Neutral Citation Number: [2024] EWHC 521 (Ch)

Case No: CH-2023-000082

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM THE INSOLVENCY AND COMPANIES COURT (ICC JUDGE BURTON)
INSOLVENCY AND COMPANIES LIST

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 11 March 2024

Before :

MR JUSTICE RICHARDS

- -

Between :

VALERIY ERNESTOVICH DRELLE	**Appellant**
- and -	
SERVIS-TERMINAL LLC	**Respondent**

Charles Samek K.C. and James Bickford Smith who did not appear below **(**instructed by **Sterling Lawyers Ltd**) for the **Appellant**
Mark Philips K.C. and **Clara Johnson** (instructed by **Latham & Watkins (London) LLP**) for the **Respondent**

Hearing dates: 15 and 16 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 11th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE RICHARDS

MR JUSTICE RICHARDS:

1. The Appellant, Mr Drelle, appeals against the order of ICC Judge Burton (the "Judge") dated 31 March 2023. By that order Mr Drelle, was adjudged bankrupt following a petition presented by Servis-Terminal LLC ("ST"), a company incorporated in the Russian Federation. ST's bankruptcy petition was founded on a debt of RUB 2 billion, some £22 million in sterling terms, (the "Debt") that was said to have arisen following a judgment (the "Judgment") that ST obtained from the Russian Arbitrazh Court of Yaroslavl Oblast (the "Arbitrazh Court"), a commercial court of the Yaroslavl region of Russia, on 19 May 2019. The Judgment was upheld following onward appeals to superior courts in Russia and permission to appeal to the Russian Supreme Court was refused.

2. Mr Drelle's appeal to this court raises two issues:

    i) Whether the Judge was correct to conclude that ST was entitled to present a bankruptcy petition pursuant to s267 of the Insolvency Act 1986 based on the Debt in circumstances where the underlying Judgment had neither been registered nor recognised by an English court (the "Petition Debt Point").

    ii) Whether the Judge erred in concluding that the Debt was not subject to any genuine and substantial dispute when Mr Drelle's case was that it was at the very least not fanciful to suppose that the Judgment was impeachable for fraud (the "Fraud Point").

3. So that this judgment can readily be read together with the reasoning of the Judge, I will tend to use defined terms used in the Judge's reserved judgment of 9 March 2023 (the "Petition Judgment"). One of the points made on appeal is that the Judge wrongly elided distinctions between the Judgment and other judgments given in Russian appeals. In particular, Mr Drelle argues that a relevant question before the Judge was whether the Judgment specifically could be impeached for fraud and not whether the Russian proceedings generally could be so impeached. Accordingly, I will seek to be rigorous in my use of defined terms. The term "Judgment" refers specifically to the judgment of the Arbitrazh Court of 24 May 2019. I use the wider defined term "Russian Judgments" to refer to the totality of the judgments in Russia, including appeals against the Judgment.

4. References to numbers in square brackets are to paragraphs of the Petition Judgment unless I specify otherwise.

THE JUDGMENT BELOW

Background – the proceedings in Russia

5. Mr Drelle had previously been a shareholder and CEO of ST. On 3 April 2017, ST was declared bankrupt by the Arbitrazh Court. ST's claims against Mr Drelle were brought by ST's trustee in bankruptcy.

6. ST's bankruptcy was brought about by Gazprom Neft PJSC ("GPN"), a Russian company that was owned as to 95.68% by PJSC Gazprom ("Gazprom"), the well-known energy company in which the Russian State owns a 50.23% stake.

7. The claims by ST's trustee in bankruptcy against Mr Drelle related to a loan (the "Loan") of RUB 2 billion that ST advanced in December 2011 to Fort Steiton LLC ("FS"), a Russian company with the benefit of a personal guarantee (the "Personal Guarantee") from FS's owner, a Mr Motylev. A company called Intercom Capital LLC ("Intercom"), which was controlled by Mr Motylev, succeeded to FS's obligations under the Loan on 5 November 2014.

8. Intercom defaulted on the Loan. In August 2016 and December 2016, ST obtained judgments in Russia against both Intercom and Mr Motylev with the latter judgment holding that Mr Motylev and Intercom were jointly and severally liable to ST for sums due under the Loan. ST was able to locate a number of Mr Motylev's assets outside Russia with ST's asset-tracing efforts continuing to the point of its own bankruptcy in April 2017. However, Mr Motylev did not pay the full amount due to ST.

9. The proceedings in Russia against Mr Drelle were based on Article 53(3) of the Civil Code of the Russian Federation. It was asserted that Mr Drelle had failed to act in good faith or reasonably in the interests of ST when, as a director of ST, he procured ST to make the Loan. As a consequence, it was said that he was liable to reimburse ST for losses occasioned when FS and Mr Motylev defaulted on their obligations ([47]).

10. In the Judgment, the Arbitrazh Court gave judgment for ST on its claim, finding among other matters that:

    i) Mr Drelle failed to verify FS's solvency to the requisite standard before transacting with it. His failure to do so meant that he was not acting in good faith or reasonably performing his duties as ST's CEO ([51(i)]).

    ii) Mr Drelle had not verified Mr Motylev's personal financial position and so should not have accepted an unsecured personal guarantee from Mr Motylev. He should have required Mr Motylev to provide security for his obligations. These failings also meant that Mr Drelle had also failed to act reasonably or in good faith [51(ii)].

    iii) The Loan was a sufficiently large transaction to require the approval of ST's shareholders which had not been sought ([51(iv)]). That was significant because, under Russian law, if a director procured a company to enter into a transaction without having obtained a necessary approval as required by law or the company's charter, that engaged a presumption that the director had not acted in good faith ([48]).

11. Mr Drelle appealed against the Judgment to the Russian Court of Appeal. The appeal involved a full review of the decision at first instance ([53]) with the result that it gave Mr Drelle a further opportunity to succeed on the merits. The Court of Appeal upheld the Judgment deciding that it had correctly applied the law taking into account the circumstances of the case ([56]).

12. Mr Drelle brought a further appeal to the Cassation Court. That court's jurisdiction on appeal did not include reviewing the manner in which the court below had evaluated the evidence. The Cassation Court dismissed the appeal and Mr Drelle was refused permission to appeal to the Russian Supreme Court.

The Petition Judgment

13. The Judgment was not eligible for registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "1933 Act") and, accordingly, ST made no attempt to register it under that Act. Nor did ST take any separate proceedings in the English courts under Part 7 that specified the Judgment as a cause of action and sought an English judgment ("Recognition Proceedings"). Its position was, and remains, that the Judgment resulted in Mr Drelle owing it a "debt" for the purposes of s267 of the Insolvency Act 1986 (the "Insolvency Act") and that this is sufficient for ST to apply for a bankruptcy order.

14. Although not mentioned in the Petition Judgment, it is common ground that ST served a statutory demand in respect of the Debt dated 9 October 2020 on Mr Drelle at his home address in London. ST presented a bankruptcy petition on 13 October 2020 that was founded on the Judgment.

The Petition Debt Point

15. Before the Judge, Mr Drelle accepted that the Judgment, even though it had not been the subject of Recognition Proceedings was in principle capable of constituting a petition debt for the purposes of s267 of the Insolvency Act. His main opposition to the making of a bankruptcy order was based on the proposition that the Fraud Point meant that the Debt was the subject of a bona fide dispute on substantial grounds.

16. By his order of 31 July 2023, Fancourt J gave Mr Drelle permission, to the extent necessary, to withdraw any concessions of the kind described in paragraph 15. above. On 16 August 2023, Fancourt J also gave Mr Drelle permission to appeal against the Petition Judgment. As a consequence, it is common ground that the Petition Debt Point is properly before me and, since it was not before the Judge, I cannot set out her reasoning on it.

The Fraud Point

17. The Judge directed herself as follows:

    i) Rule 48 in the then current edition of *Dicey, Morris & Collins, The Conflict of Laws* (*"Dicey"*) (Rule 51 in the most recent edition) required her to treat the Judgment as inviolate unless it can be impeached under Rules 50 to 52 on the grounds of fraud, the Judgment being contrary to public policy or opposed to natural justice ([30]).

    ii) An allegation of judicial bias and/or of improper interference with the judicial process is capable of making out the "fraud", "natural justice" and "public policy" exceptions in Rule 50.

    iii) A bankruptcy petition cannot successfully be founded on a debt that is subject to a bona fide dispute on substantial grounds ([6]). Accordingly, it is necessary to determine whether there was a bona fide dispute on substantial grounds to the effect that Russian Judgments may be impeached for one of the reasons set out in paragraph 17.i) above ([31]).

    iv) She would apply the following approach to deciding that question ([61]):

> *Evidence to the standard of a genuine triable issue of incompetence, if I were to find it, is not enough. I must find that there is before me, a substantial dispute as to whether the Russian Judgments are deliberately wrong or that the decision is so wrong as to be evidence of bias or to be such that no court acting in good faith could have arrived at it, and/or there must be a substantial dispute that the judgment is impeachable by fraud or that the proceedings were opposed to natural justice (the "Threshold Test").*

18. Both Mr Drelle and ST accept that the Judge's formulation of the "Threshold Test" was correct. Moreover, there is no challenge to the self-directions summarised in paragraph 17. except insofar as the Judge directed her attention at the "Russian Judgments". Mr Drelle's argument, advanced as part of Ground 3, is that focus should have been only on the Judgment.

