Neutral Citation Number: **[2020] EWHC 887 (Comm)**

CL-2017-000737

Case No: CL-2017-000737

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

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

Date: 14 April 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

MR RUSTEM MAGDEEV	**Claimant**
- and –	
MR DMITRY TSVETKOV	**Defendant/ Part 20 Claimant**
- and –	
~~**(1) MR EMIL GAYNULIN**~~	
(2) EQUIX DIAMONDS DMCC	
(previously EK DIAMONDS DMCC)	**Part 20 Defendants**
~~**(3) EQUIX GROUP LIMITED**~~	

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- -

Mr Stephen Robins and **Mr Riz Mokal** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
Mr Steven Berry Q.C. and **Ms Anna Dilnot** (instructed by **PCB Litigation LLP**) for the **Defendant/Part 20 Claimant**

Mr Jonathan Adkin Q.C. and **Mr Adil Mohamedbhai** instructed by **Ignition Law Services Limited**) for the **Part 20 Defendants**

Hearing dates: 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29th, 30th January 2020
4th, 5th, 6th February 2020
Draft Judgment sent to parties: 7 April 2020

Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to Tuesday 14 April 2020 at 10:00am

Mrs Justice Cockerill :

Introduction

1. Over the course of three weeks in January and early February I have heard evidence in what, on its face, looks like a simple matter. It is the story of the breakdown of trust between two very close friends. The question for me to decide is this: is the Defendant Dmitry Tsvetkov ("Mr Tsvetkov") liable to repay the sum of US$10 million loaned to him by a former friend Rustem Magdeev ("Mr Magdeev") to enable him to buy Graff diamonds to sell in concessions in Dubai and Cyprus; or has that sum already been repaid by means of a variety of different payments, none of which directly say they are repayments of the loan?

2. The question can be stated simply. The amounts in issue are, by this Court's standards, relatively modest. Yet the case is a less than straightforward matter. There are issues of UAE law and English law in relation to illegality. The accounts given by each of the principals involved many conflicts and contradictions. For reasons to which I shall come, the documents have not been the safe resource on which this Court so often relies. The List of Issues runs to nine pages. Closing submissions ran to over two hundred and forty pages and three days of argument.

3. In those circumstances it is plainly impossible for me to deal with every issue which has been raised by the parties. To do so would, in the words of Teare J in *The Suez Fortune* [2019] EWHC 2599 (Comm) at [26], result in a judgment of "intolerable length". It would also run into serious danger of making it impossible to see the wood for the trees. Thus, while I have carefully considered all the points which were argued orally and in writing, this judgment aims to steer a path through the issues, bearing in mind the guidance given by Lord Phillips MR in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409: "*the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained*". The result is scarcely ever to set out all the arguments advanced for each side; but that does not mean that they were not carefully considered and of much assistance in reaching my conclusions.

4. The course which this judgment will follow is to outline such facts, derived from the documents, as appear to be reliable; noting in passing where each of the main issues in the case "drops in", and where feasible resolving issues of fact which do not easily fit in elsewhere. I will then deal with the trial and the evidence, and my approach to that evidence, before turning to decide the key issues in the light of that.

5. In order to navigate the judgment a reader may be assisted by the following index (by paragraph number):

The Facts

Pre-2014

6. Mr Magdeev is a Russian and Cypriot citizen. He is a businessman and investor and met Mr Tsvetkov in 2009 through Mr Rinat Khayrov, father of the Mr Tsvetkov's wife Elsina Khayrova ("Ms Khayrova").

7. Mr Tsvetkov for his part is a Russian, Cypriot and British national, primarily residing in London. A friendly relationship developed between Mr Tsvetkov and Mr Magdeev. Mr Tsvetkov ran a "quasi-family office" for Mr Magdeev. They also did some business together in informal partnership. Both were indeed emphatic before me about the relationship of trust which subsisted between them. In Mr Magdeev's words, he trusted Mr Tsvetkov "boundlessly". Mr Tsvetkov agreed that the pair became very close; he said that the relationship was based on mutual trust and that he regarded Mr Magdeev as something akin to an elder brother. It is ironic that this very trust may have had its own part to play in the disagreement – if Mr Magdeev and Mr Tsvetkov had initially trusted each other less, it seems likely that they would have spent more time ensuring that they were clear and unambiguous as to what terms were attached to their financial dealings.

8. Mr Tsvetkov also became close to a family of the name of Graff, the owners of a well-known luxury jewellery business Graff Diamonds Ltd ("Graff"). In December 2011 Francois Graff (the CEO of Graff) agreed that Mr Tsvetkov could purchase jewellery at a fixed discount (50% for jewellery and 37.5% for items containing GIA-certified white diamonds). Mr Magdeev was a client of Mr Tsvetkov in this regard, and so was a friend of his, a Mr Ilya Trombachev. Mr Trombachev indeed became one of the major conduits for the selling of the Graff jewellery.

9. Following this agreement Mr Tsvetkov sold the jewellery so obtained to his clients at a profit. This developed into what was referred to before me as "the Graff Business".

10. In mid-2013 Mr Magdeev became involved as an investor in the Graff Business. On 7 June 2013 Bronzeway Holdings Limited (a company

controlled by Mr Magdeev) and Hegir Capital Management Limited (a company controlled by Mr Tsvetkov) entered into an Investment Agreement No.1/GR2013 under which Bronzeway loaned $2 million to Hegir. This is known as the "Bronzeway/Hegir Agreement". This loan forms no part of the dispute – it was repaid in July 2015.

11. In July 2013 Mr Tsvetkov, using the money loaned by Mr Magdeev, incorporated a company known as EK Diamonds DMCC in the UAE ("Equix Dubai"[1]). The company's name was selected using the initials of Mr Tsvetkov's spouse Ms Khayrova.

2014

12. In 2014 Equix Dubai formally began a business trading in jewellery manufactured by Graff.

13. On 5 March 2014 a Memorandum of Association of Equix Dubai was signed by Mr Oleksandr Dovgan ("Mr Dovgan") as the sole shareholder. Mr Dovgan had met Mr Tsvetkov through a property transaction and had arranged for him to have an employment contract, via Mr Dovgan's company Dovgan Conveyancing Services, enabling him to have a Dubai visa. He took the role of initial shareholder in Equix Dubai at Mr Tsvetkov's request, to facilitate the speedy registration of the company. On 21 May 2014 Mr Dovgan transferred 100% of the shares of Equix Dubai to Ms Khayrova. She thus became the sole shareholder of Equix Dubai. At this time Equix Dubai had no premises.

14. The real story of the case commences in late September/early October 2014, against a background where Mr Tsvetkov was looking to expand the Graff business.

15. On 22 September 2014 Mr Magdeev entered into what claims to be an employment contract (the "RM Employment Agreement"). The status of this agreement is one of the issues between the parties.

16. The evidence was, in broad terms, that at around this time it was agreed that Mr Magdeev would lend Equix Dubai US$10 million for three years, and receive 15% interest on that loan. It was also agreed that the loan would not be structured in quite this way. The reasons why, and the importance of those reasons, are contentious.

17. But as a result, on 9 October 2014 an Investment Agreement was signed ("the October Agreement") between Mr Magdeev, Equix Dubai and Mr Tsvetkov, by which Mr Magdeev agreed to loan US$10 million to Equix Dubai for three years ("the US$10 Million Loan"). That loan

[1] The parties' references to the Equix parties were widely at variance. I have for the purposes of the judgment settled on "Equix Dubai" and "Equix Cyprus" which are the descriptors least prone to confusion.

was guaranteed by Mr Tsvetkov – again in circumstances which give rise to an issue. The purpose of the US$10 Million Loan was to enable Equix Dubai to develop its business of selling diamond jewellery from Graff and other jewellery suppliers.

18. Within the October Agreement, Mr Magdeev is the "Investor"; Equix Dubai is the "Trading Company"; and Mr Tsvetkov is the "Guarantor".

19. The October Agreement recorded this (genuine) objective. It also provided for Equix Dubai to employ Mr Magdeev under an employment contract, so that he could be involved in the achievement of that objective:

> "The Parties have agreed regarding the following goals for the Trading Company (hereinafter referred to as 'Goals'):
>
> Trading Company's turnover increase in its cooperation with Graff;
>
> Trading Company's profit margin increase from its operations with jewelry.
>
> Trading Company's business expansion, including, but not limited to, establishing relations with other suppliers of precious stones and jewelry, as well as the development of the quantity and the quality of the client base …
>
> In order to achieve the Goals the Trading Company undertakes an obligation to sign with the Investor personally an employment agreement (hereinafter an 'Employment Agreement'), and the Investor undertakes an obligation to fully assist within his abilities the Trading Company to reach such Goals".

20. So far as interest was concerned, the October Agreement on its face provided for an interest free loan:

> "Within 3 working days from the date the Present Agreement is signed by all Parties the Investor shall initiate a bank transfer from his personal bank account in the amount of US$10m (the 'Investment') to the following bank account of the Trading Company …
>
> An Investment shall be provided for the period of 3 (Three) calendar years without any interest accumulated and shall be returned to the Investor within 10 (Ten) working days from the moment of the mentioned period expiration. An Investment

> can only be used by the Trading Company for providing Graff the deposit in the amount of the Investment (hereinafter referred to as the 'Deposit')".

21. It was more or less common ground that the RM Employment Agreement was both concluded at the same time as the October Agreement and was intended to be the means by which Equix Dubai would discharge its obligation to pay a return of 15% per annum to Mr Magdeev under the October Agreement. Mr Tsvetkov put it this way: "*In return and to account for interest on the loan, Mr Magdeev would be offered employment with Equix Dubai with a total salary of AED16,425,000 for the three-year period*". In his written evidence Mr Magdeev said: "*The salary under the RM Employment Contract was calculated so as to provide a return of 15% per annum on the USD 10 million loan at an agreed USD/AED rate of 3.65*". (A return of 15% is equivalent to AED 5,475,000 per year, or AED 456,250 per month.)

