism and his honesty to which he responded with equanimity. I am satisfied that he was an honest witness and I accept the evidence he gave.
24. Ms Dohmann KC is an experienced commercial barrister who gave firm and forthright evidence of her involvement as counsel acting on behalf of Mr Gusinski and the guarantor companies in the arbitration proceedings. She was at the relevant time Barbara Dohmann QC and referred to as such in the contemporaneous documentation, but those post-nominal letters changed on the death of H.M. Queen Elizabeth II. I refer to her as Ms Dohmann KC or Ms Dohmann. Ms Dohmann was an honest witness (it was not suggested otherwise in cross examination). On some occasions she gave answers with greater confidence than was justified by the documents, but readily accepted when she was mistaken. Those errors did not affect the overall credibility of her evidence. I accept the evidence she gave.
25. Mr Stoj is an IT support engineer employed by Ameris IT Support who provided external IT support to GSC at the times material to this case. He gave evidence of Mr Samuels' lack

of IT sophistication and certain issues relating to disclosure of GSC electronic documents. I accept his evidence.

26. Ms Stanley KC and Mr Walmsley appeared for the Bank and Mr George KC and Ms Valles appeared for GSC and Mr Samuels. I was pleased to see Mr Walmsley and Ms Valles conducting parts of the hearing as advocates. The intelligent deployment of junior advocates, in accordance with the 8 November 2023 Practice Note 39 PG.5 from the Lady Chief Justice, Master of the Rolls and Heads of Division, has benefits for the parties and their legal teams, as well as for the junior advocates concerned, and is to be encouraged.
27. The time estimate for the trial was provided by the parties and the trial timetable was agreed between counsel.
28. The Bank's written opening skeleton argument said in relation to the claims against Mr Gusinski that the application of the relevant legal principles to the relevant facts would be addressed in closing submissions after the evidence had been heard. It said:

"[The Bank's] case will to a significant extent be proved from contemporaneous documents. The role and steps of wrongdoing of D1 is, it will be submitted, evident from those documents."

Very little time was in fact devoted to the Bank's case against Mr Gusinski during the trial. In her written closing submissions Ms Stanley provided lists of bundle references to the documents the Bank relied upon in a 13-page Appendix which was handed up during the course of Ms Stanley's closing submissions. It became clear that Ms Stanley did not intend to take the court to the documents relied upon by the Bank as part of her closing submissions. There was the following exchange at page 33/4 of the transcript of Day 6:

15 "MR JUSTICE RAJAH: Right. On this, just so I'm clear,
16 Ms Stanley, I had assumed at some point you would take
17 me through the basis upon which you are asking me find
18 against D1.
19 MS STANLEY: Yes.
20 MR JUSTICE RAJAH: For the moment I have heard, during the
21 course of this trial, practically nothing.
22 MS STANLEY: Nothing. Well, I think that that was actually
23 the original reason why we wanted longer openings and
24 closings. But they have been concertinaed. I think the
25 best that I can do is to say: D1 is not here. The
evidence that you have is in Mr Stoliarov's witness

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1 statement and we would invite you to accept that. The
2 particulars of claim have been verified by a statement
3 of amended particulars of claim being verified by
4 a statement of truth, so, as against Mr Gusinski, there

5 is no evidence to gainsay that. Deputy Master Scher, in
6 his judgment on iniquity, held that there was
7 a prima facie case against Mr Gusinski being involved in
8 iniquity, and, in the absence of a defence, we would
9 invite you to do the same thing. There is a prima facie
10 case, the other side are not defending it, and so, in
11 those circumstances, we ask you to make the findings
12 that are alleged in the particulars of claim.
13 For good reason or bad, the trial has been the
14 length it has been. And to go through everything with
15 my Lord, I would not be able to do it in three hours.
16 Hence I thought, ...,
17 that the appendix would be another way to do it.
18 I wanted to focus my oral submissions on the position
19 against D2 to D3...”

29. Mr Gusinski has been debarred from defending, but it is still necessary for the Claimant to prove its case on the balance of probabilities and satisfy the court that the Bank is entitled to the relief sought; *Times Travel v Pakistan International Airline Group* [2019] EWHC 3732 at [55], approved by the Court of Appeal in *Hirachand v Hirachand* [2021] EWCA Civ 1498.
30. Ms Stanley relied on the facts stated in the Amended Particulars of Claim (“**the APOC**”) being verified by a statement of truth but a statement of case can only be used as evidence in an interim application and not at trial; see CPR 32.6 (2) and PD32 para 26.1. A finding of a *prima facie* case by DM Scher for the purposes of an interim application is relevant history, but it does not create a *res judicata* or relevant issue estoppel, and it is inadmissible opinion evidence. I am the trial judge and I must decide the case on the evidence before me. I have had the benefit of hearing oral evidence from the witnesses which DM Scher did not, and of seeing the privileged communications which DM Scher did not see but ordered to be disclosed.
31. While the court relies on counsel to cooperate and agree timetables which make effective use of court time it should be remembered that a trial is the first and the last night of the show (to borrow Lewison LJ’s phrase in a different context). The parties must at the trial bring out all the evidence on which they wish to rely and make their submissions on that evidence and the law at the trial. That gives any other interested party the knowledge of what evidence is relied on and what submissions are being made on that evidence and the law, and gives them an opportunity to respond. It gives the judge the opportunity to consider the evidence while the parties are in court, and to ask questions or test the submissions being made. Timetables and time estimates have to allow time for this to be done. It is not acceptable, without the court’s prior approval, to produce lists of documents which have not been referred to in court for the judge to look at for the first time after the trial. It is not fair to the parties for the judge to be looking at documents which are being relied upon but have not been aired in court because there is no opportunity for an interested

party to make points or submissions as to the weight or effect of any particular document and there is no opportunity for the judge to explore with the parties the weight or effect of any particular document.

32. I made clear that I would not decide the case against D1 effectively on paper by looking at documents for the first time after the trial was over. I was taken to some further documents, and tracts of Appendix 1 were deleted as unnecessary. However many of the remaining documents in Appendix 1 had not been referred to in opening skeleton arguments or during the trial. Dipping into them suggested that they are often merely more detail which add little to the overt acts of conspiracy relied upon as against GSC and Mr Samuels. Ms Stanley relied on the fact that some of these documents were referred to in the 8th witness statement of Aleksey Stoliarov. However it is the contemporaneous documentation from which inferences can be drawn, and not Mr Stoliarov's one sided commentary on them. To the extent that he gives evidence of matters which are within his personal knowledge (e.g. paragraphs 42, 44, 45) I take that evidence into account. To the extent that his witness statement is a commentary on the documents, or submissions, (e.g. paragraphs 70, 76, 78, 83, 84, 123, 125, 138-149, 156-164 etc – this is not a comprehensive list) that is impermissible, contrary to PD57AC and I disregard it. I have not looked at any of the contemporaneous documents in Appendix 1 to which I was not taken during the trial.
33. Even then, in relation to Mr Gusinski I have ultimately received no oral, and only limited written submissions, on the application of the relevant legal principles to the relevant facts (as promised in the opening skeleton argument) and therefore why the Bank is entitled to the relief sought.

The Facts

34. The loan facility that the Bank made available in 2013 was to a New Media Group company called New Century Distribution GmbH (“**the Borrower**” or “**NCD**”). NCD acted as the “treasury” company for the Group. The Bank agreed to provide NCD with US\$75 million (of which only US\$35 million was in fact ever made available for draw down). During the currency of the facility the Group proved to be an unreliable borrower. The facility was nevertheless restructured and extended in February 2014, March 2015 and March 2016. Internal credit committee minutes of the Bank show that by 2016 the Bank had formed the view that the Group was heavily dependent on revenue from NTV, a Russian television channel. It had no significant tangible assets other than an extensive library of Russian language television programme content (“**the Library**”) which was owned by a Group company incorporated in the Cayman Islands called New Media Programming, and four “Thematic channels”. The Bank held a security pledge over the shares of New Media Programming.
35. GSC and Mr Samuels had acted on various matters for Mr Gusinski since 2011. Mr Samuels had periodically instructed Ms Dohmann KC to advise Mr Gusinski. In 2015 NMDC commenced proceedings against one Mr Kagalovsky, a business associate of Mr Gusinski, (“**the Kagalovsky Proceedings**”). GSC, Mr Samuels and Ms Dohmann KC acted for NMDC in the Kagalovsky Proceedings. When in 2016 Mr Gusinski became

concerned that the Bank may exercise its security over the shares of New Media Programming to gain control of the Library he sought advice from Mr Samuels and Ms Dohmann KC as to a potential claim against the Bank if it enforced its security over the shares of New Media Programming.

36. In April 2017 Mr Gusinski instigated an insolvency process in Russia for one of the Russian Group companies, Centre for Film Production (“CFP”), using another vehicle owned by him. This was a matter of concern to the Bank because the company had been a guarantor of NCD’s borrowing from the Bank. Christopher Renaud, a director of NCD, sought to persuade the Bank that there had been no value in the company, and that the bankruptcy had avoided repayment of debts due to third parties and had improved the liquidity of the Group for the benefit of the Bank. To give the Bank comfort Mr Gusinski and Mr Renaud gave limited personal undertakings in relation to the value of CFP.
37. In May 2017 the loan facility was extended again until the end of 2018 but with further protections for the Bank. As one of the conditions of this extension of the facility, several other Group companies guaranteed the performance of the Borrower’s obligations. The facility letter of 19 May 2017 (“**the Facility Letter**”) and the guarantees were governed by English law and contained an arbitration agreement, requiring that any dispute would be referred to and resolved by arbitration under the LCIA Rules. NMDC agreed that it would procure that NTV was instructed to pay sums due to NCD into NCD’s account with the Bank in Luxembourg (“**the Luxembourg account**”). NCD gave those instructions to NTV, although with the Bank’s agreement, the instructions were revocable.
38. By July 2017 NCD was seeking the Bank’s indulgence on repayments of interest which had fallen due. Then in August 2017 the Bank learnt that two of the new guarantor companies, Forward Film and Silver Screen, had been placed into insolvency without notice to the Bank. The process which was used has been described as a circular bankruptcy by which each of three Group companies claim a debt from another so that all three are made bankrupt. Again the explanation from Mr Renaud to the Bank was that Mr Gusinski had initiated this process so that debts due to third parties did not need to be paid and it improved the Bank’s position. The Bank wrote to NCD on 6 September 2017 to record its view that the insolvency of the two guarantor companies had placed NCD in default and the Bank had the right to declare that all indebtedness of NCD be paid immediately by serving an acceleration notice under the Facility Letter. It did not do so immediately. It investigated what had been said, obtained information from the liquidator, and appeared to be satisfied that such information “*seems not materially different from what we have been told by New Media to date*” (an internal email on 5 October 2017).
39. The circular bankruptcies of Forward Film and Silver Screen are relied on by the Bank as overt acts pursuant to the Conspiracy.
40. In September 2017 Yaron Kupfer sought advice on behalf of Mr Gusinski from Mr Samuels and Ms Dohmann KC as to whether acceleration and enforcement of the pledge on New Media Programming’s shares could be resisted. Mr Kupfer was a lawyer and the Chief In-House Legal Counsel for the Group. In an exchange of emails with Mr Samuels and Ms Dohmann KC, Mr Kupfer expressed concern that if an acceleration notice was

served, the Bank would exercise a right of set off against any sums paid by NTV into the Luxembourg account which would halt NCD's operations. Nevertheless he was conscious that if instructions were given to NTV to pay into a different account that would itself be a default which should be avoided. Ms Dohmann KC endorsed that view saying that NMDC/NCD could not afford another breach.