19. Mr Drelle relied on evidence from the following witnesses in support of his argument that the Threshold Test was met:

    i) Expert evidence of Mr John Lough on the propensity of the Russian state to interfere in judicial proceedings involving state entities such as GPN.

    ii) Expert evidence of Mr Maxim Kulkov, an expert in Russian law, to seek to establish that the Judgment was so flawed and infected by procedural irregularities that it must have been procured by the interference of the Russian state.

    iii) Evidence of fact from Ms Zheglova, ST's finance director. On or around 26 January 2019, Ms Zheglova had a conversation with Ms Lobanova (the "Zheglova/Lobanova Conversation"). Ms Lobanova was director of an audit firm and during that conversation, she relayed the contents of a conversation she had had with Mr Guschev, the Chairman of the Arbitrazh Court (the "Lobanova/Guschev Conversation"). These conversations were relied upon for the proposition that, on 26 January 2019, before the Judgment was given on 24 April 2019, the Arbitrazh Court had already made up its mind that, because GPN was behind the claim, Mr Drelle could not win and there would be judgment against him for RUB 2 billion.

20. ST relied on expert evidence from Professor Paul Stephan and from Professor Andrey Egorov who had expertise in Russian law. Professor Stephan also had expertise in matters that overlapped with those of Mr Lough and so his report dealt with issues similar to those dealt with in Mr Lough's report. Professor Egorov focused on issues of substantive Russian law.

21. None of the evidence, whether given by a witness of fact or an expert witness, was tested by cross-examination.

22. I will consider the Judge's reasoning and approach later in this judgment when I address Mr Drelle's grounds of appeal. For present purposes, I simply note her overall conclusion at [141], which was that the Debt was not subject to a genuine and substantial dispute.

The Grounds of Appeal

23. The Judge refused permission to appeal. However, Fancourt J granted permission to appeal on grounds which can be summarised as follows:

    i) Ground 1 - the Judge should have concluded that the Judgment did not constitute a petition debt since it had not been the subject of Recognition Proceedings (i.e. that it was "unrecognised").

    ii) Ground 2 - the Judge erred in her treatment of the evidence of Ms Zheglova.

    iii) Ground 3 - in determining the Fraud Point, the Judge wrongly evaluated the significance of the appeal process before the Russian courts.

    iv) Ground 4 - the Judge impermissibly sought to resolve the differences in opinion between the experts on Russian law by engaging in a "mini trial" of those issues.

    v) Ground 5 - the Judge erred in her treatment of the expert evidence of Mr Kulkov and Mr Lough.

    vi) Ground 6 – the Judge failed to consider the correct question which was whether Mr Drelle's arguments raised a "genuine triable issue" (a shorthand that the parties adopted for the question whether the Debt was the subject of a bona fide dispute on substantial grounds based on the proposition that the Judgment was impeachable for fraud).

GROUND 1 - ANALYSIS

Relevant legal principles

24. Section 267 of the Insolvency Act provides, so far as material, as follows:

> ***267 Grounds of creditor's petition***.
>
> *(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.*
>
> *(2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—*
>
> > *(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,*
> >
> > *(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,*

> *(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and*
>
> *(d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.*
>
> ....

25. The Judgment was unsecured and was for a liquidated sum well in excess of the bankruptcy level of £5,000. There was no suggestion before the Judge that Mr Drelle was able to pay that sum, or had a reasonable prospect of being able to pay it and the statutory demand based on the Debt had not been satisfied. No application to set aside the statutory demand was outstanding when the petition was presented on 16 October 2020, although Mr Drelle did make such an application subsequently on 27 October 2020 and it is not suggested that this subsequent application is relevant to the analysis... Therefore, the Petition Debt Point involves the question whether the Judgment meets the requirements of s267(2)(b) of the Insolvency Act. More specifically, the question is whether the Judgment gives rise to a "debt payable to [ST] … either immediately or at some certain, future time." As a shorthand, I will refer to that as a question of interpretation of the term "debt" for the purposes of s267.

26. Both parties agree that the relevant question is as set out in paragraph 25.. However, both argue that some guidance on it can be found in the "Rules" on matters related to conflict of laws set out in *Dicey*.

27. Mr Drelle attaches significance to Rule 45 which states that:

> *Rule 45 - A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England but may […]*
>
> *(1) be enforceable by claim or counterclaim at common law or under statute […] or*
>
> *(2) be recognised as a defence to a claim or as conclusive of an issue in a claim*

28. ST considers that Rule 51 (Rule 48 in the edition of *Dicey* to which the Judge referred), which is formulated as follows, is more on point:

> *Rule 51 - a foreign judgment which is a final and conclusive on the merits and not impeachable under any of Rules 52 to 55 is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either*
>
> *(1) of fact; or*
>
> *(2) of law*

The Enforcement Point

29. In written argument, Mr Drelle advanced what he labelled the "Enforcement Point" in support of his appeal. Oral submissions focused more on the "Debt Point" that I consider in the next section. However, the Enforcement Point was not abandoned.

30. The Enforcement Point focused on *Dicey* Rule 45 and proceeds by reference to the following reasoning:

    i) Since the Judgment could not be registered under the 1933 Act, by Rule 45, if ST wished to "enforce" the Judgment in English legal proceedings, he had to take Recognition Proceedings.

    ii) "Enforcement" in this context includes any act that involves using the Judgment "as a sword", and therefore extends to the presentation of a bankruptcy petition by reference to the Judgment.

    iii) Since ST had not taken Recognition Proceedings, it could not "enforce" the Judgment by taking bankruptcy proceedings by reference to it.

31. That argument is not based on the provisions of the 1933 Act (since the Judgment is not eligible for registration under that Act). If the Judgment had been capable of registration under the 1933 Act, it would have been necessary to consider the effect of s6 which precludes an English court from entertaining any "proceedings for the recovery of a sum payable under a [registrable foreign judgment]" other than registration proceedings themselves. However, that statutory provision is not relevant in this case and so the "Enforcement Point" is based on propositions of common law.

32. Mr Drelle relies on commentary on the Rules in *Dicey* itself and also in other academic textbooks including *Briggs on Private International Law in the English Courts* 2nd edition which includes the following passage:

> *If the party in whose favour the judgment was given wishes to go further and have the losing party ordered to do the thing which the foreign court ordered him to do but which he has not yet done, that is, to use the foreign judgment as a sword, she will need an English judgment to that effect, and will need to commence original civil proceedings to obtain it. This procedure is usually, but really rather misleadingly, referred to as 'enforcing' the foreign judgment. As to that, an English judgment ordering payment of the sum which was due under the foreign judgment may be easy enough to obtain. When this happens, although the effect may be as though the foreign judgment were being 'enforced', it is important to see that it is actually the English judgment, and not the foreign one, which is used for the purposes of enforcement.*

33. Mr Samek KC showed me various authorities that he submitted supported the proposition that ST's presentation of a bankruptcy petition would constitute "enforcement" of the Judgment. For example, I was shown the definition of "enforcement" in *Jowitt's Dictionary of English law.* I was shown the judgment of the Court of Appeal in *McCourt and Siequien v Baron Meats Ltd and the Official Receiver* [1997] BPIR 114 in which their Lordships canvassed the question of whether the

judgment at issue in that case created or evidenced "any debt enforceable in bankruptcy proceedings". I was shown the judgment in *Shalson v DF Keane Ltd* [2003] EWHC 599 (Ch) in which Blackburne J used the phrase "enforcing… claims through the bankruptcy court".

34. I am far from convinced that the process of picking through isolated phrases used by judges deciding different issues sheds much light on whether the presentation of a bankruptcy petition constitutes "enforcement" for the purposes of Rule 45. However, I do not consider that I need to decide this issue since in my judgment, arguments based on the Enforcement Point fail for a more fundamental reason.

35. In s267 of the Insolvency Act, Parliament has legislated to determine which claims can found the presentation of a bankruptcy petition. It has not left this question to the common law. Parliament's answer is that only "debts" that satisfy the requirements of s267 can found a bankruptcy petition. Therefore, the question before me is what "debt" means, and not what Rule 45, or the common law that it distils, mean.

36. Mr Drelle objects that this approach might lead to statute law and common law diverging with claims that cannot be enforced as a common law matter nevertheless enabling the holder to rely on s267 to petition for bankruptcy. However, I see no such objection. Parliament was quite entitled if it so chose to enact a definition of "debt" that included claims that could not be "enforced" as a matter of common law. The question of interpretation, considered in the next section, is whether it did so in the context of unrecognised foreign judgments.