22. This was reflected in the October Agreement thus:

> "An Employment Agreement shall include the condition according to which the Investor shall be receiving salary from the account of the Trading Company within 3 (Three) years in the total amount of 16,425,000.00 (Sixteen million Four hundred Twenty-Five thousand) AED (hereinafter referred to as the 'Total Amount of the Salary');
>
> In case the Employment Agreement has been terminated by the Trading Company before its expiration the Trading Company undertakes an obligation to repay the Investor immediately the difference between the Total Amount of the Salary and the amount that the Investor has already received by the time of such termination, however the Trading Company reserves an option to cancel at its ultimate discretion the Present Agreement and the Employment Agreement on the 1st of April 2015, in such case the Trading Company shall repay not later that on the 30th of April 2015 an Investment in full as well as the difference between an amount of 2,737,500.00 (Two hundred Thirty Seven thousand Five hundred) AED and the amount of salary actually paid out to the Investor by the 1 April 2015".

23. Pursuant to the terms set out in the RM Employment Agreement:

i) Under Article 1.1 for a period of 3 years, Mr Magdeev was to work for Equix Dubai as "*business development manager*" at Unit No. 30-01-45, Jewellery & Gemplex 3, Plot No: DMCC-PH2-J&GPlexS, Dubai, which was described as Mr Magdeev's "*normal place of work*". This was in fact simply Equix Dubai's registered address and was in practice just a post box.

ii) Under Article 1.3, Mr Magdeev was not, during the period of his employment to work outside the DMCC Free Zone (described as the "Territory") or for another person either in the DMCC Free Zone or otherwise, except with the prior written approval from Equix Dubai.

iii) Under Article 2.1 Mr Magdeev was to receive a basic salary of AED365,000 per month.

iv) Under Article 2.3, Mr Magdeev was entitled to participate in Equix Dubai's private medical insurance scheme.

v) Under Article 3.1 Mr Magdeev's working hours were 8 hours per day, save during the month of Ramadan.

vi) Under Article 3.2, if Mr Magdeev worked overtime (which was not to exceed two hours per day) he became entitled to various additional payments.

vii) Mr Magdeev had holiday and sick leave entitlements as provided for under Articles 3.3 to 3.6.

viii) Mr Magdeev had travel tickets entitlements under Article 6.

ix) Under Article 10.1, the federal law of the UAE governed the Contract, with the Court in Dubai having exclusive jurisdiction to settle any dispute pursuant to Article 10.3.

24. The status of this agreement is not insignificant and is best disposed of here as part of the factual findings. Until trial it was relatively uncontroversial that Mr Magdeev would not in any real sense be an employee. His Reply stated: *"It is admitted and averred that the Purported Employment Contract was a vehicle for paying a return to Mr Magdeev on his investment (and was not, to that extent a genuine employment contract, although Mr Magdeev did refer clients…"*.

25. However it was his evidence at trial that:

> "in part, yes [it was a sham], and in part, no, in the sense that the money was paid, transfers were made, I did make referrals, the company did make money, it continued in existence, it carried on its trading activity. So the really depends on your focus and your perspective…

> It's not 100% what it purports to be, but I had to get some return and I had to make referrals and introductions. So in that sense, this is not exactly what it purports to be."

26. In the end I had no difficulty in concluding that the RM Employment Agreement was not a true employment contract and that Mr Magdeev did not have any real responsibilities or obligations under it. This was, as I have noted almost conceded initially. It was, despite Mr Magdeev's best attempts, the flavour of his evidence overall. Further it was the evidence of Mr Dovgan, who everyone agreed to be a reliable witness and who was not challenged on this.

27. It was a facet of the Investment Agreement, the parties having agreed to split the contractual agreement between two documents, which neither separately nor together painted a true picture of the agreement. The agreement was, at this stage, for a loan at 15%. The documents instead reflected (1) an Investment Agreement containing an agreement for an interest free loan of $10 million and requiring a sham employment agreement as a '*vehicle for paying a return'*; and (2) that sham employment agreement itself.

28. The reason why this structure was chosen appears to have been that it would enable Mr Magdeev or Equix Dubai to use the employment agreement in an application for an employment visa for Mr Magdeev. That visa was of value to Mr Magdeev, as was demonstrated by the fact that when it terminated on the termination of the RM Employment Agreement, Mr Magdeev sought another such visa through a friend of his, Mr Mirgalimov, who arranged an employment contract via a company engaged in some sort of agricultural business.

29. On 16 October 2014, under the October Agreement, Mr Magdeev made a transfer to Equix Dubai in the sum of US$10 million which would be repayable after three years.

30. Thus although the October Agreement stated that the loan would not 'accumulate' any interest, the effect was that the loan would bear interest at a rate of 15% per annum, i.e. US$1,500,000 per year, equivalent to AED 5,475,000 per year at an exchange rate of $1.00: AED 3.65, or AED 16,425,000 over the three-year term of the loan. The interest was agreed on as part of the loan, but (as a result of the way that the parties had chosen to structure this deal) was only payable pursuant to the RM Employment Agreement.

31. Mr Tsvetkov entered into the October Agreement to guarantee the performance of Equix Dubai's obligations to Mr Magdeev, in the following terms:

> "The Guarantor shall be fully liable in the favor of the Investor for the responsibilities of the Trading Company as per the terms and conditions of the present Agreement …".

32. On 9 October 2014 an amendment was made to the Bronzeway/Hegir Agreement so that instead of Hegir being liable to repay Bronzeway the sum of US$2 million, Equix Dubai became liable to repay that amount to Ashaja Investments Ltd ("Ashaja"), a company under control of Mr Magdeev.

33. Another thing which happened around October 2014 is that Equix Dubai reached a separate agreement with a Mr Emil Gaynulin, ("Mr Gaynulin"), a national of (a) Republic of Cyprus; (b) Russian Federation; and (c) Republic of Azerbaijan who Mr Magdeev had introduced to Mr Tsvetkov as an influential entrepreneur. That agreement was in broad terms that he would act as an investor contributing a 3-year interest-free US$ 20,000,000.00 loan, to be repaid from a profit distribution from the sales based on a 50.00% split. In essence he became a shadow 50% partner in the business of Equix Dubai. This was the first of a series of investments which Mr Gaynulin made in the Graff business, and of course was on a rather different basis to the then operative agreement with Mr Magdeev.

34. It was discovered on 1 December 2014 that the version of the RM Employment Agreement that was prepared by Mr Dovgan and provided to Mr Magdeev for signature mistakenly provided for a salary of AED 365,000 per month – a mistake which was not spotted at the time of signature – and therefore it was necessary subsequently to amend the RM Employment Agreement to provide for salary to be paid at the correct rate of AED 456,250 per month. An amendment to increase the salary was duly made.

35. On 16 December 2014 Equix Dubai made a payment of AED 912,500 to Mr Magdeev as the first two months' salary under the RM Employment Agreement.

36. On 17 December 2014 Mr Tsvetkov incorporated a further company, EK Luxury Goods Limited (later known as Equix Group Limited) ("Equix Cyprus") in Cyprus. Shortly after its incorporation, Equix Cyprus entered into a franchise agreement with Graff.

37. It is the day or two days after this that Mr Tsvetkov alleges that he and Mr Magdeev made (or concluded, following earlier discussions in November) an oral agreement ("the First Oral Agreement") at a meeting at the Bulgari Hotel in London. The nature of the agreement is said to be that:

    i) Mr Magdeev would invest US$20 million in Equix Cyprus to allow it to obtain the Cyprus franchise and open the Limassol

boutique, the return on which investment was to be interest at 9% per annum;

ii) Mr Magdeev would waive interest under the US$10 Million Loan to Equix Dubai, would continue to receive payments under the RM Employment Agreement and account for these as repayments of principal. In other words, the payments that Mr Magdeev had received and was due to receive from Equix Dubai under the RM Employment Agreement would thereafter be treated as repayments of the US$10 Million Loan.

iii) In return for this he would get at least 50% of the profits of Equix Cyprus (and 50% of shares in Equix Cyprus).

38. Mr Magdeev denies this agreement was made.

39. On 22 December 2014 Equix Cyprus, Mr Tsvetkov and Mr Magdeev entered into a written Agreement ("the December 2014 Written Agreement"). This stated that Mr Magdeev was to invest US$20 million in Equix Cyprus on the condition that he would become a 50% shareholder and Equix Cyprus would enter into a loan agreement with him.

40. On 23 December 2014 Mr Magdeev transferred the first US$10 million of the contemplated US$20 million to Equix Cyprus under the December 2014 Written Agreement.

2015

41. From 2015 Equix Cyprus operated a Graff diamond boutique at Limassol marina.

42. Over the next few months the following payments were made:

i) On 4 January 2015 Equix Dubai paid AED456,250 to Mr Magdeev as salary.

ii) On 12 January 2015 Equix Dubai paid US$110,000 to Mr Magdeev ("the US$110,000 payment"). There is an issue as to whether this was a repayment of principal under the First Oral Agreement, or of an informal personal loan.

iii) On 2 February 2015 Equix Dubai paid AED456,250 to Mr Magdeev as salary.

iv) On 2 March 2015 Equix Dubai paid AED456,250 to Mr Magdeev as salary.

43. On 4 March 2015 50% of the shares in Equix Cyprus were transferred to Mr Magdeev and his son Mr Ernest Magdeev.

44. On 6 March 2015 Mr Magdeev transferred the second US$10 million to Equix Cyprus under the December 2014 Written Agreement.

45. On 24 March 2015 Equix Dubai and Ashaja entered into a written agreement in relation to the Hegir/Bronzeway repayment of US$2 million. On 30 June 2015 Equix Dubai repaid that US$2 million to Ashaja.

46. Between April and August 2015 Equix Dubai continued to make monthly payments of the amount due monthly in the face of the RM Employment Agreement: payments were made on 2 April 2015, 4 May 2015, 4 June 2015,1 July 2015 and 1 August 2015.

47. August 2015 marks another issue between the parties, and while it is by no means the major issue in the case, it concerns an item which has perhaps become the mental image of the case: "the Pear-Shaped Diamond". It is Mr Tsvetkov's case that he and Mr Magdeev agreed to buy this particularly large (40 carat) and high profile diamond and that the next financial arrangements – in essence a loan of €5 million - were ones put in place (under a different "cover story") for this purpose.

48. Ironically, repayment of this sum is not sought in this action. Mr Magdeev did originally seek this sum, but his claim was struck out by Robin Knowles J on 19 October 2019 because Mr Magdeev's rights under the relevant agreement had been assigned to his son Mr Ernest Magdeev and the arbitration agreement in the assignment covered the dispute. Its only significance in this action now is that Mr Tsvetkov counterclaims for breach of the agreement between them on the basis that by his subsequent conduct Mr Magdeev prevented the sale of the Pear-Shaped Diamond causing him loss which can be set off against any sums owing.