41. On 1 November 2017 Mr Gusinski, Mr Kupfer and Mr Samuels had a consultation with Ms Dohmann KC about the situation with the Bank. At this point NMDC was in a precarious position with very weak liquidity, as the Bank's internal documents show and Mr Pcola confirmed in his evidence. Mr Gusinski and Mr Kupfer said that they needed more time to pay the Bank. Ms Dohmann considered with them the available options if the Bank sought to enforce the pledge.
42. On 29 December 2017 NCD defaulted on the sums due under the Facility. On the same day Mr Gusinski sent a letter to Mr Pchelintsev, the CEO of the Bank. The letter had been drafted by Mr Samuels and settled by Ms Dohmann KC. The letter reminded the Bank that some \$26 million of money which had been borrowed from the Bank had been repaid together with \$6.4 million interest on top. The letter informed the Bank of the sacrifices made by key people in the Group who had deferred payments due to them of millions of dollars and it made proposals for delayed payment of sums due in December 2017. Mr. Pchelintsev passed the letter on to his colleagues internally saying that it did not provide a reason for deviating from the Bank's plan to accelerate the debt.
43. On 3 January 2018 the Bank decided "*to maintain maximum pressure*" and to take the steps leading to acceleration and the calling in of the guarantees. This began with a letter on 8 January expressing a "Reservation of Rights". On 15 January 2018 an acceleration notice was served that had the effect of making a total of US\$9,596,920.60 immediately due and owing to the Bank.
44. Mr Samuels and Ms Dohmann KC were immediately consulted by email and a telephone consultation took place on 17 January 2018 with them and Mr Kupfer. It was clear that NCD had defaulted and the Bank was within its rights to serve an acceleration notice, and was now in a position to enforce its security. One of the issues which Mr Gusinski raised through Mr Kupfer was what to do about an anticipated payment of \$800,000 due from NTV which was needed to pay less senior staff. Mr Kupfer and Mr Gusinski were concerned that if the monies were paid into the Luxembourg account in accordance with the instruction to NTV it would be appropriated by the Bank in partial settlement of the debt due to the Bank. Mr Kupfer explored with Ms Dohmann whether there was a legal means of preventing this happening, including by diverting the funds to a different account. Ms Dohmann advised strongly against such a course as it would be another event of default. If no further default occurred Ms Dohmann thought that there was a possible but difficult argument that the Bank's actions were calculated to destroy the company and were steps which were unreasonable and disproportionate. The possibility of a Swiss insolvency process which might save NCD (a Swiss company) was raised by Mr Kupfer, but Ms Dohmann made it clear that she could not advise on Swiss law.
45. On 23 January 2018 demand was made of the guarantors.

46. Internal documents at the Bank show that the Bank knew that the Group did not have the liquidity to discharge the debts due to the Bank but its strategy was to pursue legal action to pressure Mr Gusinski into injecting his own funds to save NCD.
47. On 30 January 2018 NCD obtained from the Swiss courts a temporary insolvency moratorium on payments to the Bank with the ostensible purpose of restructuring its indebtedness and paying its creditors in full during the duration of the moratorium. An independent trustee, Professor Franco Lorandi of Holenstein Attorneys at Law AG was appointed to supervise NCD's business activity while the moratorium was in force in the interests of all creditors and to review and report whether the conditions for the grant of the moratorium were achievable. The Bank made no attempt to oppose or set aside this moratorium which was eventually extended on 24 May 2018 and remained in force until NCD was placed into liquidation. Importantly, NCD's Swiss lawyers, and the trustee, advised NCD that it should not pay the NTV monies that were due into the Luxembourg account or to any account with the Bank.
48. Neither Mr Samuels nor Ms Dohmann KC was involved in the decision to obtain the Swiss moratorium which appears to have been made by Mr Gusinski and Mr Kupfer on the advice of Swiss lawyers. Tom Coates, a barrister assisting Ms Dohmann KC, prepared a Note setting out his view that the moratorium did not provide NMDC with a defence to a claim under its guarantee.
49. Obtaining the Swiss moratorium and the diversion of book debts away from the Luxembourg account are relied on by the Bank as overt acts pursuant to the Conspiracy. Mr Samuels' knowledge of both is relied upon as evidence of the joinder to the Conspiracy by him and GSC.
50. On 13 February 2018 Mr Kupfer outlined in an email to various people including Ms Dohmann and Mr Samuels a potential argument that as Mr Evtushenkov was on a US Treasury published "Kremlin List", NMDC was relieved of its obligation to procure payment from NTV into the Luxembourg account because EWUB or Sistema had become a "Sanctions Restricted Person" for the purposes of the Facility Letter. Ms Dohmann acknowledged the argument and said she would look at it, but it was not subsequently raised as a defence.
51. Mr Samuels' knowledge of this argument being advanced by Mr Kupfer is relied on by the Bank as more evidence of the joinder of Mr Samuels and GSC to the Conspiracy.
52. On 19 February 2018 Mr Kupfer and Mr Samuels attended a consultation with Ms Dohmann KC and Tom Coates. Ms Dohmann's view was that the guarantor companies were in a difficult position. Significantly, Mr Kupfer outlined at this consultation what was to become NMDC's defence in the arbitration proceedings. He said that in December 2017 there had been discussions between Mr Gusinski and Mr Evtushenkov. Mr Gusinski wanted to launch an internet platform to utilise the Library in what has been described as a "Russian Netflix". Mr Evtushenkov was a possible partner or investor in that venture. On 30 December 2017 confidential information about this venture was shared with Sistema by the Group on the basis that it would be covered by a non-disclosure agreement which would

subsequently be put in place (and was). However this collaboration had been cancelled in early February 2018 by Sistema. It was Mr Kupfer's theory that Mr Evtushenkov was seeking to use the Bank to obtain the Library for free and that the demand for repayment of the accelerated debt was not being made in good faith ("**the Library conspiracy case**"). Ms Dohmann said that she was not prepared to argue conspiracy. In her evidence Ms Dohmann confirmed that at this point she did not believe she had the evidence to properly plead a defence or cross claim in conspiracy.

53. On 20 and 21 February Mr Samuels circulated a draft letter to Morgan Lewis to Mr Kupfer and Tom Coates. Mr Kupfer took out two sentences which referred to the Swiss moratorium and its effect on the NTV payment. Mr Samuels explained this to Ms Dohmann when he sent the letter to her for approval. Ms Dohmann made amendments to the letter but did not reintroduce the deleted passages.
54. Mr Samuels' knowledge that those two sentences had been removed by Mr Kupfer from the draft letter is relied upon by the Bank as more evidence of the joinder to the Conspiracy of GSC and Mr Samuels.
55. On 28 February the Bank made a Request for Arbitration to the LCIA. Five of the New Media Group companies which had provided guarantees of NCD's debt, including NMDC, were made respondents to the Arbitration ("**the Guarantors**").
56. From 5 March onwards GCS was instructed to obtain recognition of the Swiss moratorium by NCD under the Cross Border Insolvency Regulations 2006. The recognition application was made on 20 March 2018 and the recognition order was made on 2 May 2018.
57. The manner in which this application was made is also relied on by the Bank as an overt act pursuant to the Conspiracy and evidence of the joinder to the Conspiracy by GSC and Mr Samuels.

Preparation of the Response, Defence and Cross-Claim

58. The Bank's case is that the Defence and Cross-Claim in the arbitration was unarguable and only ever conceived as an instrument of delay. It is necessary therefore to set out in some detail how the Defence and Cross-Claim came to be prepared and filed.
59. The correspondence from March 2018, when the Gusinski/Group legal team was drafting the Response to the Request, shows the team anxiously considering the merits of relying on the Library conspiracy case. The contemporaneous documents suggest, and Ms Dohmann confirmed in her evidence, that there were periods when she had very little time to devote to this case because of her commitments in Kazakhstan where she was the chair of a new international arbitration centre. However, it is also clear from the email correspondence that notwithstanding these pressures, Ms Dohmann remained hands on and in overall control of the counsel team and the preparation of the pleadings.
60. On 29 March 2018 Mr Burgess (Ms Dohmann's new junior) emailed Mr Samuels and Ms Dohmann with his view that although it is "*very difficult to prove a predominant intent to*

injure” a lawful means conspiracy was “*arguable*” as a basis for a cross-claim. The problem, which continued to exercise the legal team throughout the preparation of the defence, was that there was an express clause in the Facility Letter prohibiting any set off of cross claims against the sums due to the Bank. Mr Burgess told Ms Dohmann that he was as a consequence struggling to see how the Library conspiracy case, while arguable as a lawful means conspiracy cross-claim, amounted to a defence to the relief sought in the arbitration. Mr Burgess nevertheless proposed to draft a response on the basis that he would “*leave the legal consequences vague for now*”.

61. Mr Burgess sent a first draft of the summary cross-claim. As Mr Samuels specifically noted on 29 March 2018: “*On the actual draft my only real query is that we are asserting that Sistemica [sic] passed information to East West but am not sure we can prove that*”. In response to Mr Samuels’ email, Ms Dohmann replied to say that the draft should be amended to say that the Guarantors “*believe or ... infer ... or it is to be inferred*”. That amendment was subsequently made.
62. On 11 April 2018 the Guarantors filed their Response to the Request for Arbitration. The Response advanced reflected the amendment suggested by Mr Samuels.
63. The legal team then set about drafting the Defence and Cross-Claim. On 31 May 2018 Mr Kupfer sent Mr Samuels a detailed document entitled “*Points of defense*” which outlined the allegation of conspiracy that the Guarantors wished to put forward in the Arbitration. Mr Samuels edited this document reflecting his instructions. Ms Dohmann’s evidence (which I accept) was that Mr Gusinski was, or at least appeared to be, convinced that there was a conspiracy to obtain the library. Mr Burgess was nevertheless still concerned that the Library conspiracy case was not a defence to the arbitration claim. On 20 June he reported to Ms Dohmann that he had not been able to find a basis for a defence under English law. Ms Dohmann suggested there might be a defence under Russian public policy and that “*we have no choice but to plead everything, in the alternative.*”
64. Mr Burgess’ drafts were pored over by Mr Samuels and Mr Kupfer and further suggestions were made. On 22 June 2018, a significant development came from Mr Kupfer who had been liaising with Luxembourg lawyers. The pleading was amended to plead implied terms of the Facility Letter that the Bank would comply with provisions of Luxembourg banking law requiring the Bank to act honestly and fairly and in NCD’s best interests and avoid conflicts of interest. Ms Dohmann reviewed the latest product on 23 June 2018 and expressed herself to be “*very pleased*”. A further draft was circulated with her input. Further debate and amendments continued until the Defence was finalised. At some point Ms Dohmann spoke personally with the Luxembourg lawyers and spoke personally with the Russian lawyer advising Mr Gusinski and was satisfied that she could properly plead the foreign law points (which were later admitted by the Bank).
65. The Defence and Cross Claim was dated 27 June 2018 and was signed by Ms Dohmann KC and Mr Burgess. In summary, the Guarantors asserted the Library conspiracy case by way of a cross claim and defended the Bank’s claim on the basis that in seeking to enforce the loan facility as part of that conspiracy the Bank was in breach of implied terms of the guarantees and of non-contractual common law duties owed to the Guarantors and

sounding in tort. Ms Dohmann's evidence was that it was arguable that there was an implied term to act honestly because of Luxembourg banking law, and that this provided a defence to the Bank's claim rather than a set off. She said she believed it then to be a proper plea and believes it now to be a proper plea. I accept her evidence. What the evidence shows is that the hard work and industry of the wider legal team had found an argument that if successful circumvented the problem caused by the no set off clause.

66. About a week later Ms Dohmann raised with Mr Samuels a concern that if the Bank refused any proposals for compromising its debt then the moratorium would fail. This was a misunderstanding by Ms Dohmann of the position under Swiss law. Mr Kupfer explained to Mr Samuels the question was whether a restructuring programme was likely to result in a good outcome for the company. The Bank could object but the court could still impose the moratorium. Professor Lorandi told Mr Samuels that he expected to positively support NCD's application for a permanent moratorium. Creditors had a right to appeal a permanent moratorium. It does not seem that the Bank took any action either to object to the moratorium being made permanent or to appeal the decision to make it permanent.
67. A CMC was set down for 5 September 2018. There was discussion amongst the legal team and Mr Kupfer about making an application at the CMC in relation to using the Russian courts to obtain disclosure from Sistema and Mr Evtushenkov. Ms Dohmann refused to make that application:

"I personally cannot lend my name to presenting a hopeless application, I'm not having my good name undermined in this way. Every judge and arbitrator before whom I appear knows and expects that I will never argue what is obviously unarguable".