37. It follows that I reject Mr Drelle's arguments based on the Enforcement Point as being directed at the wrong question. That said, I can quite accept that Parliament might have intended the meaning of the term "debt" in s267 to be informed by common law principles including those distilled in Rule 45. I address that point in the section that follows.

The Debt Point

38. By contrast, Mr Drelle's "Debt Point" does seek to address the right question and proceeds as follows:

    i) There can be no debt for the purposes of s267 if there is some obstacle that prevents a creditor from taking direct action at law to enforce that claim.

    ii) ST's failure to take Recognition Proceedings means that he is precluded from using the Judgment "as a sword" in the English courts.

    iii) That obstacle prevents the Judgment from constituting a "debt".

39. Mr Drelle supports the proposition set out in paragraph 38.i) by reference to paragraph 6-027 of *Fletcher – The Law of Insolvency* 5th Edition which states:

> *In certain circumstances, an otherwise eligible creditor is precluded by law from presenting a bankruptcy petition against his debtor, although he still may be able to prove his debt and receive dividend in a bankruptcy brought about through the petition of some other creditor who is qualified to initiate proceedings. One example which*

> *could formerly occur was the case, already instanced, of a husband who had been awarded damages against a co-respondent in divorce proceedings, when the destination of the damages was yet to be determined by the court.[*Re O'Gorman *[1899] 2 QB 62 is footnoted] Although this particular situation cannot now arise, on account of the abolition of the particular remedy in question, the essential principle which underlay the husband's disqualification as petitioning creditor is still operative in other cases, and it may be said that, as a general rule, wherever some obstacle would preclude the creditor from taking direct action at law to enforce his claim against the debtor, he will equally be precluded from resorting to the bankruptcy court as an alternative means of enforcement. For although he may be loosely termed a "creditor", such a claimant in reality is not yet personally owed any proper, legally enforceable "debt" which can become the basis of the petition. (emphasis added)*

40. Understandably, Mr Drelle relies on the underlined wording in the above quotation. However, while of course the views of the authors of *Fletcher* command respect, the summary of the law that appears in the underlined section is not directed at the specific situation arising in the present case. Moreover, it has to be read in the context of the paragraph as a whole including the reference to *Re O'Gorman*. At the time of *Re O'Gorman*, a jury could order a co-respondent in divorce proceedings to pay damages. However, an order giving effect to such an award would direct the co-respondent to pay the damages into the court's registry. The court might well exercise discretion to order that the sums then be paid to the plaintiff. However, it might exercise discretion to direct the damages to be paid elsewhere. Therefore, the plaintiff could be said to be a contingent creditor of the co-respondent (and so able to prove in a bankruptcy) but not be an actual present creditor of the co-respondent able to present a bankruptcy petition.

41. The underlined quotation is, of course, in general terms and is not limited to the situation in *Re O'Gorman*. However, even though it speaks in general terms about the "enforcement" of a claim, reading the passage as a whole, it is quite possible to read it as an articulation of the different circumstances of a contingent creditor (who can prove in a bankruptcy, but not present a bankruptcy petition) and a "non-contingent" creditor who is entitled to petition for bankruptcy.

42. Therefore, I do not accept that Mr Drelle's broad proposition as summarised in paragraph 38.i) disposes of the present dispute. It is necessary to look more deeply at the nature of obstacles that prevent a claim from constituting a "debt" for the purposes of s267.

43. In my judgment, Rule 51 is significant. For the purposes of Ground 1, I assume that the Judgment is not impeachable under any of Rules 52 to 55. On that basis, the effect of Rule 51 is that, when considering whether the Judgment gives rise to a "debt" for the purposes of s267, it is to be taken as conclusive of any matter that it adjudicates. Accordingly, for the purposes of s267, it is to be assumed conclusively that Mr Drelle presently owes ST RUB 2 billion, as determined by the Judgment. That is a strong indicator indeed that Mr Drelle owes a "debt" of RUB 2 billion to ST. I do not accept Mr Drelle's argument that Rule 51 is applicable only in cases where a claimant is relying on a foreign judgment "defensively" rather than "as a sword". The text of Rule

51 itself makes no distinction and, moreover, Mr Drelle's submissions to this effect echo the Enforcement Point that I have already rejected.

44. Mr Drelle's next argument is that, even if by operation of Rule 51 he is to be taken as having a present obligation to pay ST RUB 2 billion, that is still not enough to amount to a "debt" for the purposes of s267, because ST could not enforce that obligation in the English courts as a consequence of Rule 45.

45. The difficulty with that argument is that s267 requires that there be a "debt" without expressly considering how, or in which courts, any such debt could be enforced. Moreover, authority suggests that an inability presently to take court proceedings to enforce a claim for a liquidated sum does not prevent that claim from constituting a debt. Perhaps the clearest authority is the judgment of Chadwick J in *Bishopsgate Investment Management Limited v Maxwell* (1993) Times, 11 February. In his judgment, Chadwick J confirmed that the Insolvency Act had changed the law from that previously applicable under the Bankruptcy Act 1914. Following the Insolvency Act, a "debt" for the purposes of s267 did not need to result from a final order or judgment of an English court. Thus, a trade debt is in principle capable of founding a bankruptcy petition even though, until judgment is obtained on that debt, it will not be possible to "enforce" it.

46. The "obstacle" on which Mr Drelle relies, namely that ST has only an unrecognised foreign judgment, does not prevent the Judgment constituting a "debt". It does not alter the conclusion that the Judgment, which is to be taken as final and conclusive for the purposes of Ground 1, requires payment of a liquidated sum that is not subject to any contingency. Rather, the "obstacle" relied upon presents a barrier to enforcement of the Judgment in the particular jurisdiction of England and Wales that is no different in nature to the barrier to enforcement that faces a creditor who has an English trade debt, but no judgment.

47. Thus far, my own analysis leads me to the conclusion that Mr Drelle's arguments based on the Debt point should be dismissed. I note that, in *Sun Legend Investments Ltd v Jade Yuk Kuen Ho* [2013] BPIR 533, District Judge Musgrave, sitting in the Birmingham County Court, considered an identical issue to that arising in the present case. *Sun Legend Investments* concerned a Hong Kong judgment. The debtor opposed the making of a bankruptcy order on the basis that the creditor was not entitled to present a bankruptcy petition based on sums due under that judgment until after successful Recognition Proceedings. The overall force of the debtor's opposition to the making of a bankruptcy order was somewhat diminished by the fact that, in open correspondence, her English solicitors had admitted that the debt was due. Nevertheless, District Judge Musgrave considered the debtor's argument, concluding as follows:

> *Sun Legend has a cause of action and is in a position no different from any other creditor who seeks to pursue bankruptcy without holding an English judgement. […] I also accept the submission that a bankruptcy petition does not constitute enforcement of the Hong Kong judgment. The bankruptcy jurisdiction since 1986 is a separate jurisdiction involving a class remedy. There is no requirement for an English judgment as a precondition to proceeding with a petition.*

> *There is in my view a debt due to Sun Legend which satisfies the requirements of the Insolvency Act 1986.*

48. I respectfully agree with this conclusion which is shared by the authors of the present edition of *Muir Hunter on Personal Insolvency* who quote it without criticism at 3-316. Much of the District Judge's reasoning accords with my own analysis set out above although, as I have explained, in this case I consider that the focus should be on the statutory requirements as set out in s267 rather than analysis of whether bankruptcy is, or is not, a "class remedy".

49. Mr Drelle argues that this approach can produce anomalies. He relies upon the judgment of Sir Wilfrid Greene MR in *Re A Judgment Debtor (No. 2176 of 1938)* [1939] Ch 601 as establishing that s6 of the 1933 Act would preclude a judgment creditor from putting forward a bankruptcy petition by reference to a judgment that is capable of being registered under that Act, but which is not registered (a "registrable" judgment). Yet, on ST's analysis, he argues that a judgment creditor under a "non-registrable" judgment would be free to petition for bankruptcy without even needing to take Recognition Proceedings. He argues that this outcome is anomalous and that Parliament could not have intended there to be such a difference between the status of registrable and non-registrable foreign judgments.

50. I do not need to decide whether Mr Drelle's interpretation of *Re A Judgment Debtor* is correct.. However, even if it is, I do not accept Mr Drelle's argument based on anomaly. I do not find it particularly surprising that registrable and non-registrable judgments are treated differently. Moreover, Parliament has chosen, in s267(1) and s267(2) of the Insolvency Act, to define the nature of claims that can found a bankruptcy petition by reference to the concept of a "debt". I do not consider that there is any suggestion that Parliament intended that well-known concept to be coloured by reference to the respective treatment of registrable or non-registrable foreign judgments. After all, the focus of s267 is not on foreign judgments at all; it is on "debts".