49. The common ground is this:

    i) Mr Magdeev loaned Mr Tsvetkov €5 million and Mr Tsvetkov and his wife then each paid Equix Cyprus €2.5 million on 25 August 2015, while Mr Magdeev and Mr Ernest Magdeev each paid €2.5 million to Equix on the same day.

    ii) Those funds (or US$10 million of those funds) were used to purchase the Pear-Shaped Diamond from Graff for an amount of US$13.2 million.

50. What is in issue is whether Mr Magdeev knew of the purpose for which the loan and cash injection was made. He says not; it is his case that he knew nothing of the diamond until 2016 and that the cash injection was to enable participation in further preference shares in the business.

51. What appears on the documents is as follows. On 17 August 2015, Mr Tsvetkov and Mr Ernest Magdeev met Mrs Areti Charidemou of Areti Charidemou & Associates LLC ("AC&A") to discuss the issuance of €10 million of new preference shares by Equix Cyprus. The proposal was that Mr Magdeev and Ernest Magdeev would subscribe for €5 million of these preference shares, whilst Mr Tsvetkov and his wife Ms Khayrova would subscribe for the other € 5 million.

52. On 18 August 2015, Socrates Ellinas of AC&A sent an email to Mr Tsvetkov and Mr Ernest Magdeev confirming this proposal (*"Issuance of 10,000,000 Preference A Shares … 25% Elsina / 25 % Dmitry / 25 % E.M. / 25% R.M"*). That was confirmed by Mr Tsvetkov on 20 August 2015.

53. On 21 August 2015, Mr Magdeev and Mr Tsvetkov entered into a written agreement ("the August Agreement"). That says:

> "WHEREAS:
>
> [1] Both, the Lender and the Borrower are the beneficiary owners of EK Luxury Goods Limited - a limited liability company registered under the Laws of the Republic of Cyprus;
>
> [2] The Lender has agreed to provide the Borrower with the necessary funding in order for the Borrower and/or his family members to participate in the subscription for new shares in the EK Luxury Goods Limited".

54. On 25 August Mr Anastasiou the CEO of Equix Cyprus and/or its director emailed Graff that funds had been transmitted. Subsequent to this there was more correspondence in the autumn relating to the issuance of shares, and a spreadsheet provided by Mr Anastasiou recorded the payments as for the subscription of shares.

55. On 16 November 2015 a Deed of Assignment between Mr Magdeev ("as assignor"), Mr Ernest Magdeev ("as assignee") and Mr Tsvetkov ("as debtor") assigning Mr Magdeev's rights against Mr Tsvetkov under the Second Agreement to Mr Ernest Magdeev was entered into.

56. In September, October, November and December there were further payments of the amount supposedly due under the RM Employment Agreement from Equix Dubai.

57. On 15 October 2015 a further employment contract was apparently signed. That is the "EM Employment Agreement" between Equix Dubai and Mr Ernest Magdeev. This contract was on the same form as the RM Employment Agreement and provided for a salary of AED 182,500 per month. It appears likely that this agreement was in fact concluded and signed in December 2015.

58. What did occur in October 2015 were two payments totalling about US$3.5 million. On 17 October 2015 a Mr Mayorov paid $1,499,982.00 to Equix Dubai and on 20 October 2015 he paid a further $1,499,982.00 to Equix Dubai. The payment narrative for these payments refers to two items of jewellery, and those items were apparently invoiced to a Mr Ivanov. However, it is common ground that the payments were not in fact payments for this jewellery. The parties however disagree as to what the payments actually were. Mr Tsvetkov says that they were payments for jewellery, albeit not the items referred to. Mr Magdeev says that it was a repayment of a cash loan made to Mr Mayorov ("the Mayorov loan") – and that this same money resurfaces later in the narrative.

59. On 1 November 2015 Mr Mayorov ("Transferor") and Mr Magdeev ("Transferee") entered into a Right Cession Agreement which on its face transferred claims in respect of these payments to Mr Magdeev. Although initially part of Mr Magdeev's pleaded case, no reliance was ultimately placed by either side on this document as it was consistent with neither party's case. It appears simply to illustrate the difficulties of the documentary chain in this case.

60. On 1 December 2015 there appears to be a Services Agreement between Equix Dubai and Ashaja for payment of US$3.5 million to Ashaja. Again, however, it is common ground that this agreement was not entered into until around the end of February 2016.

61. There is then an issue about whether there was an agreement in early December 2015 ("the Second Oral Agreement"). Mr Tsvetkov alleges that, on 7-8 December 2015, it was agreed orally:

    i) Mr Magdeev and Mr Gaynulin would invest additional monies, in Mr Magdeev's case US$20 million, for the purpose of opening a Vienna franchise;

    ii) The shares in Equix Cyprus were to be split between Mr Magdeev, Mr Gaynulin and Mr Tsvetkov in the proportion 40:40:20;

    iii) The unrepaid portion remaining of the $10 million invested under the October Agreement would be repaid by Equix Dubai to Mr Magdeev and reinvested by him in Equix Cyprus (the parties knowing that Equix Dubai would shortly be able to pay about $3.5 million but not more);

    iv) Payments made and to be made to Mr Magdeev under or in respect of the RM Employment Agreement would, as previously agreed, constitute capital repayments of the US$10 Million Loan. At that time, it was envisaged that the payments would be made pursuant to the RM and EM Employment Agreements,

and the US$5 million to be paid by Equix Dubai to Mr Magdeev (which was then to be reinvested in Equix Cyprus).

62. There is then a cluster of activity in the middle of December 2015. It appears to be at about this time that the EM Employment Agreement was entered into, because on 15 December 2015 Equix Dubai made payment of AED228,125 to Mr Ernest Magdeev as salary.

63. There was then on 21 December 2015 an Investment Agreement between Equix Cyprus, Equix Dubai and Mr Ernest Magdeev ("the EM Investment Agreement") for an investment by Mr Ernest Magdeev of US$5 million in preference shares issued by Equix Cyprus. Following this on 22 December 2015 Mr Ernest Magdeev paid US$5 million to Equix Cyprus. On 25 December 2015 Equix Dubai made another payment of AED228,125 to Mr Ernest Magdeev as salary. There is an issue as to whether this represents a payment by Mr Ernest Magdeev as a subscription for preference shares, and repayment of part of the US$ 10 Million Loan by way of his "salary" (Mr Tsvetkov's case) or a loan, analogous to that made by his father in October 2014, and with the salary representing interest on that loan (Mr Magdeev's case).

64. Also in this period, there was on 17 December 2015 a payment by Equix Dubai of US$3.5 million to Ashaja. This payment ("the US$3.5 million payment") is also contentious. Mr Magdeev says it is the repayment of the Mayorov Loan. Mr Tsvetkov contends that this was a payment of part of the principal of the US$10 Million Loan, made for the purpose of reinvestment into Equix Cyprus as part of the December 2015 Agreement.

2016

65. On 4 January 2016 Equix Dubai passed a board resolution regarding a US$1.2 million bonus for Mr Magdeev. That was paid on 12 January 2016 with the payment narrative "Employee Bonus". This payment ("the US$1.2 million payment") is said by Mr Magdeev to be a genuine bonus, and by Mr Tsvetkov to be another part payment of principal under the US$10 Million Loan.

66. In early February 2016 Mr Magdeev and Mr Tsvetkov met with Mr Gaynulin. This appears to have taken place against a background of discussions as to the parties' rights *inter se* and going forward. At about this time Mr Tsvetkov offered to purchase the peripheral parts of the Graff Business – a shop, a carpet business and a cigar lounge.

67. On 12 February 2016 Mr Gaynulin was provided by Mr Tsvetkov with a summary document running to six pages of text, setting out a history of the business (the "Note for Emil"). It does not deal with repayment of principal of the US$10 Million Loan.

68. A further document "Proposal Concerning Form and Structure of Cooperation within Existing Business" ("the February 2016 Proposal")

was prepared for a meeting on 17 February 2016 and was relied on to an extent by both parties as evidence supporting their case. It sets out in stages a "Historical Structure of Agreements". This referred at Stage 3 to Mr Magdeev becoming a 50:50 partner in late 2014 – "*whereupon all the interests within the framework of the agreements made at Stages 1 and 3 should be deemed as a profit gained by RM from Graff*". Further (in relation to later developments) Mr Tsvetkov placed emphasis on the fact that at Stage 8 of this document it referred to a 40:40:20 split. Mr Magdeev for his part referred to a reference to interest being payable.

69. By about this point, the relationship between Mr Magdeev and Mr Tsvetkov had deteriorated. A review of the business of Equix Cyprus was carried out by Mr Magdeev's advisor and "right hand man" Vladislav Slizikov ("Mr Slizikov") during the first half of 2016. He concluded that there had been discrepancies and mismanagement. He raised concerns about Mr Tsvetkov's chartering of private jets at Equix Cyprus' expense, when the use was not often apparently for the business, and his paying for personal security from the same source. There were also concerns about amounts being paid to Mr Tsvetkov's relative Mr Ramil Gubaydulin and his personal accountant Mr Maxim Skachko ("Mr Skachko").

70. During Mr Slizikov's review of Equix Cyprus Mr Magdeev and Mr Gaynulin instructed Mr Tsvetkov to transfer all of the remaining shares held by both Mr Tsvetkov and Ms Khayrova in Equix Cyprus to them. He did so, transferring the remaining 50% shares in Equix Cyprus held by Ms Khayrova to them on 12 February 2016.

71. In March 2016 there was a meeting in Cyprus between Mr Magdeev and Mr Tsvetkov at which some of the issues from the review were discussed. At the end of March Mr Slizikov and Mr Tsvetkov had exchanges in which they swapped spreadsheets relating to items which Mr Slizikov suggested were Mr Tsvetkov's expenses. One of these suggested that some US$1.9 million of payments were for Mr Tsvetkov's own expenses.

72. In April 2016 Mr Slizikov turned his attention to Equix Dubai. He again raised causes for concern – Mr Dovgan could not account for stock and sales, that there was an appearance that some of Mr Gaynulin's investment may have been used by Mr Tsvetkov personally and that some Van Cleef watches which should have been in stock were not locatable.