68. On 30 October 2018 Marcus Smith J handed down judgment in the Kagalovsky Proceedings. He gave judgment for NMDC for a sum of about US\$5.2 million inclusive of interest. On 12 November 2018 Marcus Smith J refused Mr Kagalovsky's application for permission to appeal and ordered him to pay the sums due to GSC to hold until further order of the High Court or the Court of Appeal, subject to the proviso that, if no such further order had been notified to GSC by 10 December 2018, GSC would be at liberty to pay the monies it held to NMDC. The sums due were duly paid to GSC, who placed it in their client account against the name of NMDC – this was the Judgment Sum.
69. Disclosure in the arbitration proceedings was completed by the end of September 2018. The disclosure did not produce any evidence that (a) Sistema had provided the Bank with the confidential information protected by the NDA, or (b) that the Bank had decided to accelerate the loan because it received such information. Instead, it became clear that the decision to accelerate the loan was taken by the bank as early as 3 January 2018 (prior to the NDA being signed and just a few days after the confidential information had been provided to Sistema on 30 December 2017). Amongst the documents disclosed was an email from the Bank to Sistema on 15 January 2018 which undermined the Library conspiracy case. The Bank had learnt of the proposed "Russian Netflix" venture between the New Media Group and Sistema, and of the NDA. The Bank expressed considerable concern that Mr Gusinski had done this so as to provide the New Media Group with the Library conspiracy defence if the Bank sought to recover the outstanding loan. This

provided an explanation for why Sistema abruptly ceased discussions with the New Media Group about the venture and the NDA was cancelled.

70. In October and November 2018 Ms Dohmann KC urged Mr Gusinski to settle on the basis that he could not win the case. I accept her evidence that she believed there was an arguable case on the law but insufficient evidence to establish it – as she said in her email of 7 November 2018. I have not overlooked the fact that in an earlier, and in my judgment less considered, email she had described the defence as meritorious on the facts but that “*we cannot win it on the law*”. This email was not put to her in cross examination and I find it to be just loose language for conveying that the defence was morally right but would not succeed.

The final stages of the arbitration proceedings and the representations to the Tribunal and the Bank

71. The arbitration tribunal (“**the Tribunal**”), comprised Mr David Sutton in the chair, Mr Michael Brindle KC and Mr Christopher Symons KC. The arbitration was set down for final hearing on 27 and 28 November 2018.
72. By a letter dated 16 November 2018 GSC on behalf of the Guarantors wrote to the Tribunal intimating an intention to withdraw their defence and associated cross-claim and to submit to judgment; the letter said that the Guarantors “*will agree to do so subject to terms as to time for payment*” and that they intended to make an application for terms as to time for payment. The letter set out the terms proposed by the Guarantors (“**the Initial Proposal**”):

“The terms of the proposed Award are as follows:

(1) The Respondents shall pay the outstanding principal on the Facility Agreement of USD 9,150,024.89, accrued interest (including default interest) and the costs of the Arbitration (including legal fees and expenses) to be assessed by two equal instalments on 31 May 2019 and 31 October 2019 respectively (‘the Payment Dates’).

(2) In the event that the Respondents do not make the payments by either of the Payment Dates:

a) there shall be a public auction of the Library with the cooperation of NMDC’s management and the creative team ...;

b) the Library will be sold to the highest bidder; and

c) the proceeds of the sale will be used to discharge the sums then remaining due under the Award.”

73. The letter explained the rationale of the Initial Proposal, stating that the Guarantors “*do not currently have sufficient realisable assets available to make an immediate payment of the sums outstanding under the Facility Agreement*”, but that the Group would be able to do so if allowed more time. The letter made no mention of the Judgment Sum from the

Kagalovsky Proceedings, which of course was then held subject to the terms of Marcus Smith J's order of 12 November 2018.

74. On 20 November 2018 the Guarantors applied to the Tribunal for an order for staged payments of the debt to the Bank. The application was supported by a witness statement of the same date by Mr Gusinski. He stated that the Guarantors currently had no liquid assets available to make an immediate payment of the sums due to the Bank. Mr Gusinski referred to the Judgment Sum but observed that, because of the order made by Marcus Smith J, it was "*not yet available to NMDC.*" He continued: "*However, when these funds become available to NMDC this will of course improve the Group's position, including the financing of its business operations and its ability to repay the Claimant.*" He did not make any offer to apply all or any part of the Judgment Sum in settlement of the debt owed to the Bank. The proposal made in the statement was precisely in the terms of the Initial Proposal in the letter of 16 November 2018.
75. By a letter of 20 November 2018, Morgan, Lewis & Bockius UK LLP ("**Morgan Lewis**"), the solicitors acting for the Bank, made clear that the Bank would oppose the application and seek an award providing for immediate payment in full.
76. On 26 November 2018 the Guarantors filed and served written submissions from Ms Dohmann and Mr Burgess, which were written on the instructions of or at least approved by Mr Gusinski, GSC and Mr Samuels. The submissions contain the first of three statements or representations on which the Bank relies in support of its claim to have had a proprietary interest in the Judgment Sum (or at least part of the Judgment Sum). Paragraph 3 set out the Guarantors' "*Proposed Award*", which was identical to the "Initial Proposal". This was immediately modified, or improved, by paragraph 4, which contained in sub-paragraph (d) what the bank relies on as "**the Written Submissions Representation**":

"4. Since the letter of 16 November 2018, there has been an important development:

a. As set out in the witness statement of Mr Gusinski in support of the Application..., the Third Respondent [NMDC] has recently obtained a judgment in the sum of US\$5.2 million in High Court proceedings in respect of unpaid licence fees ('the Kagalovsky Proceedings'). Whilst [Mr Kagalovsky] has been ordered to pay that sum into the account of the Third Respondent's solicitors [GSC] (the same solicitors which represent the Third Respondent in the Arbitration) and has done so, release of that payment to the Third Respondent has been stayed pending an application by the Defendant in that case to the Court of Appeal for a further stay and for permission to appeal.

b. By letter dated 23 November 2018, the Court of Appeal has indicated that 'In view of the urgency of the stay application we will be referring the papers to a judge from next Wednesday 28th November 2018 at 4pm'.

c. If the Claimant's application for an interim stay fails, the Third Respondent will immediately have available to it the sum of US\$5.2 million.

d. The Respondents are therefore willing to add a further provision to the Proposed Award, in the following terms: In the event that the stay application by the Defendant in the Kagalovsky Proceedings is dismissed, the Third Respondent shall make a payment to the Claimant in the sum of US\$4.75 million within 7 days of being notified of that dismissal and such sum will be taken into account in respect of the liability to pay the first instalment (depending on the date of such payment).”

Also relevant is paragraph 5:

“For the reasons set out below, it is submitted that the Proposed Award (particularly as now fortified by the addition in the preceding paragraph) is both eminently reasonable and of substantial benefit to both parties. It will prevent the unnecessary destruction of the Group which would follow from the immediate enforcement of an Award of the sums sought. It will also provide the Claimant with a greater prospect of full recovery of those sums.”

77. This improved proposal did not find favour with the Bank, which remained insistent on immediate payment in full. Accordingly the arbitration proceedings went to a hearing on 27 November 2018.

78. At the hearing, Ms Dohmann made oral submissions on the instructions of GSC and Mr Samuels and with the approval of the Guarantors. Those oral submissions, which have been transcribed, contained the following passage, which the Bank relies on as **“the Oral Submissions Representation”**:

“Now, the second main source, more substantial source actually, is the judgment proceeds of the Kagalovsky judgment, if I may call it that for short. Sir, it is quite an astonishing submission to say that there would be deprivation of the [Bank] to enforce against a judgment sum in circumstances where it’s one of the main anchors of our proposal to this Tribunal that that sum, minus what we need to defend and to deal with cost assessment, should be specifically earmarked for repayment. I stress specifically earmarked. Why? Because it’s not just something that goes into the general estate of the guarantor company [NMDC]. It is a sum that is in the jurisdiction and we have offered it. And it is, as you know of course large enough to be almost half of what is outstanding ...”

79. Later in the hearing there was a lengthy exchange between Mr Brindle and Ms Dohmann concerning the terms of the Guarantors’ proposal. Mr Brindle expressed doubt as to the Tribunal’s jurisdiction to direct enforcement against the Library or the proceeds of sale of the Library as envisaged by the Initial Proposal, and Ms Dohmann accepted that this was something that would have to be dealt with by recital or undertaking but could not be ordered by the Tribunal. Then Mr Brindle distinguished between two parts of the Guarantors’ proposals: the first part related to the payment of \$4.75m of the Judgment Sum, which represented approximately half of the amount owed to the Bank; the second part related to the remainder of the debt, which it was proposed would be paid on 31 October 2019, and if not would be met from the proceeds of sale of the Library. Ms Dohmann accepted that the second part depended upon Mr Gusinski’s evidence as to income stream and her submissions in relation to the Library. The exchange continued:

“MR BRINDLE: Yes. One possible answer is that we might accept your submissions in relation to the first point but be unpersuaded to the second. That is open to us, is it not? ... In other words, we may accede to part of your submission, namely an extension until you say May but it may be April, it doesn't matter, but not be persuaded to give the further extension. It obviously isn't your position, I'm just saying that's open to us?”

MS DOHMANN: It is obviously open to you, yes.”

This is “**the Brindle/Dohmann Extract**” relied upon by the Bank.

80. A little later there were further exchanges concerning the possibility of providing some comfort to the Bank if staged payments were to be directed. There was discussion of the possibility of a charge over the Library; the Bank gave reasons why it did not regard that course as satisfactory. Then there was discussion concerning the \$4.75m:

“THE CHAIRMAN: We do have one other point, just talking about it, and that relates to the money that will come—assume for the moment that the Court of Appeal doesn't give permission and that then the money is available and so on. We heard Mr Gusinski tell us that that money would be paid over to the bank.

MS DOHMANN: Subject to the costs of enforcing, the costs assessment and so on.

THE CHAIRMAN: Subject to certain deductions to be made and costs of the litigation and so on. Just tell us, really thinking it through as to how that money would pass, would it go straight into Mr Samuels' firm's account?

MS DOHMANN: It is already there. That's where it is.

THE CHAIRMAN: Would his firm be in a position where he could give an undertaking that that money would be paid over, so a solicitor's undertaking that that money would be paid straight to the bank?

MS DOHMANN: Well, always subject to the deductions which are necessary. Again, I haven't got instructions on that, but that is certainly not complicated.

THE CHAIRMAN: No, it doesn't seem to us either complicated and Mr Samuels is sitting there, so you could take instructions.

MS DOHMANN: Subject to the partners and the compliance department of the firm, one doesn't see a problem with that.

THE CHAIRMAN: I think if we were minded at all to consider your application for stage payments, I think at the moment we would want to see such an undertaking, so he would need to talk to his compliance department and get clearance.

MS DOHMANN: Yes. We do have time as you are aware, because of the timetable for costs and interest. That being the case, that is something that can be resolved.

THE CHAIRMAN: Very good.

MR BRINDLE: As you can understand, we just want to be absolutely sure that there's no possibility of that money going anywhere else.

MS DOHMANN: At the moment that seems to me very clear. Right now it certainly can't go anywhere else, it's under a stay order. But if and when that's gone, if there is something else put in place, the Tribunal will be told."

81. At the conclusion of the arbitration hearing, the Tribunal reserved its award. There then followed correspondence between GSC and Morgan Lewis, much of it copied to the Tribunal, some of which is relevant.
82. By a letter dated 28 November 2018 to GSC, Morgan Lewis followed up the discussion at the hearing concerning a solicitors' undertaking and asked whether such an undertaking would be forthcoming. The letter concluded: *"For the avoidance of doubt, our client's position remains that the Tribunal should reject your clients' application for stage payments, but this suggestion of an undertaking is clearly an important point, currently left open from yesterday's hearing."* Having received no response to that request, on 30 November 2018 Morgan Lewis sent a chasing email to GSC, which was copied to the Tribunal.
83. GSC gave a substantive response on 30 November 2018, declining to give an undertaking. The letter included the following passages:

"1. The proposal made in respect of payment of part of the Judgment monies was made in the context of a staged payment Award. That proposal was made to enable the New Media Group to be able to continue to fund its ongoing operations and hopefully to ensure that your client Bank received payment. That context is of crucial significance.