51. I acknowledge that there may be academic writing that points against my conclusions. For example, in an article entitled *Recognition of Foreign Judgments: a Matter of Obligation* (2013) 129 LQR, Professor Adrian Briggs wrote:

> *A successful litigant with a foreign judgment in his favour cannot enforce that judgment in England. No measures of execution may be taken on the strength of it.*

52. In a footnote to this statement, Professor Briggs said:

> *Though they can use it for the purpose of a statutory demand leading to a bankruptcy application, if the liability is contested by the defendant, the entitlement of the judgment creditor to enforce the judgment will need to be established in English proceedings. What is then enforced is the English decision to admit the claimant to prove in the bankruptcy.*

53. This may, as Mr Drelle argues, be read as supporting his arguments on the Debt Point. Alternatively, as ST argues, it may be saying simply that, a petition can be brought by reference to an unrecognised foreign judgment, but if such a petition is brought, the

court hearing it will need to decide whether there is a bona fide substantial dispute as to whether that judgment can be impeached.

54. Whatever the correct interpretation of Professor Briggs's statement, for the reasons I have given, I reject Mr Drelle's argument on the Debt point. I conclude that, in principle, it was open to ST to bring a bankruptcy petition by reference to the Judgment even though that Judgment was unrecognised.

55. Finally, Mr Drelle referred me to a number of Commonwealth authorities. In *Re James Chor Cheung Wong* [2018] HKCU 910, the Court of First Instance in Hong Kong held that an unregistered, unrecognised Australian judgment debt was not capable of founding a bankruptcy petition in Hong Kong. That conclusion was based on s8 of the Foreign Judgments (Reciprocal Enforcement) Ordinance (the "FJREO") which is in terms very similar to that of s6 of the 1933 Act. The Australian judgment at issue in that case was capable of being registered under the FJREO. The Hong Kong court applied an interpretation of s8 of the FJREO similar to Mr Drelle's interpretation of s6 of the 1933 Act set out in paragraph 49. above (basing its conclusion on Sir Wilfrid Greene MR's judgment in *Re a Judgment Debtor*). It concluded that, since the judgment was eligible for registration under the FJREO, but it had not been registered, s8 of the FJREO precluded bankruptcy proceedings being taken by reference to it. That was a conclusion on the interpretation and application of a Hong Kong statute which is of no assistance in determining the Debt Point.

56. A similar analysis applies to the judgment of the Malaysian court in *The Bank of East Asia Ltd Singapore Branch v Axis Incorporation Bhd (No 2)* [2009] 6 MLJ 564. That judgment was based on the Malaysian equivalent of the 1933 Act being the Reciprocal Enforcement of Judgments Act 1958.

57. I found Mr Drelle's wider points on the policy of legislatures in Singapore and Canada to be of little assistance since the policy of overseas legislatures has little to say about the meaning of the term "debt" in s267.

58. Ground 1 is dismissed.

GROUNDS 2, 4 5 AND 6 – ANALYSIS

59. Grounds 2, 4, 5 and 6 overlap. Mr Drelle accepts that the Judge correctly directed herself by reference to the Threshold Test (see paragraph 18. above). However, he submits that the Judge did not actually follow her own self-direction and impermissibly conducted a "mini-trial" when reaching her conclusions (Grounds 4 and 6). He submits that the Judge erred in her treatment of the evidence of both Ms Zheglova and his experts (Grounds 2 and 5). These various challenges are best considered together since the way that the Judge treated particular pieces of evidence will inform the analysis of whether she was following the correct approach.

The approach to be followed on various issues

<u>Ascertaining whether there was a bona fide dispute on substantial grounds</u>

60. The Judge's unchallenged formulation of the Threshold Test at [61] required her to determine whether there was a "substantial dispute" as to whether particular

propositions relating to the Russian Judgments were correct. That is similar to the question that arises in the context of summary judgment under CPR 24 namely whether there is a "real prospect" of success. In *Ashworth v Newnote Ltd* [2007] EWCA Civ 793, Lawrence Collins LJ said that the question whether there is any difference between the question of "substantial dispute" and the summary judgment test "involves a sterile and largely verbal question".

61. It is well-known that, as Sir Terence Etherton C said at [80] of *Creation Consumer Finance Limited v Allied Fort Insurance Services Ltd and others* [2015] EWCA Civ 841 at [80], it is not appropriate for a Judge hearing a summary judgment application to conduct a "mini trial" in order to resolve conflicts of evidence, especially oral evidence which, in the ordinary course would be given and tested by cross-examination at a trial. Nevertheless, and despite the similarities between the Threshold Test and the test applicable to summary judgment, ST argues that this stricture does not apply in the present case on the basis that the proceedings before the Judge were a "trial".

62. That argument takes as its starting point paragraphs 28 and 29 of Mr Drelle's skeleton argument for the Pre-Trial Review ("PTR") prior to the hearing before the Judge. Those paragraphs record a settled position between the parties that there was no need for cross-examination of either the expert witnesses or of Ms Zheglova. Moreover, as is explained in that skeleton argument, prior to the PTR, the parties had been at odds on the time estimate for the hearing before the Judge. Mr Drelle had proposed a three-day time estimate to allow for cross-examination whereas ST preferred a two-day time estimate on the basis that cross-examination does not typically take place at a hearing of a bankruptcy petition. In support of his argument that the proceedings before the Judge involved a "trial", ST points out that counsel appeared in both wigs and gowns at that hearing.

63. What counsel wore at the hearing before the Judge is in my view incapable of shedding any light on the approach she was obliged to follow at that hearing. Moreover, parties frequently have different views on appropriate time-estimates or on whether witnesses need to attend for cross-examination. The ordinary correspondence that went on between solicitors on those issues has little, if any, bearing on the approach the Judge was obliged to follow when the hearing started. Whatever the correspondence between solicitors, that remained a hearing whose purpose was to determine whether the Threshold Test had been met and at which none of the witnesses was cross-examined. A hearing of that nature was not a "trial", it was analogous to a summary judgment application. Accordingly, if the Judge did conduct a "mini trial", she would have fallen into error.

64. I need say little about the approach that the Judge was obliged to take to evidence that was untested by cross-examination since that was common ground between the parties. The Judge mentioned the judgment of Rimer J in *Long v Farrer & Co* [2004] BPIR 1218 as establishing that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of cross-examination. Rimer J prefaced his conclusion to this effect by observing that the case in question was "akin to a trial, albeit one of modest dimensions". I have already explained why I do not consider that the hearing of ST's bankruptcy petition was a "trial". However, in *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, Rimer LJ (as he had become) formulated the principle more widely as applying whenever a court

finds itself faced with conflicting statements on affidavit evidence that is not tested by cross-examination.

65. The next relevant question is precisely what proposition needed to be the subject of a bona fide dispute on substantial grounds. The Judge answered that question at [61] in terms that neither side challenges. However, the parties' submissions revealed that they had slightly different perspectives on the issue and it is, therefore, appropriate to consider [61] in more detail.

66. Mr Drelle's case in essence was that there was a sufficiently triable issue to the effect that the Judgment was impeachable for fraud to preclude the Judge from making a bankruptcy order based on the Judgment. He made that case, broadly, in two ways. First, he argued that Ms Zheglova's evidence demonstrated, to the requisite threshold standard, that the Arbitrazh Court had made up its mind in advance that because GPN was effectively an emanation of the Russian state, Mr Drelle's case necessarily could not succeed. Second, he argued by reference to expert evidence, that the Judgment was so flawed that bias or partiality could be inferred.

67. The Judge referred to the judgment of Sir Michael Burton (sitting as a High Court judge) in *Maximov v Open Joint Stock Co 'Novolipetsky Metallurgischesky Kombinat'* [2017] EWHC 1911 (Comm). That case involved Part 7 proceedings to enforce an arbitration award made in Russia in circumstances where the Russian courts had given a judgment setting aside that award. The question before Sir Michael Burton was whether the Russian judgment was "so extreme and incorrect as not to be open to a Russian court acting in good faith" (see [2] of the judgment).

68. Mr Drelle seeks to downplay the relevance of *Maximov* on the basis that it concerned Part 7 proceedings designed to test whether a judgment was actually impeachable for fraud and not merely whether there was a triable issue that it may be so impeachable. However, in my judgment, even recognising this distinction, *Maximov* is relevant to Mr Drelle's "inferential" case summarised in paragraph 66.. The Judge had to apply principles set out in *Maximov* in order to establish whether the inferences on which Mr Drelle relied were sufficiently strong to raise a triable issue that the Judgment was impeachable for fraud.

69. At [15] of *Maximov*, Sir Michael Burton set out three propositions:

    i) The fact that a judgment of a foreign court is manifestly wrong or perverse is not in itself sufficient to support an inference of fraud or bias. Rather, the decision must be so wrong as to be evidence of bias or be such that no court acting in good faith could have arrived at it.

    ii) The evidence or grounds relied upon as supporting the inference must be cogent.

    iii) The decision of the foreign court must be deliberately wrong, not simply wrong by incompetence.