73. While this review was ongoing Mr Tsvetkov was keen to reach an agreement with Mr Magdeev and Mr Gaynulin. In early April 2016 various versions of a document called "the April 2016 Memorandum" were circulating between the three men. Again, the parties both placed weight on this document. Again, Mr Magdeev pointed to the absence of a clear statement that interest was not payable. Mr

Tsvetkov noted that it provided at Stage 3 *"all the interest under the agreements made at Stages 1 and 3 being deemed as a profit gained by RM from Graff"* and that "Stage 8" of that document referred, in so far as relevant, to an agreement in Moscow in December 2015 that:

i) Mr Gaynulin and Mr Magdeev would invest US$11.9 million and US$20 million respectively for the purpose of opening the Graff boutique in Vienna;

ii) Mr Gaynulin, Mr Magdeev and Mr Tsvetkov would renegotiate the profit distribution and participation in the share capital of Equix Cyprus and Dubai in the ratio 40:40:20; and

iii) All investments contributed by them would be deemed net equity of Equix Cyprus and Dubai.

74. This document and the review were discussed at a meeting on 12 April 2016. Mr Magdeev and Mr Gaynulin instructed Mr Tsvetkov to transfer all of the remaining shares in Equix Dubai to Mr Gaynulin which was done that same day. On 26 May 2016 100% of the shares in Equix Dubai were transferred from Ms Khayrova to Mr Gaynulin.

75. Meanwhile there was a series of further payments under the RM and EM Employment Agreements:

i) On 1 February 2016 AED456,250 to Mr Magdeev and AED228,125 to Mr Ernest Magdeev.

ii) On 24 March 2016 AED456,250 to Mr Magdeev and AED228,125 to Mr Ernest Magdeev.

iii) On 1 April 2016 AED228,125 to Mr Ernest Magdeev.

iv) On 2 April 2016 AED456,250 to Mr Magdeev.

v) On 1 May 2016 AED456,250 to Mr Magdeev and AED228,125 to Mr Ernest Magdeev.

76. On 1 May 2016 there was a cash payment of US$1,014,885 to Mr Magdeev by Ilya Trombachev ("Trombachev Payment 1"). Again, there is an issue as to whether this is a repayment of principal under the US$ 10 Million Loan.

77. On 24 May 2016 came a document upon which Mr Tsvetkov placed particular reliance – an email from him to Francois Graff. It was not copied to his business partners. It appears to be a plea for support. Mr Tsvetkov places stress on the fact that this email says that:

i) In December 2014 (it was submitted that this was a mistake and it should be 2015), Mr Gaynulin, Mr Magdeev and Mr Tsvetkov agreed that:

a) Mr Gaynulin would invest US$30 million and Mr Magdeev $20 million for the opening of the Graff boutique in Vienna; and

b) They would split the profit 40:40:20.

ii) In December 2015, Mr Gaynulin provided US$11.9 million and was expecting Mr Magdeev to perform his obligations by paying the US$20 million by the end of 2015, at which point Mr Gaynulin would pay the remainder, but Mr Magdeev never performed and "*as we found later he was stuck with some of his investments in his Russian ventures.*"

iii) When Mr Magdeev insisted on becoming a 50% partner in the Graff Business, Mr Tsvetkov only agreed that on condition that Mr Magdeev's debt be converted to being interest free; Mr Magdeev would still be repaid his capital at 15% and 9%, but the payments would go from his capital i.e. the principal amount of the loan. While it was put to him in cross-examination that this was not true and he was making it up, which Mr Tsvetkov denied, there was simply no reason for Mr Tsvetkov to have made that up at that time when communicating with Mr Graff.

78. Through summer of 2016 regular payments continued to be made to Mr Magdeev and Mr Ernest Magdeev:

i) On 5 June 2016 AED456,250 to Mr Magdeev and AED228,125 to Mr Ernest Magdeev.

ii) On 5 July 2016 AED456,250 to Mr Magdeev and AED228,125 to Mr Ernest Magdeev.

iii) On 15 August 2016 AED228,125 to Mr Ernest Magdeev.

iv) On 17 August 2016 AED456,250 to Mr Magdeev.

79. During this period lies the issue of the Buyout Proposal, and Mr Tsvetkov's controversial London visit. Because the weight to be given to some of the documentary evidence relevant to other issues – in particular internal spreadsheets – is partially dependent on this, my conclusions on this issue are best made and set out here.

80. The proposal alleged was explained by Mr Magdeev in his statement. He said that at a meeting in London on 17 August 2016, in the presence of Mr Slizikov and Mr Ernest Magdeev, but over the phone to Mr Magdeev who was not present, Mr Tsvetkov stated that he would '*buy out my and Ernest's investments in the Graff Business on*

the basis that we would be repaid all of the capital amounts that we had invested to date but with no interest'. His evidence was that he agreed to this proposal so long as he was paid within six months.

81. Mr Tsvetkov disputed that there was any such firm proposal – and indeed until part way through the hearing he disputed that he attended any such meeting. His case was that from earlier in the year he started to have discussions with Mr Gaynulin, a Mr Lantsov and others about them buying Mr Magdeev out.

82. A good deal of evidence was directed to this period of time. At the end of the day I was not persuaded that the proposal alleged occurred. My impression was that the case as to the Buyout Proposal was a product of clouded recollections on the part of Mr Magdeev and Mr Slizikov, aided by a desire to recall something which would explain the spreadsheets, which otherwise were not helpful to Mr Magdeev's case.

83. I do not conclude that Mr Magdeev and Mr Slizikov were lying on this point; as will be apparent to any reader of this judgment the events of this relationship (very much simplified above) are by no means straightforward or easy to keep straight in one's head, and it is apparent that there were many discussions, and that many discussions shifted ground over time. There was much conversation. Some sense of this can be gained from the evidence. Mr Magdeev demonstrated considerable fluency while giving his evidence. Mr Tsvetkov was also fluent and explained that the first version of his witness statement ran to two thousand pages. Such continuing, fluent discussions offer ample material for recollections to become confused or clouded.

84. What the record discloses is that by early in 2016 the relationship was unhappy, and Mr Tsvetkov was looking for ways to move matters forward more smoothly. He had tried to buy out the peripheral business in February. The Graff Letter in May 2016 stated: "*I have recently offered Rustem either to stay as 'silent partner' as he was and to take his capital back as it was contractually agreed, or to buy him out within 3 months at or no interest rate for 40.0m USD at my own cost, considering around 8.0m USD which he took out already. Rustem has turned my offer down, saying that he either wants all the money out at 15%...for the whole contractual period, or that he will take over the control in the company*".

85. As for how such a proposal would have been funded, there was no evidence. But there is evidence that Mr Tsvetkov was exploring the possibilities of Mr Lantsov buying out some or all of Mr Magdeev's interest in the business.

86. The main reason why this episode is in focus is the existence of spreadsheets dating to around this time. In mid-July 2016 Mr Slizikov

was working on spreadsheets, although the versions then worked on were not available. It seems likely, given what a later iteration of the document looks like, that the then current version showed what money the Magdeevs had contributed to the Graff Business. Mr Slizikov said this was to calculate the buy-out price on a no-interest basis, and that such items as the salary payments were included as capital on this hypothetical basis only.

87. There is evidence that on 9 August 2016 Mr Slizikov emailed a spreadsheet to Mr Tsvetkov's accountant Mr Skachko.

88. The later version of this spreadsheet, sent to Mr Tsvetkov in January 2017 and which Mr Magdeev appeared to agree he authorised (within the limits of his very limited interest in spreadsheets):

    i) Says: "*Please find below info regarding RM Balance. Actual capital balance is* ***$40 655 796,95***". Stress was placed by Mr Tsvetkov on the words "Actual Capital Balance".

    ii) Includes two "Ilya Sales" payments (Trombachev Payments 1 and 2) of US$1,014,885 and US$760,000 made on 1 May 2016 and 6 October 2016, the US$1.2 million, salary of US$2,750,000 paid to Mr Magdeev and salary of US$562,000 paid to Mr Ernest Magdeev. The total of these amounts was US$6,837,385.

    iii) It referred to Mr Magdeev's "capital contriburion" (an obvious mistyping of "capital contribution" which however helped to trace which later documents derived from this specific spreadsheet). The issue between the parties was whether this meant "capital repayment" or "capital contribution in relation to a buy-out proposal".

89. There was another spreadsheet called "Dmitry's interest" which shows how much interest would be payable at the contractual rates on declining balances in a repayment schedule, and how much interest would be payable at 5% per annum on declining balances in a repayment schedule. There was, on the other hand, a notable lack of the kind of more narrative documentation (or even emails) which would be expected to be generated both before and after this meeting if there had been a formal Buyout Proposal being discussed.

90. There was then the issue of Mr Tsvetkov's reluctance to accept that he had been in London at the time of this meeting. After a flat denial he said in a late statement that he had planned to go, but had cancelled his flight (supported by e-tickets) and cancelled meetings (again supported by email). He said that over the period of 13-19 August he had been in Cyprus (supported by a lively party photo and a receipt for a manicure).

91. Against this was ranged:

i) Mr Ernest Magdeev's WhatsApp messages, which on their face plainly suggested exchanges with Mr Tsvetkov on 17 August in London. A forensic review of these messages revealed nothing untoward;

ii) An email exchange referring to Mr Tsvetkov visiting the Graff store in London on 16 August and collecting items by hand;

iii) Further flight information including tickets for a flight from Moscow to London on 15 August and from London to Larnaca and Athens on 18 August.

92. Mr Tsvetkov ultimately, in the face of this material, said that he remained agnostic about his presence in London. His evidence was that his memory on this was a *tabula rasa*.

93. It seems tolerably plain that Mr Tsvetkov did visit London at the time in question. Despite the valiant attempts of his counsel to suggest there was nothing untoward about the development, the history of this point certainly presents a most unfortunate appearance, and it is hard to avoid the conclusion that Mr Tsvetkov was less than candid in his written evidence and in his instructions to his legal team about his recollections. It was particularly strange that this was the only area of his evidence about which Mr Tsvetkov not only failed to have a clear recollection, but where he had absolutely no recollection whatsoever. These facts push the observer to infer that there was some reason why Mr Tsvetkov did not wish to be found to have been in London.

94. I conclude from this that Mr Tsvetkov was in London, that he was prepared to lie to the Court if he considered it in his interests to do so, and that he did lie, both in his partial evidence in his late statement and in his disclaiming of any recollection of his visit in his oral evidence.