2. You have consistently opposed a staged payment Award

...

3. Mr Gusinski has made clear both orally at the hearing and in his witness statements that an immediate payment Award ... would threaten the continued existence of the New Media Group and its solvency. You are therefore well aware of this risk.

4. That being so, any payment of all or any part of the Judgment monies in favour of your client could be challenged in the context of future insolvency proceedings in relation to NMDC as a voidable preference under s.145 of the Cayman Islands Companies Law. We should further mention that your client's exposure to a preference challenge may be increased by reason of s.145 (2) and (3) of the Companies Law. In such circumstances our firm is understandably not willing to be put at risk of being called upon the comply [sic] with its undertaking if preference claims are raised. We consider it unreasonable for this firm to be exposed to such a risk.

5. The risk of any such liquidation will be considerably reduced by a stage payment Award as per our proposal.”

84. In its response to that letter on the same day, Morgan Lewis stated that the Bank “*would be willing to accept an undertaking from [GSC] that no part of the USD5.2 million held in [GSC’s] bank account as a result of the English High Court litigation involving [NMDC] be paid out of that account without providing [Morgan Lewis] with 14 days’ written notice that such payment [was] to be made.*” The letter said that the Bank reserved its rights to apply, among other things, for an urgent injunction unless a satisfactory undertaking were given. The possibility of applying for an injunction was explained by Morgan Lewis in a letter on 3 December 2018:

“[I]f the application for permission to appeal is determined in favour of the Third Respondent before an award has been issued by the Tribunal, there is a possibility that the funds held by GSC may cease to be available to satisfy the Tribunal’s award, and further our client may be put to the effort and expense of applying for a freezing order to preserve those funds. As/when an award is subsequently made in favour of our client, enforcement steps would then need to then take place if that award is not complied with voluntarily.”

85. On 3 December 2018, by a letter sent both to Morgan Lewis and to the Tribunal, GSC refused to give an undertaking in the terms sought by the Bank but offered instead a more limited undertaking in the following terms: “*if the stay on the Judgment monies is lifted before the Tribunal has issued its Award in this arbitration, we will notify both you and the Tribunal by email of that fact and provide you with 5 days’ notice before any withdrawal of the Judgment Sum from our client account is made which would reduce that sum to less than US\$4.75 million. This will enable your clients an opportunity to decide whether to make any further application.*”

86. The letter went on to explain the intended deductions from the Judgment Sum:

“2. Your letter seems to assume that the entirety of the Judgment Sum is to be made available to East West. That is not the case. As Mr Gusinski explained, there are various key employees and members of the creative and management teams who agreed to delay the payment of monies due to them whilst NMDC continues to operate, and they did so to enable NMDC and the New Media Group to continue to trade. They too have an interest in the Judgment sum and, if the Group becomes insolvent, there is a real risk that they will not stand by and allow East West to try to obtain an unlawful preference. They have, to date, supported the offer of a substantial part payment from the Judgment sum to East West but only as part of the overall proposal that has been made. You cannot and should not concentrate on just one aspect of the terms of that proposal; to do so runs the risk of misleading the Tribunal.

3. Further and in the meantime, further legal costs have to be incurred in the NMDC litigation including but not limited to the preparation of a bill for detailed assessment of the costs which have been awarded to NMDC. The proposal of a payment of US\$4.75 million was offered as part of a staged payment Award inter alia expressly to enable such

steps to be taken. There are also costs that have been incurred on behalf of NMDC in dealing with the arbitration itself.”

87. On 5 December 2018 GSC gave a solicitors’ undertaking to the Tribunal to notify the Tribunal and Morgan Lewis promptly if the stay were lifted before the Tribunal issued its award and to give five business days’ notice before making any withdrawal from the Judgment Sum that would reduce the amount held below \$4.75 million.
88. On 7 December 2018 the Court of Appeal refused Mr Kagalovsky permission to appeal and removed the stay on disposition of the Judgment Sum. On the same day GSC informed the Bank and the Tribunal that the stay had been removed.
89. On 10 December 2018 Morgan Lewis wrote to the Tribunal and GSC in light of the removal of the stay. The letter concerned what was said to be the need for or at least merit in a freezing order, and it contained the following passages:

“As you will recall, the Respondents have repeatedly suggested that the vast majority of the money (specifically US\$4.75 million of the US\$5.2 million judgment in favour of the Third Respondent) that was previously subject to the stay (‘the GSC Money’) could (subject to other claims) be used to partially satisfy the award which will, inevitably (given there is no defence or cross-claim), be made in favour of [the Bank] in this arbitration (‘the Upcoming Award’). Indeed, this is one of the cornerstones of the Respondents’ application for staged payments.

...

The Claimant is concerned that, if the Notice is given [viz. that money is to be withdrawn from the GSC Money so as to reduce the balance below \$4.75 million] and the GSC Money is paid out of GSC’s client account, then that money will be dissipated and put beyond the Claimant’s reach. Given this concern ..., it seems increasingly likely that the Claimant will have to apply for a freezing injunction as against the GSC Money as/when the Notice is given. Indeed, the only foreseeable circumstance in which that would not be necessary is if the Claimant is able to enforce the Upcoming Award against the GSC Money before the Notice is given.”

90. On 10 December 2018, after receipt of that letter, GSC wrote to the Tribunal and Morgan Lewis to say that a conservatory Order by the Tribunal prior to the Award was unnecessary and that a freezing injunction post Award would be opposed. The Bank relies on the following text as constituting what it calls “**the GSC Representations**”;

“We refer to Morgan Lewis’ letter of today’s date regarding the GSC Monies in the sum of US\$4.75 million currently held in our client account and subject to our undertaking to the Tribunal.

We have now taken urgent instructions and can indicate as follows:

- 1. We believe that it has at all times been made clear that the payment of the sum of US\$4.75 million currently held by this firm in its client account is an integral part of the*

Respondents' proposal which was a cornerstone of their Application for a staged payments Award, namely if their proposal became a part of the Award that sum would be paid to the Bank within 7 days of any then still current Court stay on the monies being lifted. That Court stay has of course now been removed.

2. In order to be in a position to comply with their proposal and with any such staged payment Award the Respondents would have to and will retain that sum in our client account.

3. To address the Claimant's alleged concerns, a Solicitors' undertaking was provided to the Tribunal to the effect that we would not take steps to reduce the monies currently held below US\$4.75 million without giving the Tribunal and Morgan Lewis five business days' prior notice. We indicated earlier today that we have had no instructions to serve such a notice and that remains the position. Indeed we are authorised to confirm that no such instructions will be forthcoming and no such notice will be given before the issue of the Award ..."

91. On 10 December 2018, without notification to the Bank or the Tribunal, GSC paid \$415,000 out of its client account to NCD's UBP Account in Switzerland. Some \$4.75 million remained in GSC's client account.
92. On 11 December 2018 the Tribunal issued a partial final award ("**the First Award**"), by which it ordered the Guarantors to pay to the Bank \$9,150,024.89 in two instalments, namely (i) \$4.75 million forthwith and (ii) the balance by 31 March 2019.
93. In paragraph 11 of the First Award the Tribunal recorded that the dispute had eventually come down to "*whether the amounts claimed by the Claimant should be paid immediately or by staged instalments.*" Paragraphs 22 and 39 recorded that the Guarantors had withdrawn their defences and cross-claim but had not consented to the making of an award and "*would only agree to an award on specific terms, which the Claimant opposed*". Paragraph 44 referred to GSC's letter of 16 November 2018 and to Mr Gusinski's witness statement dated 20 November 2018. Paragraph 45 quoted the proposal set out in counsel's written submissions for NMDC, reiterating the terms of the Initial Proposal.
94. Paragraph 46 referred to Ms Dohmann's oral submissions on behalf of NMDC and summarised the case advanced:
 - NMDC currently had no liquid assets available to make immediate payment of the amount due to the Bank.
 - If the Judgment Sum were released from the stay, NMDC "*would make a payment to the Claimant of US\$4.75 million within seven days [thereafter], such sum to be taken into account in respect of the liability to pay the First Instalment of the award proposed by the Respondents provided that an award is made in the terms proposed (RS, 4(d))*". (Paragraph 52 recorded that the stay had subsequently been removed on 7 December 2018.)

- If staged payments were permitted, the Group would be able to make payment in full from its ongoing commercial activities. Further, the value of the Library was more than sufficient to cover all sums outstanding.

95. After a summary of the submissions for the Bank and a discussion of the Tribunal's powers, the First Award identified at paragraph 66 certain matters that "*the Tribunal ha[d] particularly borne in mind*", which included: "*[t]he possibility that a staged payment award may prejudice the Claimant from a timely and effective enforcement as against other creditors and/or in the event of bankruptcy of some or all of the Respondents.*" The Tribunal then explained the reasons for its decision, which included the following:

"68. Having considered the evidence, and heard Mr Gusinski's testimony and the Parties' submissions, the Tribunal has, in addition, received the information provided to it by the Respondents that the sum of US\$4.75m is no longer the subject of a stay from the Courts in that case and is now 'available'. The Tribunal notes the submission made by the Respondents above namely:

'In the event that the stay application by the Defendant in the Kagalovsky proceedings is dismissed, the Third Respondent would make a payment to the Claimant of US\$ 4.75 million within seven days of being notified of that dismissal, such sum to be taken into account in respect of the liability to pay the First Instalment of the award proposed by the Respondents provided that an award is made in the terms proposed (RS, 4(d)).'

69. The Tribunal can see no reason not to order the Respondents to make immediate payment of that sum to the Claimant and will so order. As for the balance the Tribunal has decided to specify in the Award that payment in full of the remainder of the claim should be made on or before 31 March 2019.

...

73. In making this Award, the Tribunal has sought to avoid the bankruptcy of the Respondents for the sake of a short period of delay. In particular, the Tribunal took account of the statement of the Respondents' Leading Counsel that the majority of the Kagalovsky Judgment sum has been 'specifically earmarked for repayment' of the Claimant's loan and that the sum was in the jurisdiction."

96. The email from the Chairman, by which the First Award was sent, granted permission to the Bank to apply to the Court, if so advised, for a freezing order and said: "*In the absence of payment to the Claimant or the Respondents agreeing to pay the Claimant the sum of US\$ 4.75 million forthwith, the Tribunal can see no reason why such an order or injunction should not be granted.*"

Subsequent events

97. On 13 December 2018 (which is the date on which ~~a corrected version~~ the First Award was delivered), Morgan Lewis provided to GSC details of the bank account into which the first

instalment should be paid and asked for confirmation that \$4.75 million would be paid immediately.

98. On 14 December 2018 GSC replied:

“As you are aware the Arbitral Tribunal are still functional and our undertaking therefore remains in place and that the sum of US\$4.75 million is held by us. That stated, you are also aware that the stage payment proposal which we put forward on behalf of our clients had been carefully formulated taking into account the views of the various creditors of NMDC. Our clients therefore are proposing to consult with these creditors over the weekend to see what their position is in the light of the Tribunal’s Partial Award. We therefore hope to respond to you substantively during the course of Monday.”

99. No payment was made in respect of the first instalment.

100. On 17 December 2018 the Bank filed a claim form in the Commercial Court, seeking the entry of judgment in the terms of the First Award.

101. On the same day GSC wrote to Morgan Lewis in the following terms:

“Having heard further from the Third Respondent, we write in relation with the amount of US\$4.75 million currently held by this firm in its client account and having the following points to make:

1. We confirm again that our firm holds the sum of \$4.75 million in our client account and our client has not given any instructions to this firm to transfer that amount at the present time.

2. As your client is aware that amount is the only liquid asset currently available for the Third Respondent to pay its creditors which include your client as well as its other creditors being mainly employees and consultants who have so far deferred a significant part of their compensation for a long time.

3. The Third Respondent’s management has discussed with most of these other creditors the current situation following the issuing of the Partial Final Partial Award to try to ascertain whether, if the monies held by this firm were released to your client, the Group would be able to continue its operation as a going concern and whether such payment would be challenged.