70. The Judge correctly had those principles in mind when she formulated the Threshold Test at [61]. Mr Drelle argues that these principles do not determine how the Judge was obliged to approach the allegation of actual bias or partiality that was based on evidence of Ms Zheglova. I agree. If, for example, a judge had received a bribe that of

itself would cause the judgment to be impeached even if the judgment appeared otherwise to be impeccably reasoned and to come to the "right" answer. However, the Judge did not suggest that *Maximov* addressed all of the questions before her. The first part of her formulation of the Threshold Test had *Maximov* correctly and properly in mind. However, the Judge's formulation of the Threshold Test shows that there was a second aspect to it which could be satisfied by reference to Ms Zheglova's evidence namely "and/or there must be a substantial dispute that the judgment is impeachable by fraud or that the proceedings were opposed to natural justice".

The approach to be taken on appeal

71. Both parties agree that the appeal before me involves a review, rather than a rehearing. The parties were, however, not agreed on the degree of "deference" that should be afforded to the Judge's evaluative conclusion that the Threshold Test was not met.

72. ST argues that, since the proceedings before the Judge were a trial, the well-known principles set out in *Volpi v Volpi* [2022] EWCA Civ 464 apply with the result that I should not interfere with the Judge's evaluative conclusions on the Threshold Test unless satisfied that they were plainly wrong.

73. I do not accept that broad proposition since its premise, that the proceedings before the Judge involved a "trial", is not correct for reasons that I have given. The basis for the approach of principle that is outlined in *Volpi v Volpi* is that a trial judge has had the opportunity to review the totality of evidence in a case and not just a snapshot that the parties might choose to highlight in an appeal. However where, as here, the proceedings before the Judge were directed at whether a particular threshold was met (rather than the determination of underlying factual questions themselves) with that question being determined by reference to evidence that is not tested in cross-examination, I do not consider that the principle in *Volpi v Volpi* is applicable.

74. Moreover, ST's approach runs the risk of cutting off a permissible challenge to the Judge's order. As I have stated, the Judge would have erred in law if she engaged in a "mini trial" seeking to determine disputed issues that could not be determined summarily. She could also have erred in law if she wrongly "disbelieved" evidence given in a witness statement which was not tested in cross-examination. ST's approach, which focuses only on the overall evaluative conclusion, would make it unduly difficult for Mr Drelle to pursue points such as this in an appeal.

75. That, therefore, raises the question of what the correct approach of an appeal court should be in this case. I was shown the judgment of Harman J in *Re Gilmartin* [1989] 1 WLR 513. That was potentially a relevant authority since it dealt with an appeal to a High Court judge against an evaluative conclusion of a bankruptcy registrar. However, in the event, it sheds relatively little light on the degree of deference that I should give to the Judge's conclusions since the point before Harman J was whether the appeal was a "rehearing" or not, a point that does not arise in this appeal.

76. Since the Judge was performing an exercise akin to that undertaken on an application for summary judgment under CPR 24, I consider that an appeal court should take the same approach as it would on an appeal against summary judgment. ST submits that its approach summarised in paragraph 72. is borne out by the judgment of Nugee LJ in

Malik v Henley Homes plc [2023] EWCA Civ 726, an appeal against an order in a summary judgment application, in which he stated, at [79]:

> *The decision of a judge, at any rate in a case like this, that a defendant has no real prospect of successfully defending a claim is an evaluative decision on the facts. It is not a pure point of law. In those circumstances I think we should only disturb his conclusion if it was one that we are satisfied was not open to him.*

77. I do not accept ST's submission that this requires me to apply the approach set out in *Volpi v Volpi* in this appeal. Nugee LJ made it clear that his statement was made by reference to "a case like this". The essence of the challenge in *Malik* was to the evaluative conclusion that the judge reached. Mr Drelle's challenges in this case are different. He argues that the Judge performed a "mini trial" when she should not have done, which is a challenge to the approach she followed rather than the conclusion. Moreover, he argues that, in reaching her conclusion, the Judge "disbelieved" evidence that was not challenged in cross-examination when she could not permissibly do so.

78. Paragraph [103] of the judgment of Sir Terence Etherton C in *Creation Consumer Finance Ltd v Allied Ford Insurance Services Ltd and others* [2015] EWCA Civ 841 makes it clear that the degree of respect given to a first instance decision granting or refusing summary judgment is likely to depend on the reasons for the order in question. If the reasons turn on a pure point of law, then the appeal court will simply decide whether the first instance decision was correct or incorrect. The position may be different, and the approach set out in *Malik* engaged, if the challenge is to a purely evaluative judgment on the facts likely to be established at trial or a more general multi-factorial decision. Moreover, as Sir Terence Etherton C observed, if a judge has wrongly performed a "mini trial" that is likely both to involve an error of law, consisting of an incorrect approach to the question, and an evaluative conclusion that is outside the reasonable range since it was reached following a flawed approach.

79. I will, therefore, approach Mr Drelle's Grounds 2, 4, 5 and 6 as follows:

    i) If the Judge did impermissibly perform a mini trial, or did impermissibly disbelieve evidence that was untested in cross-examination, those would be errors of approach. They would justify allowing the appeal without it needing to be shown that the Judge's evaluative conclusion was "plainly wrong" although I could remake her decision to reach the same conclusion.

    ii) By contrast, if neither of the errors of approach set out in paragraph i) above are present, so that the challenge is purely to an overall evaluative conclusion, I should show a high degree of deference to the Judge's conclusion and not interfere with it unless I consider it was not open to the Judge (the formulation adopted in *Malik v Henley Homes*).

80. Since Grounds 2, 4, 5 and 6 are linked for the reasons I have given, I will set out some conclusions on matters relevant to each ground under the separate headings below. Having done so, I will explain my decision whether to allow the appeal on any of those grounds having considered matters in the round.

Observations on Ground 2 – Ms Zheglova's evidence

81. The central part of Ms Zheglova's evidence was as follows:

> *81. I explained to Ms Lobanova the situation, namely that Mr Drelle had received a claim from ST's Receiver (who was really representing GPN) for RUB 4,4 billion. I asked her if she can contact Mr Guschev and find out who is really behind this claim as we were extremely confused in this situation – we thought that we are working with GPN towards the same goal i.e. recovery from Mr Motylev.*
>
> *82. Ms Lobanova said that she would go to make few calls and let me know what she finds out. Therefore, she left the café and I stayed waiting for her.*
>
> *83. She returned after approximately one hour. I understand that she spoke with Mr Gushchev. Ms Lobanova said that things do not look well for Mr Drelle. She said that GPN is pushing this claim forward. Given that GPN was behind the claim (which is understood to mean, a very influential and powerful company working closely with the highest levels of the Russian state), we cannot win this case. She said that the decision would be judgment against Mr Drelle for RUB 2 billion.*
>
> *84 After this conversation, Ms Lobanova left the café and I reported this conversation to Mr Drelle. I already told Mr Drelle that I would be travelling to Nizhny Novgorod to meet her.*
>
> *85 We decided that in spite of the negative outcome, which Mr Guschev had described to Ms Lobanova that we would still argue this case.*

82. Mr Guschev was not the judge in the case. Rather, he was the Chairman of the Commercial Court of the Yaroslavl region at the time. The Judge did not make detailed findings as to the role of the Chairman. However, ST has not taken issue with the following quote from [73] of Ms Zheglova's witness statement on which Mr Drelle relied in his skeleton argument and I therefore accept that statement as accurate:

> *…the role of the Chairman of a regional Court has a decisive role in deciding major cases in Russia. The judges allocated to cases involving large companies, particularly state-owned companies (as GPN), discuss with the Chairman of Court such cases and decisions are taken in consultation with the Court.*

83. The Judge's conclusion on this evidence is set out at [116] and [117] as follows:

> *116 Mr Kulkov's Report states that regardless that the claim had largely been heard by the time of the alleged conversation, the fact that the outcome might have been known in advance was an indicator of a breach of natural justice*
>
> *117 This Court must consider Ms Zheglova's witness statement in the context of the test that I have held this Court must apply. Her*

> *statement comprises evidence of the fact that her conversation with Ms Lobanova took place. It is not evidence of the truth of what Ms Lobanova is reported to have said and it is not evidence of the accuracy or truth of what Ms Lobanova is said to have learned from her conversation with Mr Guschev. It is "double hearsay" evidence. As such, it is not cogent evidence that there is a good arguable case that there has been a breach of natural justice. Moreover it only refers to the Arbitrazh Judgment. The case was re-examined in the Court of Appeal where Mr Guschev's alleged advance disclosure of the result has no bearing.*

84. Mr Phillips KC appeared for ST at the hearing before the Judge as he appears before me. He argued before the Judge that Ms Zheglova's evidence was inadmissible on the basis that it was hearsay. He accepts that this submission was wrong. Section 1 of the Civil Evidence Act 1995 provides that evidence is not to be excluded on the ground that it is hearsay, of whatever degree. Nevertheless, the Judge did not say that the evidence was inadmissible. She considered the significance of Ms Zheglova's evidence. Her conclusion was that Ms Zheglova's witness statement did not provide "cogent evidence" that there was a good arguable case of a breach of natural justice.