95. But regardless of that conclusion, which naturally induces a very critical review of Mr Tsvetkov's case on this point, I do not find the evidence of a Buyout Proposal persuasive. The evidence certainly supports discussions about the business. It seems likely that in a climate of unhappiness Mr Magdeev may well have suggested that Mr Tsvetkov buy him out. The evidence supports discussions about buying out ancillary parts of the business (such as the Cigar Lounge) and that there was exploration of the possibility of others, such as Mr Lantsov, buying out Mr Magdeev. But the evidence offered by Mr Magdeev of the supposed Buyout Proposal was not clear and consistent - for example as to timing, or content or price - and as I have noted, lacked any of the support one would expect to see in the documentary record, had such a significant event occurred. The evidence offered by Mr Slizikov and Mr Ernest Magdeev also lacked consistency and credibility. It follows that this supposed episode can

offer no robust explanation for the details in the spreadsheets. Further those spreadsheets are themselves consistent in approach with the later spreadsheet exchanged between Mr Slizikov and Mr Denis Sagura, ("Mr Sagura"), the representative of Mr Gaynulin, in June 2017, which documents could obviously have no possible reference to this supposed buyout.

96. Returning to the narrative, from 1 September 2016 Mr Tsvetkov was employed as the Business Development Director of Equix Cyprus with a monthly salary of €20,000.

97. On 6 October 2016 there was a cash payment of US$760,000 to Mr Magdeev via Mr Trombachev ("Trombachev Payment 2").

98. On 1 November 2016 Mr Magdeev agreed to resign as an employee of Equix Dubai. The "First RM Resignation letter" was drafted by Mr Dovgan – the sole director of Equix Dubai and emailed to Mr Magdeev in order to sign and return to him:

> "I, Rustem Magdeev, holder of Cyprus passport No K00188823 issued on 07.08.2014, hereby confirm my resignation from Equix Dubai DMCC (former Equix Dubai DMCC) on 31st July 2016 as its mutually agreed.
>
> I herewith confirm that I have been paid in full and that I do not have, and I hereby forever waive, release and discharge, any financial, non-financial or other claims whatsoever against Equix Dubai DMCC and/or the Company's management" (emphasis added).

It is Mr Magdeev's case that his signing of the Resignation Letter was a mistake and that he had not intended to waive claims against Equix Dubai.

99. On 2 November 2016 Mr Slizikov returned to the office of Mr Magdeev and reviewed the First Resignation Letter. A cancellation email (the "correction email") was then drafted by Mr Slizikov and sent to Mr Magdeev, who arranged for it to be sent to Mr Dovgan in the following terms:

> "Please find confirmation that document sent to your email on 02/10/2016 12:13 is invalid, legal version would be re-presented the soonest".

Mr Dovgan received a further phone call from Mr Magdeev who asked him not to upload the First RM Resignation Letter to the DMCC portal and informed him that Mr Slizikov would provide additional wording later that day. Mr Dovgan recalls that Mr Magdeev said the wording

of the First RM Resignation Letter was "too general" and that he "*wanted the letter specifically to mention his employment contract*".

100. Mr Dovgan says that on 2 November 2016 he spoke by telephone to Mr Slizikov, who said that the letter should contain the additional words "*in respect to my Employment Contract dd October 01, 2014 during the period from 1st of October 2014 till 21st of July 2016*" in the second paragraph.

101. Mr Dovgan emailed an amended version of the letter to Mr Slizikov on 3 November 2016. Mr Dovgan's email to Mr Slizikov had the subject heading "updated letter" and attached a revised version of the letter with a new second paragraph in the following terms:

> "I herewith confirm that I have been paid in full and that 1 do not have, and 1 hereby forever waive, release and discharge, any financial, non-financial or other claims whatsoever against Equix Dubai DMCC and/or the Company's management in respect to my Employment Contract dd October 01, 2014".

102. Mr Slizikov prepared two further versions of the letter, a short form version (file name "simple") and a long form version (file name "Dovgan"), both of which he sent to Mr Magdeev. Subsequently he sent a revised version of the "Dovgan" version to Mr Magdeev. The second paragraph of that iteration of the draft letter provided:

> "I herewith confirm that 1 have been paid in full and that 1 do not have, and I hereby forever waive, release and discharge, any financial, nonfinancial or other claims whatsoever against Equix Dubai DMCC and/or the Company's management in respect to my Employment Contract dd October 01, 2014 during the period from 1st of October 2014 till 31st of July 2016" (emphasis added).

103. On 7 November 2016 Mr Magdeev signed the Second RM Resignation Letter in the presence of Mr Dovgan, who took it from him.

> "I, Rustem Magdeev, holder of Cyprus passport No K00188823 issued on 07.08.2014, hereby confirm my resignation from Equix Dubai DMCC (former Equix Dubai DMCC) on 31st July 2016 as its mutually agreed.
>
> I herewith confirm that I have been paid in full and that I do not have, and I hereby forever waive, release and discharge, any financial, nonfinancial or other claims whatsoever against Equix Dubai DMCC and/or the Company's management in

> respect to my Employment Contract dd October 01, 2014 for the period October 01, 2014 to July 31,2016".

2017

104. The early part of 2017 was marked by exchanges of spreadsheets. In particular:

    i) A spreadsheet was prepared by Mr Slizikov, Mr Magdeev's agent or representative, and provided to Mr Tsvetkov on 11 January 2017. This document (referred to at [88] above) derives from the document created in July 2016, though what that document said is unknown. It treats the "salary" payments received by Mr Magdeev as capital repayments (wrongly described as "contriburion") to Mr Magdeev ("the Slizikov January Spreadsheet").

    ii) On 19 January 2017 a spreadsheet similar to the Slizikov January Spreadsheet was provided by Mr Slizikov to Mr Tsvetkov under cover of an email which stated: "*sending the table with the information on the interest*".

    iii) On 13 February 2017, a spreadsheet similar to the Slizikov January Spreadsheet was provided by Mr Slizikov to Mr Skachko (Mr Tsvetkov's assistant) ("the Slizikov/Skachko Spreadsheet"). This was accompanied by a stocklist, also known as "the Magic Table" later exchanged between Mr Tsvetkov and Mr Slizikov.

105. Matters deteriorated further during the first half of 2017 with Mr Tsvetkov resigning in April 2017, around the time that Equix Cyprus's boutique in Limassol closed. Mr Slizikov informed Mr Tsvetkov that Mr Magdeev planned to commence legal proceedings against him unless Mr Tsvetkov bought him out. This was apparently confirmed in a telephone call.

106. Mr Michael Kyriakides ("Mr Kyriakides"), a partner at the law firm Harris Kyriakides LLC who were representing Equix Cyprus from about this time, and were performing a stocktake, demanded access to Mr Tsvetkov's email address. Access was not given and there is a dispute as to whether Mr Kyriakides reiterated Mr Magdeev's intent to sue Mr Tsvetkov. However, Mr Kyriakides confirmed that Mr Magdeev was certainly considering the possibility of taking legal action. On 20 April 2017 Mr Anastasiou (the CEO of Equix Cyprus) informed Mr Magdeev and Mr Gaynulin of Mr Tsvetkov's resignation from Equix Cyprus.

107. A letter written by Mr Anastasiou was then sent to Mr Tsvetkov demanding the return of two items found to be missing during the stock take at Equix Cyprus's boutique in Limassol, as well as asking for confirmation of his resignation. Mr Tsvetkov replied on 2 May 2017 stating that Mr Anastasiou had asked him to transport one item to

Graff for repair and that the other was not part of Equix Cyprus's stock. Litigation continues regarding the ownership of these items.

108. An action plan of 10 May 2017 officially appointed Harris Kyriakides and noted that all staff were to be informed that Mr Tsvetkov had been excluded from the premises.

109. At about the same time there was a suggestion of transferring the business of Equix Cyprus to another company - a course of action which Mr Kyriakides accepted was designed to stop future profits being lost to past claims.

110. On 17 May 2017 there was a meeting between Mr Magdeev, Mr Tsvetkov and a Mr Iusupov. Mr Iusupov was apparently a business associate of Mr Magdeev who acted as a mediator, saying that he was there to settle the conflict between Mr Magdeev and Mr Tsvetkov. At the meeting it was discussed that Mr Magdeev was to leave the Graff Business and Mr Tsvetkov to return to it.

111. At this point Mr Magdeev and Mr Gaynulin corresponded regarding drafts of a Novation Agreement and Master Loan Agreement. Also circulated were what appear to have been:

    i) A backdated loan agreement pursuant to which Mr Ernest Magdeev purported to loan US$5 million to Equix Cyprus; and

    ii) A backdated loan agreement pursuant to which Mr Ernest Magdeev purported to loan €2.5 million to Equix Cyprus.

112. On 13 June 2017 Mr Magdeev's solicitors, CMS, wrote to Mr Tsvetkov demanding payment under the August 2015 Agreement, enclosing a copy of the agreement, and also seeking interest at the rate applicable to judgment debts (i.e. 8%). The letter indicated that in the absence of payment within 14 days Mr Magdeev might seek to petition for Mr Tsvetkov's bankruptcy. This marked the start of pre-action correspondence in this jurisdiction.

113. About this time Mr Slizikov provided a further spreadsheet, apparently based on the Slizikov January spreadsheet, to Mr Sagura ("the Slizikov/Sagura Spreadsheet"). This showed a repayment figure of US$8,091,585.

114. On 22 June 2017 came a somewhat bizarre incident. On that day Mr Gaynulin removed stock with a value of approximately US$60 million from Equix Cyprus's boutique. Mr Tsvetkov's evidence is that he met with Mr Gaynulin and Mr Gaynulin's representative Mr Sagura at Limassol Marina for coffee and saw Mr Sagura leaving the Graff business with a large suitcase accompanied by Mr Gaynulin's bodyguard and Mr Shamil Ediev (another associate of Mr Gaynulin). However, he played no part in the removal of the stock.

115. Equix Cyprus's director Mr Anastasiou instructed Harris Kyriakides to recover the stock from Mr Gaynulin, and Harris Kyriakides reported Mr Gaynulin's actions to the Cypriot police.