4. The parties are currently waiting for the Tribunal’s Award in relation to costs and interest and that would be a further liability in an amount of circa \$ 1 .5 million. If that were ordered to be paid immediately or by the end of March 2019, the Group would make it very difficult to meet such a liability.

5. The other creditors have indicated concern as to the viability of ongoing operational activity if an immediate liability pay [sic] this further amount arises and thus both our client and your client are likely to be faced by arguments from these other creditors if the payment of the US\$4.75 million is made without regard to their interests.

6. Accordingly we have been asked to invite your client to agree to the following, namely if payment of the US\$4.75 million is made now, the payment of the additional amount can be made by no later than 1 October 2019 and you will notify the Tribunal of your agreement to this date for payment.”

102. On 20 December 2018 Morgan Lewis responded:

“So that our client can properly consider the proposal, please confirm (with certainty) the position of the ‘other creditors’. In short, our client needs express confirmation that if it was inclined to agree to your clients’ proposal then no further approval of any third party/ies is needed such that the USD 4.75 million is paid to this firm’s bank account immediately”

103. GSC’s response later on the same day did not provide the confirmation sought but instead said:

“We have just finished a meeting with our client and write to confirm that we are instructed to undertake to your firm to provide you 5 business days’ notice by email before any withdrawal of the sum of US\$4.75 million which we currently hold in our client account on behalf of the Third Respondent to this Arbitration”

104. NMDC presented a petition for its own winding up in the Cayman Islands on 18 January 2019. The affidavit in support of the petition had been sworn by Mr Gusinski on 8 January 2019.

105. On 19 January 2019 Andrew Baker J made an order permitting the Bank to enforce the First Award in the same manner as a judgment of the court and entering judgment against NMDC and others in the terms of the First Award.

106. On 25 January 2019 GSC wrote to the Tribunal and to Morgan Lewis. They did so as solicitors both for NMDC and for the joint provisional liquidators (“JPLs”) of NMDC who had been appointed by the Grand Court of the Cayman Islands on 21 January 2019. The letter enclosed the order appointing the JPLs. It also enclosed “by way of service and information” an order made that day in the High Court of England and Wales recognising the Cayman Islands Order under the Cross Border Insolvency Regulations 2006. The letter continued:

“We refer you to Article 20 of these Regulations which in effect stays any enforcement of the partial Award made in the Arbitration. We also wish to inform you that the provisional liquidators have already made demand that we release to them the monies held in our client account pursuant to the undertakings. Accordingly we hereby given you formal notice under the undertakings that we intend to withdraw the sum from our client account at the expiration of five working days from today’s date namely: Monday 4 February 2019.”

The demand of the JPLs had in fact been made by email to Mr Samuels on 22 January 2019.

107. On receipt of GSC's letter of 25 January 2019, Morgan Lewis stated that they reserved the Bank's rights, but they took no further action.
108. On 5 February 2019 GSC paid \$4,647,000 to the JPLs, having first deducted from the moneys it was holding a sum of \$103,000 in respect of its own fees in respect of (a) the arbitral proceedings and (b) the JPLs' recognition application in England.
109. Also on 5 February 2019 the Tribunal issued its Second and Final Award in respect of interest and costs, requiring the Guarantors to pay approximately \$1.8 million to the Bank. Those moneys have not been paid.
110. At the time of the application for NMDC's winding up a document ("**the Letter of Guarantee**") signed by Mr Gusinski had been produced to the JPLs, and to Mr Samuels. It purported to be a guarantee by NMDC of amounts owed to Group employees, and an undertaking to pay them from sums received from the Kagalovsky litigation. The Letter of Guarantee is dated 18 January 2018 and is said to be governed by the law of New York. The Letter of Guarantee had not been mentioned to Mr Samuels or Ms Dohmann before. The Bank says this is a suspicious document but it advances no positive case either that it is a backdated forgery or that it is valid. It advances no positive case one way or the other.
111. In May 2019 the JPLs became joint official liquidators ("**JOLs**") of NMDC by order of the Grand Court of the Cayman Islands. In the same month NCD's moratorium was converted into a full liquidation by the Cantonal Court of Zug.
112. On 22 May 2019 the Bank submitted a proof of debt, signed by Mr Stoliarov, in NMDC's liquidation for \$10,775,769.98. The proof did not refer to any security for the debt.
113. In July 2019 the Bank joined the liquidation committees of both NMDC and NCD.
114. By a letter dated August 2020, solicitors newly consulted by the Bank asserted to the JOLs that the moneys transferred to them by GSC on 5 February 2019 "*were in fact held on trust for the Bank and were transferred to you in breach of that trust.*" By another letter of the same date to GSC the Bank's solicitors asserted the existence of the trust, relying on the Oral Submissions Representation, and made allegations of breach of trust against GSC.
115. There ensued a dispute between the Bank and the JOLs. In summary, the JOLs denied that the Bank had any proprietary interest in the moneys that had been transferred to them as JPLs on 5 February 2019 and issued a summons in the Cayman Islands to resolve the issue. In August 2021 the Bank and the JOLs compromised the dispute on terms that included acceptance by the Bank that it had no proprietary interest in the moneys then held by the JOLs. The Bank says it took a pragmatic approach in reaching a compromise. I disregard the compromise with the JOLs when considering the Bank's claim in these proceedings that it had a proprietary interest in the Judgment Sum.

Proprietary interest

116. I shall deal first with the Bank's claim that by reason of representations made when seeking an arbitration award for payment by instalments, the Bank acquired a proprietary interest in the Judgment Sum.
117. The Bank submits that its proprietary interest arises either from an equitable assignment by NMDC to EWUB of the Judgment Sum, with the Bank thereby acquiring an equitable charge over the Judgment Sum or because a constructive trust arose such that the Bank became a beneficial owner of the Judgment Sum.

Relevant principles - assignment

118. There is little dispute as to the applicable principles in relation to an equitable assignment which can be shortly stated so far as relevant to this case:
- a. an equitable assignment may be effected by a communication which manifests a final and settled intention to transfer the chose immediately to the assignee: *Guest on the Law of Assignment* (5th ed, 2024) at 3-13;
 - b. such communication may occur orally or arise from a course of dealing: *Guest* at 3-13;
 - c. the intention to assign is objectively ascertained; *Swiss Bank v Lloyds Bank* [1982] AC 582;
 - d. a purported assignment of a future chose can take effect as an agreement to assign. An agreement for consideration to assign a future chose is binding on the conscience of the assignor and once the consideration is paid or executed, immediately the chose is acquired by him it will be held by him on constructive trust for the assignee. *Guest* at 3-27, *Holroyd v Marshall* (1862) 10 HL Cas 191; 11 ER 999.
 - e. Counsel (here Ms Dohmann) has implied actual authority alternatively ostensible authority to bind their client when acting for them at a hearing: *Waugh v Clifford* [1982] Ch 374.

Relevant principles – constructive trusts

119. As for constructive trusts, we are concerned here with institutional constructive trusts (or a constructive trust of the first kind to use Lewin's terminology; see below) rather than the situation where equity compels a defendant to "account as constructive trustee" (a constructive trust of the second kind). The latter is a form of equitable relief where the defendant is not actually a trustee. Whereas an institutional constructive trust arises by operation of law as from the date of the circumstances which give rise to it, the function of the court is merely to declare that it has arisen and determine the consequences of it having arisen when it did: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 714-5. The hallmarks of such a constructive trust are described by Lewin on Trusts 20th ed at 8-011 as follows:

“Constructive trusts of the first kind arise where a person has accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty. Such a constructive trustee really is a trustee. He does not receive the trust property in his own right, but by a transaction which was intended to create a trust from the start. The trustee’s possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and any subsequent appropriation of the property to his own use is a breach of that trust.”

120. The concept of a purely remedial constructive trust which is imposed by the court as an exercise of discretion and in the absence of an underlying cause of action in order to prevent unjust enrichment from unconscionable conduct is recognised in some jurisdictions but not English law; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [45], *Re D&D Wines International Ltd* [2016] UKSC 47; [2016] 1 WLR 3179 at [27]. Mr Walmsley who made submissions on this issue on behalf of the claimant expressly disclaimed any reliance on a remedial constructive trust.

Final and settled intention to assign

121. The bank says there was an intention manifested on behalf of NMDC to assign \$4.75m of the Judgment Sum immediately to the Bank at the time of the hearing, or was conditional only upon any staged award being made which did not require NMDC to pay before the stay imposed by Marcus Smith J on the Judgment Sum had been lifted. Such an intention it is said can be objectively ascertained in respect of the sum of \$4.75m of the Judgment Sum from (a) the Written Submissions (b) the Oral Submissions Representations and (c) the Brindle/Dohmann Extract.
122. Before considering this submission it should be said that it is clear that nobody at the time considered that there had been an immediate or conditional assignment of \$4.75m. Mr Stoliarov was quite clear in his oral evidence that no one at the Bank had any idea at the end of the hearing that they had acquired a proprietary interest in any part of the Judgment Sum. Ms Dohmann was equally clear that she had no intention of making an assignment or giving the Bank a proprietary interest in any part of the Judgment Sum, had no instructions to do so, and did not believe she had done so. It is clear from the post-hearing correspondence about undertakings and freezing orders that neither GSC nor Morgan Lewis thought that any part of the Judgment sum now belonged to the Bank – else that point would have been stridently asserted. The Tribunal plainly did not think there had been an immediate assignment or conferral of a proprietary interest. The Award describes Ms Dohmann’s proposals in relation to the Judgment Sum as conditional on NMDC’s proposals as to payment by instalments being accepted by the Tribunal (“provided that an award is made in the terms proposed”) and they were not.
123. The Written Submissions relied upon by the Bank said that the respondents “*were willing to add a further provision to the Proposed Award*” which “*fortified*” it. That proposal was to make a payment of \$4.75m within 7 days of the Judgment Sum ceasing to be subject to a stay and that such payment “*will be taken into account in respect of the liability to pay the first instalment*” under the Proposed Award. The proposal in relation to \$4.75m was

therefore made an integral part of the Proposed Award and it was only offered as part of the Proposed Award. The Bank says it was not expressly conditional on the Proposed Award being made, but it was in fact a part of the Proposed Award. There was no proposal in relation to \$4.75m capable of being accepted independent of the Proposed Award. The Proposed Award was the award the Tribunal was being invited to make. The Written Submissions do not suggest that the terms of the Proposed Award could or would have any effect unless and until an award was made in those terms. The Written Submissions therefore do not disclose any intention that the Bank should acquire any proprietary interest in the Judgment Sum, at least unless and until an award was made in the terms of the Proposed Award sought by NMDC. No such award was ever made and so I heard no submissions as to whether the Written Submissions would have constituted such an assignment, and I express no view on that issue. An intention manifested during the hearing to make an immediate assignment, or one conditional upon some other staged payment award being made, would be inconsistent with the Written Submissions.

124. The Oral Submissions Representations also do not in my judgment show any intention to assign, at least unless and until an award was made in the terms of the Proposed Award. The passage, in its context, just shows Ms Dohmann saying that it was an “anchor” of the Proposed Award that \$4.75m should be specifically earmarked for repayment of the Bank. That was correct. Ms Dohmann was explaining why the Proposed Award if made met the Bank’s submission that the bank was prejudiced if the Proposed Award was made by not being able to enforce against the Judgment Sum. There is nothing in the passage to suggest that Ms Dohmann was modifying or even clarifying the Proposed Award or Written Submissions. The words used are not in my judgment remotely capable of displaying a final and settled intention to make an immediate assignment, or an assignment conditional upon any staged payment being made.
125. The Brindle/Dohmann extract is said to show the Tribunal clarifying NMDC’s position as to the \$4.75m if NMDC’s proposed award was not accepted but some other staged award was made. The extract does not bear that construction or reading either on its own or when read as part of the whole transcript.
126. Taken on its own, the passage shows Mr Brindle debating with Ms Dohmann the possibility of the Tribunal accepting Ms Dohmann’s submissions that there should be an extension of time for payment until April or May 2019 but not the rest of NMDC’s proposal that half the outstanding sums should not be paid until October 2019. In that passage Mr Brindle is explicit that the Tribunal has not yet made a decision. That was a debate as to whether there should be an extension of time for payment beyond April or May 2019 as NMDC proposed. It was not a debate about whether NMDC would be willing, contrary to the Written Submissions, to agree that the \$4.75m would be made available to the Bank if the Tribunal did not make the award in the form NMDC proposed. Mr Brindle did not ask Ms Dohmann to confirm that the offer in relation to the \$4.75m would remain on the table if the Tribunal made some different award and she did not do so. All she agreed was that the Tribunal had the power to reject her submissions and make a different staged award to that which NMDC was seeking.