85. I am unable to accept Mr Drelle's submission that, in reaching this conclusion, the Judge "disbelieved" Ms Zheglova's evidence. She had, after all, at [60] directed herself, by reference to *Long v Farrer* that she should not do so. The Judge's point was not that Ms Zheglova was lying, or mistaken, about her account of the Zheglova/Lobanova Conversation, or Ms Lobanova's report of the Lobanova/Guschev Conversation. Rather, her conclusion was that even if Ms Lobanova's report was completely accurate, it was not sufficiently "cogent" to establish a good arguable case of a breach of natural justice.

86. I acknowledge that the Judge, after noting that the evidence was "double hearsay" expressed the conclusion that "as such" it was not cogent evidence. It is possible to read this as a conclusion that double hearsay evidence was simply incapable of having the requisite "cogency". However, it is important not to read judgments as if they were statutes. This was a careful judgment in which the Judge looked in detail at the evidence that was before her. The suggestion that the Judge concluded that "double hearsay" evidence was necessarily incapable of being sufficiently "cogent" is negatived by the fact that, at [115], the Judge showed that she had considered the import of Ms Zheglova's evidence as she summarised it with conspicuous accuracy.

87. In his oral submissions, Mr Samek argued that, provided Ms Zheglova's evidence was not "manifestly incredible", it was sufficient to establish a triable issue that the Judgment was impeachable for fraud. I do not accept that. To be "cogent", Ms Zheglova's evidence needed to point in favour of the proposition that the Arbitrazh Court had made up its mind in advance to decide the case in favour of GPN. I consider that the Judge was entitled to conclude that it did not do so. While I quite accept that the lack of cogency did not follow <u>inevitably</u> from the fact that the evidence was double hearsay, there were material gaps in the evidence that flowed from the fact that Ms Zheglova was reporting on a conversation that Ms Lobanova had with Mr Guschev. The Judge was not obliged to fill in those gaps in a manner favourable to Mr Drelle.

88. In particular:

i) There is no attempt to report either what Ms Lobanova actually said to Ms Zheglova, or what Mr Guschev actually said to Ms Lobanova. What is relayed is simply the gist of both conversations.

ii) It is not clear whether the statement that "we cannot win this case" is something that Mr Guschev said, or whether it was simply Ms Lobanova's opinion on the matter.

iii) Mr Drelle argues that it is obvious that the view that Mr Drelle could not win was that of Mr Guschev not least since paragraph [85] of Ms Zheglova's refers to the "negative outcome, which Mr Guschev had described to Ms Lobanova". I do not agree. Ms Lobanova's brief as described in paragraph [81] was to find out "who is really behind this claim". It is quite possible to read Ms Zheglova's witness statement as meaning that the "negative outcome" was that GPN, who Mr Drelle had previously been assuming was focusing on tracking down assets owned by Mr Motylev, was in fact focusing on securing a contribution from Mr Drelle to ST's bankruptcy. If Mr Guschev was simply confirming that GPN was behind the claim against Mr Drelle, it is quite possible that the view that Mr Drelle "cannot win" represented the opinion of Ms Zheglova and/or Ms Lobanova rather than a statement of Mr Guschev.

iv) Moreover, the wording in paragraph [83] of Ms Zheglova's witness statement reads most naturally as an expression of Ms Lobanova's opinion. The words "she said" appear at the beginning of the second sentence and of the fourth sentence. Therefore, the conclusion that there would be "judgment against Mr Drelle for RUB 2 billion" is expressly said to be a statement made by Ms Lobanova rather than by Mr Guschev. One might expect that if Ms Zheglova was intending to make the eye-catching assertion that the Chairman of the Court had told Ms Lobanova that Mr Drelle "cannot win", that would have been said expressly. Mr Lough, at [70] of his expert report, appears to have read her witness statement in this way referring to "the conclusion allegedly drawn by Ms Lobanova after her telephone enquiries [with Mr Guschev]".

89. Mr Drelle argues that the analysis set out in paragraph 88. is at odds with the Judge's summary of Ms Zheglova's evidence at [115]. I do not agree. That summary carefully reflects the evidence that was given without seeking to fill in the gaps as to whether it was Ms Lobanova or Mr Guschev who said that Mr Drelle "cannot win". I acknowledge that, at [138(i)], the Judge refers to "the hearsay evidence of Ms Zheglova alleging that the Chairman of the court [had disclosed the outcome of the Judgment before it was released]". There is a similar reference at [117] to "Mr Guschev's alleged advance disclosure of the result". However, the use of the word "alleging" is quite capable of being read as summarising the inference that the Judge had been asked to draw from Ms Zheglova's evidence rather than a finding as to what Ms Zheglova said in that evidence. As I have explained, her evidence did not say in terms that the Chairman told Ms Lobanova that judgment would be entered against Mr Drelle for RUB 2 billion.

90. Next, Mr Drelle objects that the analysis set out in paragraph 88. does not appear on the face of the Judgment. That is true, but the Judge's conclusion that the evidence was not sufficiently "cogent" does. Moreover, the gaps in the evidence arise precisely because of the fact that Ms Zheglova was reporting the gist of the Zheglova/Lobanova

Conversation and Ms Lobanova in turn was reporting the gist of the Lobanova/Guschev Conversation. Perhaps with hindsight, the Judge could have spelled out in more detail those aspects of the evidence she thought were lacking in cogency, but it is clear that she was troubled by the lack of specificity in the evidence. I do not accept that ST could only advance arguments in support of the analysis set out in paragraph 88. if it had served a respondent's notice seeking to uphold the Judgment on different grounds. The points made in paragraph 88. explain a rationale for the conclusion expressed in the Judgment that the evidence lacked cogency.

91. There is a further point. Even if Mr Guschev was the source of the "cannot win" statement, that would not lead inexorably to the conclusion that the case had been predetermined. By the time of the Lobanova/Guschev Conversation, the case against Mr Drelle had been proceeding for some time. To be "cogent" at least it needed to set out some basis for a conclusion that the case had been predetermined. The judge was entitled to conclude that, even if Mr Guschev was indiscreetly and inappropriately commenting on the outcome in advance, that was not on its own evidence of predetermination.

92. Mr Drelle submits that Mr Lough's expert evidence was consistent with predetermination, but the Judge was entitled to find that consistency with other evidence is not enough. Mr Drelle also emphasises what he sees as a suspiciously correct prediction of the amount of judgment against him (RUB 2 billion). However, the force of that point is diminished by the fact that this was the principal amount of the Loan which, on the trustee in bankruptcy's case, had been lost as a result of Mr Drelle's defaults and so was an obvious candidate for an award of damages.

93. Overall, the evidence of Ms Zheglova was light indeed on detail as to why the various conversations reported raised a clear and cogent case to the effect that the Arbitrazh Court had made up its mind in advance.

Observations on Ground 4 – the expert evidence on Russian law

94. Ground 4 needs to be understood in the context of the relevant Russian law on which the experts disagreed. At a very high level of generality:

    i) ST had suffered loss because it had made a loan of RUB 2 billion which was not repaid and Mr Motylev had not honoured the Personal Guarantee.

    ii) Mr Drelle could be made personally liable for that loss under Article 53(3) of the Civil Code if he had fallen short of an objective standard in procuring ST to enter into that loan. Mr Kulkov and Professor Egorov did not agree on how the objective standard is properly described, but it was something like a duty of "good faith" or "reasonable care".

    iii) There would be a rebuttable presumption that Mr Drelle acted in breach of duty in procuring ST to make the Loan if ST needed shareholder approval which was not obtained.

    iv) If the Loan was a "major transaction", it would need shareholder approval unless it was within the ordinary course of ST's business.

95. Mr Kulkov and Professor Egorov prepared a joint statement setting out those issues on which they agreed and those on which they disagreed. Mr Drelle, in characterising this document as setting out a "clash of expert evidence" emphasised its length (at 45 pages) and the number of issues that were in dispute. In my judgment, that overstates matters. The experts were broadly agreed on the applicable principles. Their disagreements involved how the principles should be applied to the circumstances of Mr Drelle's case. So, for example, they were not agreed on the steps that Mr Drelle needed to take to show reasonable care in verifying the creditworthiness of either FS in respect of the Loan or Mr Motylev in respect of the Personal Guarantee in circumstances where there was a previous track record of successful trading with these counterparties. They were not agreed on what precisely constituted a "major transaction" and whether that was to be measured purely formally (by considering whether it involved more than 25% of the company's net assets) or whether other measures could be relevant as well. They agreed that shareholder approval need not be express, but could be given implicitly (or on a de facto basis as they put it in their Joint Report), but did not agree on what constituted de facto approval.

96. Mr Drelle argues that the mere fact that the experts were disagreed on so many issues of itself meant that there was a triable issue that the Judgment could be impeached. I do not agree. The question was not how many issues the experts disagreed on but rather whether there was a triable issue to the effect that the Judgment was so badly wrong that the errors in it must have been deliberate as the Judge's unchallenged formulation of the Threshold Test shows.