116. Mr Gaynulin was persuaded to return the stock to the boutique on 26 June 2017 under police escort.

117. A meeting at the offices of Equix Cyprus's lawyers was convened at which a shareholders' resolution was agreed in the following terms:

> "Having regard to the removal of the stock last week … it was unanimously decided as follows:
>
> [1] THAT urgent actions shall be taken by the Company for the immediate and secure return of the stock to the shop of the Company in Limassol Marina, under the co-ordination of Harris Kyriakides LLC, the law firm representing the Company (the 'Firm').
>
> [2] THAT provided that Mr Emil Gaynulin ensures that the stock is returned intact and without any item missing, none of the shareholders or the director of the Company shall have any complaint against any other shareholder or their representatives named in clause 5 below regarding the removal of the stock.
>
> [3] THAT the Firm, acting pursuant to its engagement letter, shall prepare and circulate to the shareholders for approval:
>
> [3.1] a draft shareholders agreement which shall regulate the rights and obligations of the shareholders;
>
> [3.2] ancillary agreements, under which each shareholder shall enjoy security (charge) rights on the stock by reference to the loan agreements between the Company and each of the shareholders and shall, amongst others:
>
> [3.2.1] with regards to stock security rights, adopt an analogy of 65% for Mr Gaynulin and 35% jointly for Ernest Magdeev and Rustem Magdeev; and
>
> [3.2.2] providing that the one single most expensive item (Ref. No. GP 14923) shall fall within the security rights of Ernest Magdeev and Rustem Magdeev;

> [4] THAT the Firm shall set out proper procedures and protocols, which shall be notified to and approved by the Shareholders, so that the Company's shop operates smoothly and opens the soonest possible and the Director of the Company shall follow these procedures and policies and any other procedures and policies communicated to him by the Firm and ensure that all the personnel of the Company follows these procedures and policies.
>
> [5] THAT in relation to the above matters, the Firm shall act in accordance with joint written instructions of the shareholders, which shall be received in writing (including by email) from the shareholders, either personally or through their authorised representatives, namely Mr Denis Sagura (on behalf of Mr Gaynulin) and Mr Vladislav Slizikov (on behalf of Ernest Magdeev and Rustem Magdeev)".

118. However despite this apparent agreement, a degree of disharmony remained between Mr Magdeev and Mr Gaynulin. Mr Gaynulin seems to have signed the agreement to avoid any criminal proceedings being taken against him and to have been not entirely happy about that situation. Mr Gaynulin tried to terminate the retainer of Harris Kyriakides, who he considered were not acting impartially. Then Mr Magdeev, through Mr Kyriakides, threatened Mr Gaynulin with Equix Cyprus pursuing Equix Dubai, and Mr Gaynulin personally, as well as involving the UAE authorities.

119. On 7 July 2017, Mr Potamitis of BDO Limited circulated the first drafts of the security agreements contemplated by Clause 3.2 of the Shareholders' Resolution, namely a fixed charge agreement in favour of Mr Gaynulin and a fixed charge agreement in favour of Mr Magdeev. These charges were then executed before being lodged with the Cypriot Companies Registry on 12 July 2017. The charge in favour of Mr Magdeev covered particular items of jewellery with a total purchase price of US$21,421,990.00 (the "RM Charged Stock").

120. The effect of these documents, if executed, was that:

    i) As Mr Magdeev knew, Equix Cyprus would be left with little or no stock – and certainly stock worth less than US$30 million, which would put it in breach of the franchise agreement with Graff;

    ii) Equix Cyprus would have been left with stock and monetary assets worth only US$16.7 million, some 20% of what it owned originally.

It seems to have been contemplated that the security might well be executed; certainly it was Mr Kyriakides' impression that Mr Magdeev was keen to get his money out as soon as possible.

121. The consolidated loan agreements and fixed charges were signed by Mr Anastasiou on 8 July 2017.

122. On 10 July 2017 there was a meeting in Moscow between Mr Magdeev, Mr Gaynulin, Mr Iusupov, Mr Turetskiy and Mr Ediev, at which both Mr Magdeev and Mr Gaynulin signed the consolidated loan agreements and fixed charges. Mr Magdeev testified that he came under "immense pressure" from Mr Gaynulin, Mr Turetskiy and Mr Iusupov to dismiss Mr Kyriakides in retaliation for the latter's role in recovering Equix Cyprus' stock; Mr Magdeev refused.

123. Mr Tsvetkov says that Mr Gaynulin told him that he was reluctant to sign. It was at this time – on 10 July 2017 - that Mr Tsvetkov says that the conspiracy to injure him took place.

124. On 19 July 2017, Mr Magdeev made a demand for the repayment of the sums due and owing to him by Equix Cyprus.

125. On 27 July 2017, Mr Magdeev and Equix Cyprus entered into a settlement agreement pursuant to which Equix Cyprus allowed Mr Magdeev to take possession and ownership of the RM Charged Stock in exchange for a reduction of US$21,421,990.00 in Equix Cyprus's indebtedness to Mr Magdeev. At the same time Mr Magdeev and Mr Gaynulin produced a draft Memorandum of Understanding agreeing to divide any recoveries from Mr Tsvetkov, with Mr Magdeev getting a 35% share.

126. Over August there is evidence of Mr Magdeev trying to seek funding for Equix Cyprus, with a business plan and presentation being put together. He also attempted to get the shop re-opened – attempts which seem to have been initially frustrated by Mr Gaynulin issuing contradictory instructions to Mr Anastasiou on the ground.

127. On 11 September 2017 Mr Sagura was appointed as director of Equix Dubai and Mr Dovgan was discharged as director. The shop re-opened shortly thereafter.

128. On 9 October 2017 Mr Magdeev sent a demand letter to Equix Dubai seeking repayment of the US$10 Million Loan.

129. On 31 October 2017 Equix Dubai sent a letter to Mr Magdeev in response to his demands for repayment. In the letter Equix Dubai explained that its current management was investigating the affairs of the company and that it had made enquiries of Graff. It also explained that Equix Dubai was not in a financial position to satisfy the alleged claim by Mr Magdeev by 1 November 2017 or any time thereafter in the reasonably foreseeable future.

130. On 14 November 2017, CMS sent a letter to Mr Tsvetkov demanding payment from him in his capacity as a guarantor under the First Agreement. He did not pay.

131. On 2 November 2017 Mr Anastasiou ceased to be a director of Equix Cyprus.

132. On a further spreadsheet entitled "BalanceRusteem.xlsx" sent by Mr Slizikov to Mr Tsvetkov on 11 November 2017 all of the salary payments, bonus payments and Tormbachev payments are shown as capital repayments.

133. On 4 December 2017 Mr Magdeev issued these proceedings.

2018: The Dubai and English Proceedings

134. In February 2018 Mr Tsvetkov filed his Defence to these proceedings, and joined Mr Gaynulin, Equix Dubai and Equix Group Limited as Part 20 Defendants. Further pleadings followed throughout the year.

135. On 5 August 2018 Mr Magdeev commenced "the First Dubai Proceedings" by filing an urgent *ex parte* application in Dubai for interim relief, which was dismissed.

136. On 26 August 2018 Mr Magdeev filed an *inter partes* commercial grievance in the Court of First Instance with case number 499/2018 ("the Second Dubai Proceedings"). Pursuant to the grievance he sought a precautionary attachment over assets of Equix Dubai.

137. On 1 October 2018 Equix Dubai commenced English proceedings against Mr Magdeev.

138. On 14 November 2018, the parties agreed terms in relation to the Dubai Proceedings as set out in the Consent Order of Teare J of the same date ("Order dated 14 November 2018"). As set out in the recitals to the Order dated 14 November 2018, Equix Dubai and Mr Magdeev undertook to take all steps reasonably available under the laws of Dubai to suspend for a period of at least six months (and, if necessary, to maintain the suspension beyond the initial six months of) the Dubai Proceedings. In accordance with paragraph 1 of that Order dated 14 November 2018, it was ordered that "*provided the Dubai Proceedings are both suspended for a period of at least six months the application for an interim anti-suit injunction against the Defendant…shall be stayed*".

139. On 9 December 2018 the Dubai Courts gave judgment and rejected the Second Dubai Proceedings.

140. On 15 January 2019 it was ordered by the Dubai Courts that the First Dubai Proceedings be suspended for a period of 60 days starting from 15 January 2019 ("Suspension Order"). On 19 February 2019 the

Dubai Courts accepted the request submitted by Mr Magdeev and determined that the First Dubai Proceedings be suspended "for six months" rather than 60 days. This decision of the Dubai Courts, issued on 19 February 2019, ordered that the First Dubai Proceedings be suspended for 6 months starting from 15 January 2019 ("Amended Suspension Order"). This suspension period of the First Dubai Proceedings in the Amended Suspension Order ended on 15 July 2019.

141. After the expiry of the six month suspension period, Mr Magdeev had 8 days in which to request that the Dubai Courts accelerate the First Dubai Proceedings. He made no request to accelerate the proceedings and therefore is considered to have abandoned the First Dubai Proceedings.

142. In early January 2019 there was a CMC in the English Proceedings, which consolidated the two sets of English proceedings and set a date for a strike out application brought by Mr Gaynulin in respect of the Part 20 claim against him. That strike out succeeded; the claim against Mr Gaynulin was struck out pursuant to the Order of Picken J dated 20 June 2019 on the basis that even if Mr Tsvetkov won, no monies would be payable by Mr Gaynulin because the effect of the counterclaim in conspiracy was to neutralise Mr Magdeev's claims under the October 2014 and August 2015 Agreements and would not result in damages being paid to Mr Tsvetkov and that Mr Tsvetkov's loss was barred, as against Mr Gaynulin, by the principle against recovery of reflective loss (the losses being made good if Equix Cyprus and Equix Dubai's assets were replenished). An appeal against that order was dismissed on 22 October 2019.

Payments – a summary

143. Following on from this recital it follows that Mr Magdeev received the following payments from Equix Dubai from the period October 2014 onwards.

    i) "Salary" payments under the RM and EM Employment Agreements, totalling AED10,037,500 in the period December 2014 to August 2016.

    ii) A payment of US$110,000 on or around 12 January 2015 described on the relevant bank statement as a payment for travel expenses (the US$110,000 payment).

    iii) A payment of US$3.5 million to Ashaja on or around 18 December 2015 (the US$3.5 million payment).

    iv) A "bonus" payment of US$1.2 million to Mr Magdeev on or around 12 January 2016 (the US$1.2 million payment).

v) The sums of US$1,014,885 and US$760,000 paid to Mr Magdeev on 1 May 2016 and 6 October 2016 (Trombachev payments 1 and 2).

The Trial

144. The case has been heard before me over three Commercial Court weeks and has involved factual and expert evidence, as well as lengthy closing submissions.