127. When one looks at the rest of the transcript, one sees the later exchange between the Chairman and Ms Dohmann as to whether GSC would give a solicitor's undertaking to pay the \$4.75m. The Chairman said "*if we were minded at all to consider your application for stage payments, I think at the moment we would want to see such an undertaking*". Two points arise from this. Firstly, Ms Dohmann was throughout this hearing making only one application for staged payments, namely the Proposed Award, and the Tribunal clearly understood the offer of \$4.75m to be tied to that. Secondly the Tribunal's requirement of an undertaking underlines the point that the Tribunal and Ms Dohmann did not understand from the representations relied on by the Bank that NMDC had an intention to confer on the Bank an immediate or conditional proprietary interest. If there were such an interest, GSC could not properly pay those funds to NMDC even without having given an undertaking (as the Bank now asserts in these proceedings in its claim for compensation from GSC for breach of trust and fiduciary duty).
128. Taken on their own or taken together the Written Submissions, the Oral Submissions Representations and the Brindle/Dohmann Extract do not allow a final and settled intention to assign to be objectively ascertained.
129. It is not therefore necessary to determine whether an assignment of \$4.75m of the Judgment Sum which was held in GSC's client account pursuant to the order of Marcus Smith J was an assignment of a future chose in action which required consideration, and if so whether there was any such consideration. Suffice it to say I accept Mr Walmsley's submissions that on the proper construction of the order of Marcus Smith J the Judgment Sum belonged to NMDC when it was paid and therefore the Judgment Sum represented an existing chose in action belonging to NMDC.

Constructive trust

130. The defendants correctly say that the Bank has not pleaded a claim in constructive trust as an alternative to assignment. The claim in constructive trust is pleaded on the basis that the Bank succeeds in establishing that there has been an assignment. It is therefore not necessary to consider the Bank's contentions at trial on constructive trust. There was in any event no merit in those contentions if there has been no assignment. In essence Mr Walmsley submitted that the representations made on behalf of NMDC gave rise to a fiduciary duty on its part but he was unable to identify a coherent argument which survived the failure of the assignment claim as to why this was so. If there was no assignment, NMDC owed no fiduciary duty to the Bank in respect of the Judgment Sum which belonged to NMDC alone. The Judgment Sum was NMDC's money, NMDC never intended to hold any part of it on trust for the Bank and never assumed the role of a trustee of it in favour of the Bank. There can be no institutional constructive trust.

Claims based on bank's alleged proprietary interest

131. The claims against Mr Gusinski, GSC and Mr Samuels for breach of trust, breach of fiduciary duty, knowing receipt and dishonest assistance, which were all premised on the Bank having a proprietary interest in all or part of the Judgment Sum, have failed.

Conspiracy

The law

132. There are two types of actionable conspiracy torts. They were defined in *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 (CA) at 311 as follows:

(1) A conspiracy to injure by lawful means is actionable where the claimant proves that the claimant has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure the claimant, where the predominant purpose of the defendant is to injure the claimant.

(2) A conspiracy to injure by unlawful means is actionable where the claimant proves that the claimant has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure the claimant by unlawful means, whether or not it is the predominant purpose of the defendant to do so.

133. The core common to both forms of the tort is that it is necessary to show that the defendant has been party to a combination and that action taken in pursuit of that combination has caused the claimant to suffer loss and damage.
134. In the case of lawful means conspiracy, the additional requirement over and above that common core is that the predominant purpose of the defendant is to injure the claimant. That requirement is not satisfied if the defendant's predominant purpose is to advance the defendant's own interests.
135. In the case of unlawful means conspiracy, the additional requirements over and above that common core are that (i) the defendant intends to injure the claimant and (ii) that the means used are unlawful. Injury to the claimant need not be the defendant's primary purpose, which may be to advance his own interests; *Lonrho Plc v Al-Fayed (No.1)* [1992] 1 AC 448 at 466A. The requisite intention exists where the defendant inflicts harm as an end in itself or as a means of achieving the end of enriching the defendant; *OBG Ltd v Allan* [2008] 1 AC 1 at [62] and [164]. What is required is an actual intention to cause loss, or reckless indifference as to whether loss is caused. Reckless indifference means here a conscious decision not to inquire into the existence of a fact; *OBG* at [41]. Mere foreseeability of a consequence does not satisfy the requirement of intention; *OBG* at [43]. A defendant's foresight that his or her unlawful conduct *may* or *will probably* damage the claimant is not enough; *OBG* at [166]. Where, however, loss is inevitable if there is to be gain by the defendant, and the gain cannot be attained without the loss, then the defendant who knows this and goes ahead with unlawful action has the requisite intention; *OBG* at [167].

136. It is not necessary to show that there is anything in the nature of an express agreement. It is sufficient if two or more persons deliberately combine to achieve a common goal; *Kuwait Oil Tanker* at 312H. What must be shown is that the parties to the conspiracy shared the same object and were sufficiently aware of the surrounding circumstances for it properly to be said that they were acting in concert at the time of the acts complained of; *Kuwait Oil Tanker* at 313C.
137. It needs to be proved that steps taken pursuant to the conspiracy have caused loss and damage. It is not necessary, however, to establish that every conspirator carries out acts pursuant to the combination: *Digicel v Cable & Wireless* [2010] EWHC 774 (Ch), Annex I, at [76]; the conspirator's liability arises from his or her joinder to the combination which causes loss, not the acts he or she personally does in furtherance of it.
138. In the context of unlawful means conspiracy, the unlawful means do not have to be independently actionable at the suit of the claimant (*Lakatamia Shipping Co Limited v Nobu Su* [2021] EWHC 1907, [90]).
139. On the current state of the authorities, in an unlawful means conspiracy the defendant must know the facts that render the means unlawful but there is no requirement that he or she appreciates the legal effects of those means: *The Racing Partnership Ltd v Done Brothers (Cash Betting) Ltd* [2020] EWCA Civ 1300 (per the majority – Arnold LJ at [139]-[144], Phillips LJ at [171], Lewison LJ dissenting).
140. One of the issues which arises in this case is how these principles apply to a solicitor alleged to be conspiring with his client. It was common ground between the parties that in the ordinary case a solicitor or barrister who carries out a professional engagement by lawful means in accordance with his or her instructions and professional obligations is not in any type of conspiracy with the client, even if the client has the requisite predominant intention to injure for a lawful means conspiracy. It was not common ground as to why. In my judgment this is because: (a) there is no combination with the client to injure and (b) the solicitor (or barrister) does not have the requisite intention. There is no combination to injure the Bank because the solicitor (or barrister) has merely agreed to accept lawful instructions and provide his or her services as a solicitor (or barrister) to the client. There is no intention to injure because the client's intention is not imputed to the solicitor (or barrister), and the solicitor's (or barrister's) own actual intention is not to injure the Bank but to do his or her job in accordance with his or her professional obligations.

The Conspiracy

141. The Bank's pleaded case on the Conspiracy is that Mr Gusinski conspired with Group companies and their officers to use lawful and unlawful means to delay and ultimately avoid payment to the Bank of the Judgment Sum or any of the sums due to the Bank under the loan facility or arbitration award. The Bank's pleaded case is that GSC and Mr Samuels later joined this Conspiracy.

142. Particulars of the Conspiracy are pleaded in paragraph 97 of the APOC. It is summarised in the Bank's opening skeleton argument for the trial at paragraph 113:

"In summary, EWUB relies on the following as demonstrating the fact of the Conspiracy, and also as being steps taken in pursuit of the Conspiracy (and as being causative of loss):

- (1) Reliance on false and fictitious evidence in setting up the bankruptcies of Forward Film and Silver Screen in Russia in the summer of 2017;*
- (2) Obtaining and misusing the Moratorium (and the CBIR order) in respect of NCD;*
- (3) Diversion, delay and misuse of NDC receipts/entitlements during the Moratorium;*
- (4) Pursuit of an unarguable defence in the Arbitration;*
- (5) Misleading of EWUB and the Tribunal in connection with the Earmarked Funds;*
- (6) Dissipation of Earmarked Funds;*
- (7) Covert preparation for and then obtaining orders appointing / recognising the JPLs in respect of NMDC and NMP (inter alia) on the spurious basis of the letter of guarantee;*
- (8) Creating new purported liabilities for the purpose of diluting EWUB's interests in the liquidations of NMDC and NMP;*
- (9) Obstruction of enforcement against Movie Production Centre and Progress Studio in Russia."*

(The "Earmarked Funds" as defined in the APOC are the Judgment Sum, alternatively \$4.75m of the Judgment Sum)

143. The Bank says that there were a number of acts taken by Group companies which it is to be inferred from Mr Gusinski's beneficial ownership, control, and active involvement in the Group affairs were acts which he conspired with another to do. It is important to note that the Bank's case is that there was only one conspiracy and that GSC and Mr Samuels joined it by January 2018 or some later date. The two pleaded parts of the conspiracy before the other defendants are alleged to have joined it are the Forward Film and Silver Screen circular bankruptcies and obtaining the Swiss moratorium.

The requisite intention on the part of Mr Gusinski

144. In the circumstances of this case, the Bank has to establish an actual intention on the part of Mr Gusinski and his co-conspirators to harm the Bank by securing that it was never repaid the outstanding sums it was owed by NCD and its guarantors. It is not sufficient for a lawful means conspiracy by Mr Gusinski and his co-conspirators that the predominant intention was to defer or delay repayment to buy time for the Group to recover. There can be no unlawful means conspiracy unless there was also an actual intention to harm the Bank, or a certainty of harm to the Bank from the unlawful means deployed.
145. The central difficulty for the Bank is that the evidence supports an inference that Mr Gusinski was attempting to preserve the Group and obtain time to repay the Bank, rather

than seeking permanently to deprive the Bank of repayment. That finding is fatal to both forms of conspiracy alleged.

146. There is a considerable amount of evidence that Mr Gusinski, and those involved with him in the Group such as Mr Renaud and Mr Kupfer were motivated by a desire to buy time for the Group to recover. Although at times the Bank appeared to cast doubt on this, it is clear that the Group was in serious financial difficulties at the end of 2017. It was unable to pay its employees in full. The letter of December 2017 written by Mr Gusinski to the Bank is clear that the Group cannot pay the instalments as they fall due, but that with a bit more time it will pay – it is not a case of being able but unwilling to pay. The Bank itself internally recorded the Group as virtually valueless and unable to pay the Bank. Its strategy was apparently one of “*maximum pressure*” to force Mr Gusinski to inject his personal funds to rescue the Group. The steps thereafter taken until the appointment of the JPLs, such as obtaining the Swiss moratorium and seeking a staged payment Award, are all consistent with Mr Gusinski and others in the Group trying to buy time for the Group to survive and repay the Bank. In the documents one can see contemporaneous statements to this effect. See for example, the 6 February 2018 email from Mr Renaud to Professor Lorandi which refers to managing cash flow so that NCD could continue its deliveries and “pay the Bank back”. It is what Mr Gusinski and Mr Kupfer told Mr Samuels and Ms Dohmann was the intention. Ms Dohmann’s evidence was that Mr Gusinski’s instructions throughout 2018 (and earlier) was that the Group desperately needed time to trade out of their difficulty and survive and that she believed him. So did the Tribunal which accepted his evidence to this effect.
147. It is also relevant that by the time of the acceleration notice, the Group had repaid the Bank \$26 million of capital and \$6.4 million of interest. Clearly the repayment of those sums is not consistent with there being an intention to delay and ultimately avoid repaying the Bank, at least at the time they were repaid. Apart from vague and (at this trial unsubstantiated) assertions that Mr Gusinski was diverting monies away from the Group for his personal benefit instead of using those monies to repay, or that Mr Gusinski thought the demand for repayment was unreasonable, the Bank is unable to point to a cogent reason why Mr Gusinski and others in the Group would have suddenly formed a specific intention to injure the Bank by avoiding repayment at any time.
148. The matters relied upon by Ms Stanley from which she invites an inference of the requisite intention are the acts which the Bank asserts were taken pursuant to the Conspiracy. The problem for the Bank is that all those steps are just as consistent with Mr Gusinski not having any specific intention of injuring the Bank at all, but with Mr Gusinski trying to buy time for the Group to survive and repay the Bank.
149. I am not persuaded on the balance of probabilities that Mr Gusinski had the requisite intention for either a lawful means conspiracy or an unlawful means conspiracy.
150. I nevertheless go on to consider the parts of the alleged conspiracy which affect GSC and Mr Samuels.