97. Mr Drelle seeks to persuade me that, at [63] to [114], the Judge engaged in an impermissible mini trial in which she determined issues of Russian law on which the experts did not agree for herself and without the benefit of any cross-examination of those experts. I do not accept that argument.

98. First, it would be surprising if the Judge had done this given that, in her self-direction at [61], she had set herself the task of deciding whether there was a substantial dispute to the effect that the Russian Judgments were deliberately wrong, or so wrong is to raise an inference of bias. Answering those questions did not require her to choose between the evidence of Mr Kulkov and Professor Egorov. If she had thought that she did need to choose between their evidence, she would have said so in her careful self-direction.

99. In any event, a reading of these paragraphs dispels the notion that the Judge was engaged in a mini-trial. Mr Drelle emphasises the length of this section of the Judgment. However, the section is lengthy because the Judge was taking care to ensure that she understood both the criticisms that Mr Kulkov was making and the way in which the Russian Judgments had addressed the issues that were criticised. Having done so, the Judge considered whether there was a triable issue to the effect that the Russian Judgments were so badly wrong as to raise the inference of fraud.

100. In oral submissions on behalf of Mr Drelle, Mr Bickford Smith took me to what he submitted were some examples of the Judge engaging in a mini-trial:

    i) [68] begins with the phrase "My reading of the Arbitrazh Judgment is…". Mr Drelle argues that this shows that the Judge was, impermissibly, interpreting the Judgment for herself without the benefit of expert evidence that was tested in cross-examination. I do not accept that. The Judge's point was effectively one of

"cogency". As recorded at [64], Mr Kulkov was accusing the Arbitrazh Court of having wrongly concluded that Mr Drelle had a specific duty as a director of ST to investigate the solvency of ST's counterparties. In deciding whether this accusation by Mr Kulkov went towards establishing a triable issue that the Judgment was so badly wrong that it must have been infected by fraud, the Judge was entitled to read the Judgment to see whether there was a triable issue that it had reached that conclusion.

ii) The same analysis applies to [71]. Mr Kulkov had said that it was "manifestly wrong" for the Russian courts to examine the reasonableness of Mr Drelle's conduct by reference to the kind of due diligence that a lending institution would perform. The Judge was entitled to examine the Judgment to see if this was indeed the conclusion of the Arbitrazh Court.

101. Each relevant section of the Petition Judgment ends with an evaluative conclusion as to whether the criticisms raise a substantial dispute that the Russian Judgements were deliberately wrong or otherwise meet the Threshold Test (see for example [75], [79], [86] and others). In circumstances where the Judge has taken such care to explain the approach that she is following I am not satisfied she did something else.

Observations on Ground 5A

102. Ground 5A follows on from Ground 4. Mr Drelle relies on what he describes as "a swathe of major errors with the [Judgment]". He argues that the cumulative effect of these alleged errors, coupled with the evidence of Ms Zheglova and Mr Lough was, at the very least that, there was a triable issue that Judgment could be inferred to be impeachable for fraud.

103. The fundamental difficulty with Ground 5A is that, even if Mr Kulkov was correct, and there was a large number of errors in the Judgment, that would not in itself be enough to establish a triable issue that the Judgment could be inferred to be impeachable for fraud. As made clear in *Maximov*, something extra would be needed, namely evidence that supports the proposition that the Judgment was deliberately wrong.

104. Mr Drelle counters that the Judge was looking only for a triable issue, and was not determining the question finally at trial as in *Maximov*. However, that does not answer the point. Even though she was looking only for a triable issue, the Judge was entitled to require some cogent evidence of the extra ingredient beyond a list of the alleged errors. Ground 5A fails to engage with the Judge's core point repeated throughout [63] to [110] that, while Mr Kulkov's expert report suggested that there may have been errors in the Judgment, those alleged errors did not raise a sufficiently triable issue on the extra ingredient so as to satisfy the Threshold Test.

105. The Judge made this point expressly at [82] and [86] when she observed that Mr Kulkov was criticising aspects of the Judgment as being "ill-founded". Mr Drelle criticises these passages but the Judge's meaning was clear. At [80] and [81] she quoted extensive passages from Mr Kulkov's expert report. Those passages certainly show that Mr Kulkov disagreed with the Arbitrazh Court's formulation of Mr Drelle's duty to check the solvency of ST's counterparties, including Mr Motylev and whether Mr Drelle had discharged that duty. The Judge's point at [82] and [86] was that this was

insufficient to establish a triable issue to the effect that the Judgment was deliberately wrong. That conclusion was available to her.

106. Written submissions on behalf of Mr Drelle on Ground 5A on occasions criticised the Judge for not referring to particular passages of Mr Kulkov's expert evidence and on other occasions criticised her for "dissecting" his evidence (see [75]). Those criticisms strike me as mutually incompatible. In any event, the criticism of undue "dissection" of the evidence overlaps with the arguments that I have considered, and rejected in my analysis of Ground 4. Therefore, what is left is an assertion that, if the Judge had focused on other parts of Mr Kulkov's expert report, she would have reached a different conclusion. Mr Drelle's submissions in support of Ground 5A have not identified those aspects of the expert evidence that are said to point in favour of the proposition that there was a triable issue that Judgment was deliberately wrong. I consider that the Judge's evaluative conclusion, that none of the evidence she was shown supported the existence of such a triable issue, was available to her.

107. Nor do I find it particularly surprising that Mr Drelle has struggled to show a triable issue to the effect that the Judgment was deliberately wrong solely by reference to alleged errors in the Judgment. At a very high level of generality, the proceedings in Russia concerned the scope of Mr Drelle's duty and whether he had discharged that duty. These are questions that arise in commercial courts throughout the world. Commentators on decisions of this kind frequently express the view that the judgment is wrong because the duty has been set too high or too low, or because the court was unduly lenient or unduly harsh in judging whether the duty was discharged. Without expressing any view on matters of Russian law, at a high level, there were always going to be difficulties in establishing a triable issue that a judgment on issues such as this was so fundamentally flawed as to be deliberately wrong.

Observations on Ground 5B – The treatment of Mr Lough's evidence

108. By Ground 5B, Mr Drelle challenges the Judge's treatment of Mr Lough's expert evidence. Mr Lough had spent six years with NATO between 1995 and 2001, including being posted to Moscow where he set up NATO's Information Office. He had also worked as the international affairs adviser at Russia's third-largest oil company, TNK-BP. Mr Lough gave opinion evidence on the extent of Russian State interference in judicial proceedings and it was accepted that he had both sufficient expertise and sufficient independence to give that opinion evidence.

109. Mr Drelle relied on Mr Lough's evidence in three respects. First, he emphasised Mr Lough's opinion that there is an absence of judicial independence in Russia that makes the Russian courts vulnerable to interference by powerful interests acting in the name of the state at all levels. Second, he expressed the opinion that both Gazprom and GPN (an almost wholly-owned subsidiary of Gazprom) are integral parts of the current Russian system which involves a fusion between political power, economic resources and the personal interests of Russia's governing elite headed by President Putin. As such, Mr Lough's evidence was that GPN was in a strong position to influence the outcome of the proceedings against Mr Drelle. Third, Mr Lough endorsed what he saw as Ms Zheglova's conclusion that "with GPN driving the case, Mr Drelle stood no chance of winning in court".

110. The Judge referred in detail to Mr Lough's report between [121] and [123]. She also referred to Professor Stephan's more nuanced assessment at [124] to the effect that "the Russian state reserves its powers as a controlling shareholder to implement national policy, not to settle insignificant commercial disputes where only money, and not firm viability or capacity is at stake".

111. Mr Drelle's first argument under Ground 5B is that, at [125], the Judge decided between the expert evidence of Mr Lough and that of Professor Stephan. He submits that this involved the Judge engaging impermissibly in a mini-trial and/or that it involved the Judge "disbelieving" Mr Lough's evidence which had not been tested in cross-examination.

112. I do not accept that argument. [125] has to be read together with the Judge's overall evaluation of the significance of Mr Lough's evidence at [131]. In both [125] and [131], the Judge was commenting on the "cogency" of Mr Lough's evidence. The Judge's point in [125] was that Mr Lough made wide-ranging allegations of the ability of the state, and state-owned energy companies, to interfere in judicial proceedings, but the examples given in his report of cases where this had actually happened involved cases against critics of President Putin. In doing so, the Judge did not "disbelieve" Mr Lough's evidence or prefer Professor Stephan's opinion. She was simply pointing out that the specific examples that Mr Lough had given did not bear directly on the case since there was no suggestion that Mr Drelle was a critic of President Putin.

113. I am reinforced in that conclusion by the Judge's self-direction by reference to *Long v Farrer*. Moreover, there would be formidable difficulties in the way of choosing between such highly generalised opinions about the Russian legal and political systems that Mr Lough and Professor Stephan expressed. There is no suggestion in the Petition Judgment that the Judge thought she was embarking on such a difficult task.