145. So far as factual witness evidence is concerned, Mr Magdeev gave evidence himself and called three other factual witnesses: Mr Ernest Magdeev, Mr Vladislav Slizikov and Mr Michael Kyriakides. The first two of these gave evidence through simultaneous translation. In Mr Magdeev's case this was because he does not speak or read English. Mr Ernest Magdeev plainly does speak and read English but chose to give evidence through a translator because English is not his first language. Mr Slizikov and Mr Kyriakides gave evidence in English.

146. Mr Tsvetkov and Mr Dovgan gave evidence in English.

147. Before turning to evaluate the factual witnesses' evidence, I should mention a further point on the witness roster. Although there was thus a considerable number of witnesses, both parties suggested that I should draw adverse inferences against the other because other witnesses were not called.

148. Mr Magdeev submitted that negative inferences should be drawn against Mr Tsvetkov because of the absence of Mr Skachko in relation to spreadsheets and the August 2016 meeting and buy-out proposal and against Equix Dubai because of the absence of Mr Gaynulin and Mr Sagura. In turn Mr Tsvetkov said that such inferences should be drawn against Mr Magdeev because of the absence of expected documents in relation to the meeting of August 2016, the repayment figure in the Slizikov/Sagura spreadsheet, and Mr Tsvetkov's lack of involvement in the 22 June 2017 stock removal and also because of the absence of Messrs Mayorov, Iusupov, Anastasiou, Shchurkova, Sagura and Skachko.

149. This was based on the increasingly relied upon authority of *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 where Brooks LJ said:

> "*(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*

> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified*".

150. This is not the place to deal with this issue at length but the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller.

151. In this connection I note that it was suggested for Mr Magdeev in reliance upon *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 that I was effectively bound to draw such inferences, at the risk of perpetrating a legal wrong.

152. As I noted in the course of legal submissions, this line of argument neglects to take account of the recent Court of Appeal decision in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882, where Sir Ernest Ryder SPT said:

> "*Wisniewski* is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion i.e. "the court is entitled [emphasis added] to draw adverse inferences"

153. He also made clear that such matters as proportionality may give rise to a valid reason for a witness's absence.

154. In my judgment the point can be dealt with relatively briefly thus:

    i) This evidential "rule" is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.

    ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the "missing" witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:

a) the overriding objective; and

b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial.

iv) In this case, save as to one very narrow issue with which I will deal at the appropriate point below, the exercise required of the parties relying on this principle has not really been done.

v) I have nonetheless considered the point to the best of my ability based on the rather broader submissions made, and am not satisfied that the "missing" evidence is properly regarded as material such that it would be appropriate to draw an inference. This is particularly so when it comes to the "hindsight" roster put forward on behalf of Mr Tsvetkov, but applied also to Mr Skachko, who was apparently not present at the bulk of the meetings in relation to which the inference was said to arise, and who would add nothing on the spreadsheets with which Mr Tsvetkov had also engaged.

vi) Further, against a background where:

a) many of the "missing" were not party witnesses;

b) no evidence was put forward as to their availability and willingness;

c) and (as regards the absences on Mr Magdeev's side) the parties were limited to four witnesses of fact by the Order of Phillips J of 29 January 2019;

there would be a good explanation for not calling such witnesses.

155. When it comes to evaluating the evidence of the witnesses my brief conclusions (in response to the usual submissions by each side that the other side's witnesses utterly lacked credibility) are as follows.

156. The main witnesses were obviously Mr Magdeev and Mr Tsvetkov.

157. I have been very aware in evaluating their evidence that Mr Tsvetkov had the advantage of giving evidence in English, which inevitably gives greater immediacy to the evidence given. It also makes it more difficult for a witness to adopt an approach which is not responsive to the question, because it is possible for counsel to follow the answer as it is given, and give the kind of non-verbal cue which tends to draw a long answer to a close. Therefore, although Mr Tsvetkov presented

as the more compelling witness, some at least of this could be attributed to the intrinsic advantages which he had in the way in which his evidence was given. I have endeavoured to allow for that in evaluating the evidence given.

158. Ultimately however I did find Mr Tsvetkov to be a more impressive and credible witness than Mr Magdeev (though far from faultless himself). Although in some respects Mr Magdeev conveyed an impression of genuineness I was concerned by the fact that he appeared to have been prepared for his cross-examination, and that he was noticeably careful to prompt himself by repeated reference to his witness statement, both in the breaks and indeed in the course of his evidence. Although (as I have noted above) some of this can be ascribed to the consequences of translated (even simultaneously translated) evidence, he gave the impression of having things which he wished to say, and not being overly concerned to answer the questions put to him. Indeed, as time went on Mr Magdeev became increasingly unwilling to keep within the constraints of the questions, and was determined to tell his entire views about the case regardless of whether there was any discernible link between the question and what he said. In addition, his evidence was, as I will note below, often inconsistent.

159. This is not to say that Mr Tsvetkov was an entirely satisfactory witness. He did himself tend to be astute to make the points he wished to make, rather than always responding to the questions posed; though he did tend to respond to the questions as well. And as I shall make plain below, I was not satisfied with his evidence as regards the events of August 2016.

160. When it comes to honesty, the impression I received was that while Mr Tsvetkov was perhaps more cavalier about documents – both as to their creation, and as to whether their substance reflected the reality, both principals were perfectly prepared to create documents which did not fully reflect the truth, with a view to satisfying the requirements of third parties who should have been entitled to expect genuine documents – such as banks or the Dubai authorities. While I understand that this may have been regarded by them as inconsequential, and *inter se* such an approach was of course a matter for them, it was not an honest way of proceeding when third parties might be affected by those documents.

161. As for their oral evidence, I have formed the view that the evidence given by both was an amalgam of honest evidence and evidence which was not honest; I have concluded that at points both Mr Magdeev and Mr Tsvetkov were less than candid in their evidence.

162. However, another impression which I received from the evidence was that in fact neither gentleman actually analysed these transactions in quite the way in which it was done during the course of the litigation.

I commenced the trial expecting (given the nature of the issues) that it would be necessary to decide that one of the main witnesses was lying in regard to each of the main points. In the event, I concluded that on occasion neither was – despite the fact that in the witness box they embraced in clear and fluent evidence positions which were diametrically opposed.

163. What I conclude has happened at some points is a particularly acute species of the situation which is not infrequently encountered, when a witness, during and in part because of the exercise of consideration inherent in the court's processes (pleadings, witness statements and so forth) has his recollection actually altered from what it would have been at the time.

164. The reason why this problem is particularly acute here is because this process has occurred over the top of a base which was itself not solid. My impression from their evidence – and from the less than honest documents in which both participated - was that both of them regarded the structures by which payments were made as being somewhat fluid, at least having the possibility to fluctuate over time. As such, their recollections were built not on a simple structure of what was agreed and decided, but upon a base composed of recollections of the various flexible permutations which had been considered over a period of time. This was perhaps to some extent reflected in Mr Magdeev's answer *"I have explanations. If you don't like them, I have others."*

165. I am therefore not persuaded that the principals necessarily addressed their minds to the issues with which I must grapple with any degree of focus at the time. Thus Mr Tsvetkov was unclear as to whether he had really looked at certain of the documentation (such as the assignment). He also gave evidence that he did not think that Mr Magdeev would address his mind to the technicalities of what was meant by redemption of the preference shares – and this seemed to be consistent with Mr Magdeev's own evidence. Somewhat surprisingly for a businessman of his experience and obvious success, Mr Magdeev claimed not to be good with or interested in figures; and yet over the course of a lengthy cross-examination the impression he gave in handling such material was that this evidence was at least broadly correct.

166. So far as concerns the other witnesses, Mr Ernest Magdeev was not an impressive witness. Like his father he appeared to have been prepared for his evidence. The two of them gave almost word for word identical answers in relation to a question on the obligation to attend at the office which was notionally a part of documents described as employment contracts into which they entered. He appeared to be at pains to suggest that his involvement in the events was greater than it was and he also gave evidence as to his role for Equix Cyprus which lacked credibility – for example as to the genuineness of the role and

the suitability of the very limited tasks he appeared to have performed as the "Finance Director" of the company.

167. Mr Slizikov was plainly a very intelligent witness. However, his evidence was at points evasive, and I was not able to accept key aspects of it.

168. Mr Kyriakides was (as was perhaps to be expected of a trained lawyer) a careful witness; but concessions forced from him in cross-examination revealed that he had slightly overstated his evidence in his witness statement (for example in relation to Mr Tsvetkov's role in the events of 22 June 2017 and whether Mr Magdeev and Mr Gaynulin had made any commitment to fund Equix Cyprus going forward from mid-2017).

169. Mr Dovgan was a slightly hesitant witness, because although he did give his evidence in English, his degree of fluency was somewhat less than that of Mr Tsvetkov. However, he was a candid and straightforward witness who was clear about what he did and did not recall. I have no hesitation in accepting his evidence – and indeed the contrary point of view was sensibly not really suggested by Mr Robins for Mr Magdeev.

The experts

170. The two experts in UAE law were Mr Bajamal and Professor Al-Aidarous. I will deal with their evidence in detail below, but in summary, as I said during the course of the hearing, this was an occasion when the evidence of both experts was of great assistance in clarifying the position on the law, and I am grateful to them both for their assistance.

The approach to the documents

171. The position, as I have noted, has been complicated by the fact that on both sides' cases, the documentary record cannot be regarded as entirely reliable. Some documents were admittedly backdated, or produced with a different intent than that stated within them.

172. This raises the question of how I should approach the documentary record.

173. On this, both parties effectively agreed that I should look for and place weight on internal and "off the cuff" documents ahead of carefully drafted ones. This echoes the approach indicated by Males LJ in *Simetra Global Assets v Ikon Finance* [2019] EWCA Civ 1413 at [48]:

> "I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those

> concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see."

174. Of course the parties do not always agree what falls within this category, or what should be concluded based on those documents, but the broad approach is at least relatively uncontroversial, and explains why in what follows less weight is placed on such documents as signed contracts than is usual in this Court.

The burden of proof

175. Before passing to consider the individual issues, I should deal with an overarching issue which becomes occasionally relevant during the course of that consideration. Unusually some argument was directed to the question of burden of proof.

176. Equix Dubai submitted that the Court should treat the various payments received by Mr Magdeev as repayments of principal unless Mr Magdeev can *"put forward any other credible justification for his receiving those payments"*.