Forward Film and Silver Screen (APOC para 97(1))

151. The Bank alleges that Mr Gusinski combined with these companies or their directors (inter alia Messrs Andreev and Joshin) to procure the circular bankruptcies of these companies (see paragraph [38] above). The Bank relies on a decision of the Ninth Arbitrazh Court of Appeal dated 16 July 2018 (“**the 2018 decision**”) and a further Ruling of the Arbitrazh Court of Moscow dated 29 March 2024 (“**the subsidiary liability ruling**”) which are briefly explained in the unchallenged expert report of Dr Rackhov of 2 December 2025. The 2018 decision is an appellate decision which held that the companies had together orchestrated a fictitious debt in order to give them control of their bankruptcies and cancelled a lower court decision that the debt was valid. In the apparently unrelated subsidiary liability ruling Mr Gusinski, NCD and Mr Renaud were made personally liable for part of the debts of the companies but the basis on which that occurred is not clear and is in any event not pleaded.
152. The APOC does not assert that the circular bankruptcies were unlawful means for the purposes of the tort of conspiracy but I assume that they were. There is no evidence from the companies or their directors, and no evidence as to how a decision was made but I infer from the correspondence with the Bank referring to Mr Gusinski instigating the bankruptcies see paragraph [38] that he was integral to the decision to pursue this course. For the Bank to succeed Mr Gusinski and the companies or their directors must have had an actual intention to injure the Bank, although it may not have been their predominant intention.
153. As set out in paragraph [38], and as I find, the bankruptcies of these companies may have been intended to prejudice other creditors but it was not intended by Mr Gusinski to prejudice the Bank, and did not do so. The fact that insolvent companies were no longer available as guarantors of the Bank’s debt was not injury to the Bank, and the steps taken were intended to improve the liquidity and strength of the remaining Group which improved the Bank’s position. At this stage the Bank had not served an acceleration notice and there was no reason, even on the Bank’s case, for Mr Gusinski to have formed the intention that he wished to secure that the Bank would never be paid.

The Swiss moratorium (APOC 97(7))

154. On 30 January 2018 NCD obtained from the Swiss courts a temporary insolvency moratorium on payments to the Bank (and its other creditors) with the ostensible purpose of restructuring its indebtedness and paying its creditors in full during the duration of the moratorium. The temporary moratorium was extended on 24 May 2018 and remained in force until NCD was placed into liquidation. See paragraph [47] above.
155. The Bank’s pleaded case is that Mr Gusinski conspired with NCD to procure this moratorium and I accept that it is clear that NCD combined with Mr Gusinski to achieve the common end of a moratorium under Swiss law. This was an available and lawful insolvency procedure in Switzerland. The APOC does not plead otherwise.
156. Ms Stanley nevertheless submitted that obtaining the Swiss moratorium was part of an unlawful means conspiracy. She relied upon the expert report on Swiss law by Professor

Vogt as to the duties of care and loyalty owed by directors and de facto directors of a Swiss company under Swiss law. She contended that Mr Gusinski owed these duties as a de facto director and had breached them in procuring the moratorium. Professor Vogt explains that these duties of care and loyalty are owed to the company and not to creditors, but ordinarily paying the rightful debts of a company is in its interests. I am prepared to accept in this undefended case that Mr Gusinski probably is a de facto director of NCD. However, I am not persuaded on the balance of probabilities that it was a breach of duty by the directors of NCD to apply for a moratorium in Switzerland. This was an available process, replete with safeguards against abuse and supervised by an independent Trustee and the Swiss court, for a company to delay the repayment of creditors to secure its survival. The fact that the Swiss Court granted the interim moratorium, and then extended it, is compelling evidence that the application for a moratorium was appropriate, in the company's interests, and involved no breach of duty by the directors.

157. It was also suggested that the Swiss Court was misled as to the prospects of NCD's survival because it was premised on the Bank agreeing a composition of its debt when Mr Gusinski knew that it would not. Certainly the Bank ignored the Swiss moratorium and did not engage with NCD's Swiss lawyers. However, the Bank's cooperation was not essential for the Swiss moratorium as one of the grounds for a permanent moratorium was the prospect of a successful restructuring which allowed the Bank to be paid in full within the moratorium period. NCD's application for an extension was premised on the basis that it could pay the Bank in full if it was given time and the Swiss court in its judgment concluded that there was a realistic chance of that.
158. Mr Samuels was cross examined about the application for the recognition of the Swiss Moratorium under the CBIR. It was put to him that he had failed to properly advise Professor Lorandi on the obligation to make full and frank disclosure. It is, however, quite clear from Mr Samuels' attendance notes and I find that he did explain to Prof Lorandi the need to make full and frank disclosure; see the penultimate paragraph of his 15 March 2018 attendance note, and the 16 March email from Professor Lorandi confirming his understanding that Mr Samuels wanted him to make full disclosure to the court. It was also put to him that the application failed to make full and frank disclosure of Ms Dohmann's concern that the Bank's cooperation was required so as to obtain the Swiss moratorium; but Mr Samuels had established that her concern was misplaced; see [66] above and the preceding paragraph [157]. These matters are not pleaded as an overt act pursuant to the conspiracy but it is convenient to deal with them here.
159. I am therefore not satisfied that obtaining the Swiss moratorium involved the use of unlawful means for the purposes of the alleged conspiracy. I am also not satisfied that Mr Gusinski and NCD had the intention of injuring the Bank by obtaining the Swiss moratorium (whether predominant or not). The predominant intention was to secure the survival of the Group, with the consequence that the Bank would ultimately be paid in full.

Joining the conspiracy

160. It is difficult to see how the circular bankruptcies and the obtaining of the Swiss moratorium could be the same conspiracy as there is no overlap in the identity of the pleaded co-conspirators (Forward Film/Silver Screen/their directors on the one hand, and NCD on the other) with Mr Gusinski. It is not alleged that NCD was a co-conspirator in the circular bankruptcies and it is not alleged that the Russian companies or their directors were involved in any way with the Swiss moratorium. In any event as neither is in my judgment a proven conspiracy by Mr Gusinski with another the pleaded case that GSC and Mr Samuels joined a pre-existing conspiracy between Mr Gusinski with another must fail. I will nevertheless go on to consider the acts of conspiracy alleged against all the defendants as co-conspirators. In relation to GSC and Mr Samuels the Bank only alleges a claim in unlawful means conspiracy.

Further acts of conspiracy

161. The matters relied on by the Bank as particulars of joinder of the conspiracy (so far as it was a conspiracy to use unlawful means) are pleaded in paragraphs 97 and 98 of the Amended Particulars of Claim. They relate to Mr Samuels' knowledge and involvement in a conspiracy by Mr Gusinski and another in relation to the following matters (ignoring those premised on alleged knowledge of the Bank's proprietary interest in the GSC Monies which fail in light of my findings above on this issue):
- i) the diversion of revenue from NTV away from NCD's account with the Bank contrary to the terms of the Facility during the moratorium;
 - ii) the instruction by GSC of Ms Dohmann and Mr Burgess in breach of Solicitors' Code of Conduct to put forward a Cross Claim which disguised the fact that there was no genuine dispute as to whether amounts were due to the Bank, which was not made in good faith, and which was intended to delay the determination of the Bank's legitimate claims;
 - iii) the representations made orally and in writing to the Tribunal and the Bank about the Judgment Sum which it is said misled them (and prevented the Bank applying for a conservatory order) and were made recklessly as to whether they were so misled; APOC para 98.4 and 98.5
 - iv) dealings with the Judgment Sum;
 - v) covert preparation for and then obtaining orders appointing / recognising the JPLs in respect of NMDC and NMP.

Diversion of NTV revenue away from the Luxembourg account

162. At the time of the moratorium there was a sum of \$800,000 due to be paid imminently by NTV to NCD. Under the terms of the facility letter NMDC was bound to procure that NCD paid this sum to the Luxembourg Account with the Bank. The position under Swiss law, according to NCD's Swiss lawyers and Professor Lorandi was that NCD could not and

should not pay those monies to the Luxembourg account as the Bank was a creditor. NCD did not pay the sum of \$800,000 or other sums which may have fallen due thereafter to the Luxembourg account.

163. The Bank says that this was unlawful conduct by Mr Gusinski conspiring with NMDC and NCD as part of the conspiracy to ensure the Bank was never repaid. Whether it is unlawful conduct for the tort of conspiracy not to perform a contract when performance of the contract under English law requires a breach of Swiss law was not the subject of any submissions by Ms Stanley. Mr George said it was not, relying on the *Ralli Bros* rule that an English law contract is not enforceable if it is illegal in the place of performance. I do not need to decide that point. Even if it is unlawful conduct, I am not satisfied on the balance of probabilities that Mr Gusinski, NMDC and NCD had a specific intent to injure the Bank by delaying and ultimately avoiding repayment to the Bank.
164. So far as GSC and Mr Samuels are concerned, there were emails which Mr Samuels saw which discussed the potential diversion but he and GSC were not asked to advise on whether the payments should be diverted in accordance with the advice of the Swiss lawyers and the Trustee or whether doing so would amount to a breach by NMDC of the Facility. They were merely observers for the purposes of remaining informed, as this was outwith their instructions.
165. Ms Stanley relied on the fact that Mr Kupfer had identified an argument that NMDC was not in breach of the Facility Letter in not making the \$800,000 payment because Mr Evtushenkov was on a “Kremlin List” prepared by the United States Treasury Department. The Facility Letter provided that a payment was not required if it would be to someone who was on a sanctions or similar list. Ms Stanley submitted that the Kremlin List was clearly not a sanctions list and Mr Samuels must have known that or turned a blind eye to it. It was not, however, Mr Kupfer’s argument that the Kremlin list was a sanctions list but rather that it was arguably a “similar list”. That was, without investigation, a plausible argument. Ms Dohmann responded at the time saying “Would make a nice defence”. Neither Mr Samuels nor Ms Dohmann were asked to advise upon it. In fact it was never raised in the arbitration. I do not consider that this point takes the analysis of the allegation of conspiracy against GSC and Mr Samuels any further.
166. Nor does another of the Bank’s points that Mr Samuels had allowed Mr Kupfer to remove references to the NTV payment and the moratorium from a draft reply to the Bank from GSC to the Bank’s letter before action. The reference was not necessary for the purposes of the letter and Mr Kupfer presumably preferred to let sleeping dogs lie. There was nothing improper in that approach. Mr Samuels pointed out to Ms Dohmann that this reference had been removed from his draft when he asked her to approve the letter, and she did so without reintroducing the references. Mr Samuels was simply doing his job.
167. In relation to the diversion of NTV revenue there was no combination by Mr Samuels and GSC with Mr Gusinski to achieve any end Mr Gusinski may have had and there was no specific intention on the part of Mr Samuels and therefore GSC to injure the Bank and ensure it was never repaid.