114. Mr Drelle's next argument is that, contrary to the Judge's conclusion, Mr Lough's evidence, especially when viewed together with that of Ms Zheglova and the fact that GPN's chief executive had written to Russian prosecutors asking them to take criminal proceedings against Mr Drelle, was sufficiently "cogent" to establish at least a triable issue that the Judgment could be impeached. Since I have rejected the argument that the Judge made any error of approach when assessing the evidence of Mr Lough or of Ms Zheglova, I treat this as a challenge to the Judge's evaluative conclusion to which I should pay a good degree of respect (see paragraph 79.ii) above).

115. Mr Lough's evidence was not focused on the Judgment or the proceedings that led to it. Rather, it was, as Sir Michael Burton noted in connection with similar evidence advanced in *Maximov*, evidence of "context". I do not accept the submission that Mr Bickford Smith made in his oral argument that Mr Lough's evidence was "probative of the appellant's case". Mr Lough's evidence was of the wider political and societal context within which the Russian Judgments were given. It was certainly capable of supporting Mr Drelle's case since it suggested that judges in Russia might exercise partiality in favour of GPN. However, the Judge was entitled to conclude that his evidence was insufficient on its own to establish a triable issue since it said nothing about how the particular proceedings against Mr Drelle had been conducted.

116. I do not, therefore agree with Mr Drelle, that [131] represented the outcome of a mini-trial, rather than an examination of whether a triable issue was present. Rather, [131] is

an evaluative conclusion on the significance of Mr Lough's evidence when put together with the other evidence she was shown. In my judgment, read in the context of the Judgment as a whole, [131] is directed appropriately at whether the Threshold Test was met.

117. Finally, Mr Drelle argues that the Judge overlooked the significance of a letter sent by GPN's CEO, Mr Dyukov to the Russian police. In that letter, Mr Dyukov, said to be a close friend of President Putin, alleged that Mr Drelle was part of an "organised criminal group" that had been stealing from GPN and, by extension, from the Russian Federation as GPN's controlling shareholder. Mr Dyukov alleged that GPN's loss was of about RUB 10 billion and that the Russian police should take criminal proceedings against those involved, including Mr Drelle. Mr Drelle's argument suggests that he views this letter as a "silver bullet" demonstrating the pressure that was being brought to bear on figures who would clearly have seen the significance of a request being made by such a close ally of President Putin.

118. However, it was for the Judge, have correctly directed herself by reference to the Threshold Test, to evaluate the significance of this letter. Her conclusion, at [135] that the letter was not cogent evidence of the Judgment being impeachable for fraud was available to her. She was entitled to have regard to the fact that, while the letter alleged a loss of RUB 10 billion, and in the proceedings against Mr Drelle, ST was seeking damages of RUB 8 billion, ultimately the Arbitrazh Court awarded damages of the much lower sum of RUB 2 billion.

Ground 6 and overall conclusion on Grounds 2, 4, 5 and 6

119. Ground 6 draws on various points made in connection with Ground 2, 4 and 5 to advance the proposition that the Judge erred in her approach to ascertaining whether there was a triable issue that the Judgment could be impeached for fraud. Accordingly, in my judgment Ground 6 does not add anything to the other grounds advanced. However, it does emphasise the important point that Grounds 2, 4 and 5 must be evaluated "in the round" by reference to each other. That is the exercise I perform in this section.

120. In my judgment, even considering the various arguments that have been made in the round, these grounds of appeal must fail. As I have explained in my discussion of the Grounds viewed individually, I am not satisfied that the Judge made any error of "approach". She directed herself, correctly, that she should apply the Threshold Test. She also directed herself, correctly, by reference to *Long v Farrer* that she should not disbelieve any of the evidence before her, which had not been tested in cross-examination, unless satisfied that it was implausible. She did not impermissibly undertake a "mini-trial". In my judgment, she followed the correct approach when performing her multi-factorial evaluation.

121. Therefore, to succeed on Grounds 2, 4, 5 and 6, Mr Drelle must show that the Judge's evaluative conclusion, that the Threshold Test was not met, was not open to her in the sense set out in *Malik v Henley Homes*. In my observations on Grounds 2, 4, 5 and 6 above, I have explained why I consider the conclusions the Judge expressed were indeed open to her. Noting the high degree of deference that I should show to the Judge's evaluative conclusions following an application of the correct test, I will not interfere with those conclusions.

122. Grounds 2, 4, 5 and 6 are dismissed.

GROUND 3

123. By Ground 3, Mr Drelle criticises the Judge's references to his unsuccessful appeals to superior courts in Russia as pointing against a conclusion that there was a triable issue the Judgment was impeachable for fraud. For example, Mr Drelle criticises the following passages of the Petition Judgment:

    i) Paragraph [137] in which the Judge suggested that the appeals to superior courts pointed against the conclusion that "the judgment arose as a result of a miscarriage of justice".

    ii) Paragraph [32] in which the Judge stated that the relevant question is whether there is a "bona fide dispute on substantial grounds that the Russian Judgments may be impeached" (my emphasis). Mr Drelle argues that this betrays an error since the Judge's focus should have been on the Judgment only.

    iii) Paragraph [117] in which the Judge noted that Ms Zheglova's evidence related only to proceedings before the Arbitrazh Court and "The case was re-examined in the Court of Appeal where Mr Guschev's alleged advance disclosure of the result has no bearing".

    iv) Paragraph [131], in which the Judge comments on a lack of cogent evidence "that points to the existence of any potential interference with the judges in all four courts".

    v) Paragraph [129] in which the Judge said that the relevant question was whether there was cogent evidence to support a finding that there is a genuine triable issue that "all four of the Russian Courts were deliberately wrong".

124. In support of this Ground, Mr Drelle relies on two distinct but related propositions:

    i) A litigant who can show that a foreign judgment has been obtained by fraud can successfully impeach that judgment in the English courts even if he or she has not used an available remedy in the foreign court with reference to that fraud (see the judgment of Slade LJ in *Adams v Cape Industries* [1990 1 Ch 433 at 569).

    ii) A litigant who asserts that a foreign judgment should be impeached for fraud in the English courts is making an argument based on English law which is for the English court to determine. Accordingly, the views of the foreign court on whether there has or has not been a fraud are not relevant (see the judgment of Staughton LJ in *Jet Holdings Inc v Patel* [1990] 1 QB 344).

125. In my judgment, the Judge's conclusions did not run contrary to either of these propositions.

126. As I have noted, Mr Drelle's case was in part based on inference. He argued that the Judgment was so badly wrong that there was a triable issue that it must have been infected with fraud or partiality. The fact that the Judgment was upheld at each stage of appeal in Russia was relevant to the Judge's assessment of that case. The Judge was not saying that Mr Drelle's inferential case could not succeed because he had not alleged

fraud in the course of his Russian appeals. Rather, she was simply noting that the fact of his unsuccessful appeals pointed against the conclusion that the Judgment was so badly wrong that the flaws must be deliberate. The Judge was entitled to make that observation.

127. Once the Judgment is read as a whole, it is clear that the Judge was not suggesting at [129] that there was a proposition of law to the effect that Mr Drelle's arguments would fail unless he could show a triable issue that all four Russian Judgments were impeachable for fraud. If that had been the Judge's approach, the Petition Judgment would have been much shorter as Mr Drelle was clearly not seeking to do that.

128. [129] forms part of the Judge's assessment of conclusions to be drawn from Mr Lough's evidence. It introduces a "cogency" point to the effect that his evidence is too general that is made at [130]. It also introduces a point made at [131] that since Mr Drelle's experts were not criticising the decisions of the two most senior Russian courts (the Cassation Court and the Supreme Court) which had upheld the Judgment, that pointed against the conclusion that the Judgment itself was "deliberately wrong". The Judge's point was that, since senior courts upheld the Judgment, in the absence of a suggestion that their judgments were impeachable for fraud, that pointed against the case, based on inference, that the Judgment itself was deliberately wrong.

129. Ms Zheglova's evidence was not tendered in support of an inferential case as it did not involve criticisms of the Judgment, but was said to indicate that the Arbitrazh Court had determined the outcome in advance. However, as I have explained above, the Judge was entitled to conclude that Ms Zheglova's evidence was insufficiently cogent. Mr Drelle had failed to demonstrate the premise of the proposition set out in paragraph 124.i), namely that there was a triable issue that the Judgment should be impeached for fraud. Accordingly, properly understood, when the Judge referred to the judgments of appeal courts in [117] when dealing with Ms Zheglova's evidence, she was not concluding that the subsequent appeals wiped the slate clean of a fraud that had infected the Judgment. Rather, she made her observations about the appeals process having already concluded that Ms Zheglova's evidence was insufficiently cogent to demonstrate a triable issue of fraud in the first place. Perhaps there was no need to mention the judgment in the Russian Court of Appeal having reached that conclusion, but the reference that the Judge chose to make does not vitiate her conclusion on the impact of Ms Zheglova's evidence.

130. Ground 3 is dismissed.

DISPOSITION

131. Mr Drelle's appeal is dismissed on all grounds.