Bad faith Cross Claim

168. The Bank alleges that in breach of the Solicitor's Code, Mr Samuels instructed leading and junior counsel to plead a legally unarguable and evidentially false claim in relation to the Library. This allegation is pleaded against GSC and Mr Samuels only. It is not pleaded against Mr Gusinski, although in submissions Ms Stanley says that her case is that the Library Defence was concocted by Mr Gusinski.
169. It is not alleged that Ms Dohmann or her junior did not believe that the Cross Claim was properly arguable and had a plausible evidential basis but it is not conceded that she did so believe. I have explained above (at paragraph [65]) that I accept Ms Dohmann's evidence that she thought the pleading was properly arguable.
170. Under the relevant part of the Solicitors' Code of Conduct at the time:
- a. GSC and Mr Samuels were obliged to achieve Outcome O(5.1):
"you do not attempt to deceive or knowingly or recklessly mislead the court";
 - b. GSC and Mr Samuels were obliged to achieve Outcome O(5.2):
"you are not complicit in another person deceiving or misleading the court";
 - c. By Indicative Behaviour IB(5.7): *"Acting in the following way(s) may tend to show that you have not achieved these outcomes... constructing facts supporting your client's case or drafting any documents relating to any proceedings containing: (a) any contention which you do not consider to be properly arguable..."*.
171. Mr George does not accept that an act in breach of professional regulations is sufficient to qualify as the use of unlawful means for the tort of conspiracy but does accept that in this case if Mr Samuels had attempted to deceive or knowingly or recklessly mislead the court or been complicit in another doing so that would probably involve torts such as deceit and misrepresentation and would comprise unlawful means. I proceed on the basis of that concession.
172. The Bank's case is that whatever Ms Dohmann's belief, the Cross Claim was unarguable and Mr Samuels was reckless as to whether it was unarguable or not.
173. The first point to make is that Ms Stanley accepts that she has to show that the pleading was unarguable. I was surprised therefore that I was not asked to consider and conclude that the Defence as pleaded was bad in law. No submissions were addressed to me on the law or authorities relevant to the matters raised in the Defence, including Luxembourg law.
174. In cross examination of Ms Dohmann KC various criticisms were made of the Defence and Cross Claim, but whether the Defence and Cross Claim is unarguable is a matter of law for me rather than a matter of evidence as to what Ms Dohmann thought or thinks now. Examples of the criticisms follow.

- a) The Library conspiracy claim had been pleaded even though no pecuniary loss had yet been suffered. Ms Dohmann's evidence which I accept is that she believed that there was future loss which was sufficiently certain to occur so as to make the claim an arguable one.
- b) Set-off had been pleaded although Ms Dohmann accepted that this defence was unarguable.
- c) That Ms Dohmann was wrong to plead a defence dependent on the acceleration notice having been sent pursuant to a contractual discretion where there was no discretion because the Bank was acting as an agent *"instructed by the finance parties to send the acceleration notice"*. The Bank was also the only lender. In essence, Mr Walmsley put to Ms Dohmann that even though the Bank was the agent (and the agent *"may"* send an acceleration notice), it could avoid its contractual discretion by putting on its lender hat and saying that it was acting *"both as lender, giving the instruction, and as agent, sending the notice"* because it had been instructed (by itself) to send the acceleration notice. Mr Walmsley seemed to be suggesting this was a fatal flaw in Ms Dohmann's analysis that the Bank was exercising a discretion or a choice in serving the Acceleration Notice. It is clear that no one identified it at the time, not even the Bank's legal team who did not plead it in answer to the Defence and Cross Claim. Indeed it was raised for the first time in cross-examination of Ms Dohmann, it not having been pleaded in the APOC or mentioned in opening skeleton arguments or correspondence. In my judgement it was at the very least properly arguable that the Bank had a discretion as to whether to send an acceleration notice and the fact that it was both lender and agent did not affect that analysis.
- d) That a question over the ownership of the confidential information sought to be delivered up had not been resolved by the time the pleading was served.

175. This line of cross-examination did not advance the Bank's case as to GSC's or Mr Samuels' participation in a conspiracy. The Bank has in my judgment failed to prove that the Defence and Cross Claim was not properly arguable. Further, even if it was unarguable, GSC and Mr Samuels were entitled to rely upon Leading and Junior Counsel who pleaded the Defence and Cross Claim and signed it. The signature by Counsel to a pleading has always been taken as a confirmation by that barrister that the pleading raises claims or defences which are properly arguable. Reliance on counsel was not reckless indifference by Mr Samuels as to whether the pleading was arguable; it was confidence in the ability and judgment of his counsel team.
176. Ms Dohmann's evidence (which I accept) was that Mr Gusinski was convinced of the Library conspiracy case. The evidence of internal communications as it came out on disclosure undermined that case, but Mr Stoliarov accepted that without sight of that documentation, belief in the Library conspiracy case was not unreasonable. The assertion

that Mr Gusinski advanced that case in bad faith is simply that – assertion. I am not satisfied on the evidence that the Library conspiracy case was not advanced by Mr Gusinski in good faith.

177. Even if that is wrong, I reject the suggestion that Mr Samuels was reckless as to whether the case advanced was raised in bad faith. It is not suggested that Mr Samuels had any relevant knowledge which Ms Dohmann did not have and it is clear from her evidence that she did not believe the Library cross claim was raised in bad faith. As with Mr Gusinski the allegation of recklessness is mere assertion and is not supported by any cogent evidence. Mr George points out that, far from being reckless, Mr Samuels was diligent when reviewing the Defence and Cross Claim to point out when the evidence did not support the pleading; see paragraphs [61] and [62] above.
178. Although Ms Stanley has levelled a raft of criticisms at Mr Samuels in cross examination and in closing submissions, I record that in my judgment Mr Samuels has conducted himself throughout this retainer with appropriate professionalism.
179. In summary the Defence and Cross Claim was not unlawful action by GSC or Mr Samuels. Neither GSC nor Mr Samuels combined with Mr Gusinski, their client, to inflict an injury on the Bank. Mr Samuels and GSC did not have a specific intention to injure the Bank, or reckless indifference to such injury, by the Defence and Cross Claim. They were simply doing their job.

Misleading the Tribunal and Bank

180. The Bank's allegation is that (as part of the Conspiracy) Mr Gusinski in his evidence and GSC and Mr Samuels through written submissions and oral submissions by Ms Dohmann misled the Tribunal and the Bank that the Judgment Sum or \$4.75 million would be paid to the Bank regardless of whether the Proposed Award was made. The Bank says that Mr Gusinski never intended to pay the Bank any of the Judgment Sum.
181. In light of my findings above in relation to the meaning and effect of those representations, I can deal with this shortly.
182. The written submissions and Ms Dohmann's oral submissions were clear and not liable to, or intended to, mislead. Mr Gusinski's witness statement and oral evidence was similarly clear that unless the Proposed Award was made the Group would fail whereas if the Proposed Award was made there was a good chance that it would not. Mr Gusinski did not represent that the Bank would be paid anything from the Judgment Sum unless the Proposed Award was made and there is no evidence at all that the sum of \$4.75m would not have been paid if it had been.
183. Neither the Tribunal nor the Bank was in fact misled. The correspondence after the hearing between GSC and the Bank's solicitors, copied to the Tribunal, as to whether a solicitors' undertaking would be offered was quite clear that \$4.75m was not being offered except as part of the Proposed Award and that the Bank was "on risk" as to whether it would be paid anything if the Proposed Award was not made. That the Bank was not misled is also clear

from the Bank's indication that it would apply for a freezing order whatever award was made by the Tribunal. That the Tribunal was not misled is reflected by the terms of the Award that the \$4.75m had been proposed as part of the Proposed Award (see e.g. paragraphs 46 and 68 of the Award relevant parts of which are quoted above) and by the Tribunal's permission for the Bank to make an application for a freezing order when it released its award.

Dealings with the Judgment Sum

184. The Bank's case is that the payments out of GSC's client account of sums which reduced the amount it held to \$4.75 million were unlawful acts as part of the Conspiracy. Although Ms Stanley points to descriptions of the type of deductions that would be made in Ms Dohmann's oral submissions to the Tribunal, the only commitment that was made on behalf of the Group was that \$4.75 million would be earmarked for payment to the Bank as part of the Proposed Award if the Proposed Award was made. Unlawfulness for the purposes of the tort is mainly premised on the success of the Bank's claim that it had a proprietary interest in the Judgment Sum or \$4.75m of it – that claim has failed. It is partly premised on payments out of the client account to NCD not being made to the Luxembourg account contrary to the Facility Letter. GSC was not party to the Facility Letter, and whether NMDC is in breach of the Facility Letter when Swiss law requires the payments to be made elsewhere is unproven. GSC's obligation was to pay the sums as it was instructed to do by its client except in relation to the \$4.75m in respect of which it had given an undertaking. The payments it made were lawful.
185. I have already found that Mr Samuels did not have a specific intention to injure the Bank.

JPLs and CBIR

186. The Bank's pleaded case against GSC and Mr Samuels (but not Mr Gusinski) is that they at all material times knew that Mr Gusinski intended to wind up NMDC if payment to the Bank could not be avoided or satisfactorily deferred. Without more, there is nothing unlawful in that. Mr Gusinski had been consistent in his position that if immediate payment to the Bank was ordered the Group was insolvent and could not survive, but that it probably could if it was given more time to pay. I am prepared to find that Mr Samuels knew that was Mr Gusinski's position. Again, there was nothing unlawful in that.
187. The Bank relies on the close chronology between the First Award on 11 December 2018 and the decision by NMDC and NMP on 8 January 2019 to petition for their own winding up, but in my judgment the gap of nearly a month suggests that there was nothing preordained about the companies' decision.
188. The Bank also pleads that GSC, who acted for the JPLs on their application for recognition under the CBIR, had failed to alert the JPLs to the Bank's proprietary interest in the client funds. As I have found that the Bank has no proprietary interest there is nothing in this

point. Ms Stanley sought in closing submissions to identify another failing on the part of Mr Samuels and GSC in failing to flag concerns about the validity of the Letter of Guarantee. I accept Mr George's submission that this was not pleaded and cannot be raised, but I record my view that I do not see what relevance such concerns had to the recognition application.

Post liquidation overt acts

189. There is one pleaded overt act post liquidation which I will mention because I can see that once the survival of the Group was not possible Mr Gusinski's intention might have changed (although I heard no submissions on this point). The overt act relates to Mr Gusinski only and is an alleged combination as part of the Conspiracy with Movie Production Centre LLC and Progress Studio LLC not to pay the arbitral awards against them by successfully opposing steps to enforce them in Russia. The Russian court decided that these subsidiaries of NCD were protected by the Swiss moratorium and the subsequent Swiss liquidation of NCD. There is no evidence of Mr Gusinski's involvement in the decision making of these companies, but I leave that issue to one side. Ms Stanley accepts that the steps taken by the Companies were lawful under Russian law. The steps taken were consistent with a desire to protect the companies' interests and its assets from a claim which was contrary to Russian law. There is no evidence of a predominant intention to harm the bank rather than to protect the companies interests.

Procuring a breach of contract

190. This is another claim against Mr Gusinski which received superficial treatment during the trial.
191. The Bank claims against Mr Gusinski damages for procuring a breach of contract. The principal breach that is pleaded is a failure to pay the sums due to the Bank and a failure to pay the Award. The Bank has not proved that NCD or the Guarantor companies were able to pay but Mr Gusinski procured that they did not pay. If the relevant Group companies were not able to pay, as Mr Gusinski consistently maintained, as the Bank's internal memoranda also indicated, and as appears to be borne out by NMDC, NMP and NCD's insolvent liquidation after the First Award, then there was no inducement of a breach by Mr Gusinski and no proved loss caused by such breach.
192. The APOC says there were "other breaches" procured, and in the Bank's written closing submissions other unpleaded alleged breaches were identified – but I was not taken to underlying documentation relating to any of these. I find them not pleaded and proved.
193. One of the issues which was not explored at the trial is the extent to which the rule in *Said v Butt* affects the Bank's claims against Mr Gusinski. The rule is that a director will not be personally liable for inducing a breach of contract between their company and another entity if the director has acted in good faith and in accordance with their duties to the company. It is central to the Bank's case on conspiracy that Mr Gusinski had *de facto*

control of the Group companies although he was only a director of NMDC and NMP. For example, the Bank says he was a de facto director under Swiss law of NCD and owed the duties of a director to that company. There is therefore a real issue as to whether or not a claim can lie against him for inducing a breach of contract by a Group company.

194. For these reasons I am not satisfied that the Bank has proved its case against Mr Gusinski for procuring a breach of contract.

Conclusion

195. I dismiss the Bank's claims against all the defendants.