177. For Mr Magdeev it was submitted that this reverses the correct burden of proof and that in reality where a debtor seeks to defend a claim in debt by asserting that the debt has been discharged, the burden of proof lies on the debtor. Reference was made to *Chitty*, vol.1, [39-269]:

> "Once a debt is proved to have existed, its continuation is presumed; thus the obligation to repay a loan is presumed to continue to exist unless the borrower proves that the loan has been repaid or otherwise discharged, or such repayment or discharge can properly be inferred from all the circumstances. A receipt is not conclusive but only prima facie evidence that a loan has been repaid".

178. To similar effect in *Douglass v Lloyds Bank Ltd* (1929) 34 Com Cas 263 (KBD), Roche J cited with approval the following textbook statement as correctly summarising the law:

> "a debt once proved to have existed is presumed to continue unless payment, or some other discharge, be either proved or established from circumstances…".

179. The peculiarity of the present case is that (on the whole) it is not a case such as those cited by Mr Robins for Mr Magdeev, where the

question is a binary one – is there, or is there not, proof of a payment? Here, because of the circumstances often there is no doubt as to the making of a payment. The issue is as to its characterisation. In those circumstances the answer may not be the same.

180. In the end I have come to the view that the following rules pertain as to burden of proof:

    i) Whether a payment was made or not: burden on Mr Tsvetkov;

    ii) Whether a payment was made in discharge of principal (absent proof of an agreement for repayment of principal): burden on Mr Tsvetkov;

    iii) Whether a payment was made in discharge of principal (where there is proof of an agreement that principal shall be repaid): burden on Mr Magdeev.

The First Oral Agreement

181. In terms of the structure of the claim, it makes sense to deal first with the repayment issues, and to start with the First Oral Agreement. Not only does this come first, it forms crucial background for the other issues.

182. On this issue I have concluded that the case advanced for Mr Tsvetkov is essentially correct.

183. At some point over the period November to mid December 2014, Mr Magdeev and Mr Tsvetkov agreed, (against the background of the new Cyprus venture) that the interest on the US$10 Million Loan would be waived and that payments under the employment contract would be treated as repayments of principal.

184. The reason for this change was the very substantial investment package for the Cyprus venture. So:

    i) Mr Magdeev would invest US$20 million in Equix Cyprus to allow it to obtain the Cyprus franchise and open the Limassol boutique, the return on which investment was to be interest at 9% per annum;

    ii) Mr Magdeev would get at least 50% of the profits of Equix Cyprus (and 50% of shares in) Equix Cyprus.

185. Essentially Mr Magdeev was getting interest and profit share on the Cyprus investment; against that background it made sense for the Dubai investment to be varied so as to be paid off gradually. Mr Magdeev's evidence on the commercial side of the deal was broadly accepting of the proposition that the position advanced for Mr Tsvetkov was commercial.

186. Yet the converse arrangement, advocated on behalf of Mr Magdeev, of 15% on the Dubai loan plus 9% (which is a commercial return, if not on the generous side of commercial) on the Cyprus investment plus 50% of the shares and profit appears on its face odd and uneconomical. It might be a deal which would be extracted by a hostile party on a pressured basis; but there was no suggestion of this in the narrative. At this point Mr Magdeev and Mr Tsvetkov were close – almost family. The deal is not a fit for these circumstances.

187. Further the deal Mr Tsvetkov says was made fits the evidence as to the process by which the deal was reached, which was that Mr Magdeev's desire to participate in the Cyprus business as a partner was a late decision. Effectively there was initially an agreement for him to lend money (akin to the October Agreement). He then wanted interest and a share of the profits of Cyprus; at which point a *quid pro quo* of waiver of interest on the US$10 Million Loan came into the equation – and then Mr Magdeev asked for (and got) shares too. It may be an oddity that the waiver of interest related to the October Agreement and not the investment in Equix Cyprus; but that is the evidence.

188. Against this background why does the December 2014 Agreement not reflect this arrangement? This was of course a point much relied on by Mr Magdeev – his "Point 1" in opposition to Mr Tsvetkov's case on this issue. In some cases this would be a powerful argument. However in this case, while it was Mr Magdeev's evidence that he liked to have deals recorded in writing, there is ample evidence to justify a conclusion that he did not always choose to have the actual nature or terms of the deal accurately recorded. It may indeed be that the position as to the payments to be received going forward referable to the October 2014 Agreement was envisaged to be susceptible of some further change as the business relationship developed.

189. However, I must decide on the balance of probabilities what was the deal which (objectively) was concluded between the parties at this time. I conclude that it was an agreement which had the features summarised above.

190. Further some support is gleaned for this approach from later "internal" if not entirely "off the cuff" documents. In particular the February 2016 Proposal while referring to 15% in "Historical Background", contained the passage at Stage 3 noted at paragraph 68 above. The wording "*whereupon all the interests within the framework of the agreements made at Stages 1 and 3 should be deemed as a profit gained by RM from Graff*", though less than pellucid, in my judgment fits best as denoting the restructuring of the October 2014 Agreement such that interest was waived and payments became repayments of principal. This document was sent to all three of Mr Magdeev, Mr Ernest Magdeev and Mr Slizikov. Its

title invited discussion. There is no evidence of its having been disputed.

191. There was then a further document, the April 2016 Memorandum, which was even clearer, and which was sent to the same parties. It removed any ambiguity about the treatment of interest, saying "*with all the interest under the agreements made at Stages 1 and 3 being deemed as a profit gained by RM from Graff*." Again, there was no record of any disagreement being raised – and it is perhaps the more significant in that this was by now at a stage in the timeline when "*boundless trust*" had plainly disappeared. It was contemporaneous with the transfer of the remaining shares in Equix Cyprus to Mr Gaynulin, and not long before the transfer of the Equix Dubai shares. At this point if there was disagreement one would expect that disagreement, particularly with such a fundamental point, to be noted.

192. On top of these there were the spreadsheets. These, though admittedly later (dating to 2016/2017) on their face and consistently with the above documents, deduct the salary payments (and other payments to which I will come below) from what appears to be a calculation of the amount invested by Mr Magdeev in the Graff Business. The January 2017 spreadsheet was even sent under cover of an email which summarised the result as *"Actual capital balance"*.

193. I did not find Mr Magdeev's evidence on these documents to be convincing. It may be the case that he did not read the documents and Mr Slizikov did not pick up on the issue. (That latter proposition seems implausible, since Mr Slizikov was plainly intelligent, details-oriented and loyal to Mr Magdeev's interests). But Mr Magdeev did not suggest that this was the case. He said he did read the document (as, in the context one would actually expect him to), and he disagreed with it. That latter proposition is unconvincing, judged against the factual background. Here his evidence was either not honest, or the wish was father to the thought.

194. On Mr Magdeev's behalf it was argued that I should place weight on the absence of any reference to this agreement in the summary given to Mr Gaynulin in early February (the "Note to Emil"). However, this was a document designed (i) as a summary and (ii) for a third party. In the circumstances this did not seem significant. Reliance was also placed on the absence of specific recitation of the terms of the First Oral Agreement. Given the inclusion of the passage noted above, this also seems relatively insignificant.

195. Finally, it was notable that on behalf of Mr Magdeev little real attempt was made to grapple with the wording of the April 2016 Memorandum, and the absence of written response to it.

196. Altogether the balance of the evidence inclines clearly to Mr Tsvetkov's case on this issue. Accordingly, the "salary" payments to Mr Magdeev fall to be treated as repayments of the US$10 Million Loan.

197. This issue is plainly not decisive of the other repayment issues. It is however significant because on this hypothesis Mr Magdeev and Mr Tsvetkov did make an agreement in December 2014 which provided for gradual repayment of the US$10 Million Loan. So the principle of repayment is there. It is against this background that the next steps take place. The first of these is the US$110,000 payment.

The US$110,000 payment

198. This was the payment which Mr Magdeev placed at the forefront of his closing submissions. The competing scenarios were (i) informal short-term loan or (ii) repayment of principal.

199. The evidence on this point is far from clear. On the one hand the co-incidence of the timing with the time when Mr Tsvetkov had just agreed to make repayments of principal, and when Mr Magdeev was about to provide a second tranche of cash injection into Equix Cyprus, is highly suggestive. Nor is there any evidence of the loan being made, or received, when Mr Magdeev's case was that he always documented financial transactions of this sort.

200. On the other, in early 2016 Mr Tsvetkov was sent by Mr Slizikov a spreadsheet identifying in yellow highlighter those of the payments made by Equix which Mr Slizikov had concluded were payments on behalf of Mr Tsvetkov personally – they were categorised as his personal expenses. Mr Tsvetkov then sent an email to Mr Slizikov of 4 April 2016 attaching that spreadsheet modified by him (i.e. demonstrating that he had interacted with it in some detail). That modified spreadsheet used the same figures as in Mr Slizikov's spreadsheet, with the global total, including the US$110,000 payment, marked as "*Personal expenses, Dmitry Tsvetkov*" and also as "*Travel expenses*" under a summary of his personal expenses. Mr Tsvetkov's response when questioned on this was that this was a document with many tabs and many entries on each sheet, and he probably did not check them all.

201. This argument may be slightly more robust than Mr Magdeev's position on the narrative documents (and the process of navigating the spreadsheets since trial, without the operator who deftly controlled them in Court, has given me rather more sympathy than I had with it at the time), but the point is essentially the same, and I conclude that the same outcome should result.

202. These documents were sent at the point when Mr Slizikov (for Mr Magdeev and Mr Gaynulin) was (effectively) accusing Mr Tsvetkov of

playing fast and loose with the assets of the company. Just as it seems less than credible that Mr Magdeev should not protest at the wording of Stage 3 in the April 2016 Memorandum, so too it seems less than credible that Mr Tsvetkov was not checking to see if he could cast doubt on Mr Slizikov's troublesome exercise, which was poisoning his relationship with Mr Magdeev; and that if he had made an "extra" payment of principal, that he was not actively looking to see that it was not getting confused with other payments. Further the spreadsheets were not actually unclear; one at least of the spreadsheets identified the payment clearly as "Travel Expenses".

203. This is the only point in the judgment at which the question of burden of proof seemed potentially relevant. On all the other issues my conclusions as to the result were ones which I reached by a sufficient margin of evidence that burden of proof did not even require to be considered.

204. Ultimately, I conclude here that the question of burden of proof remains (just) irrelevant. Mr Magdeev's evidence is more robust. Mr Tsvetkov's evidence is not convincing, though I was not persuaded that this was, as was submitted for Mr Magdeev, a case of Mr Tsvetkov advancing a false case "*which he must know to be untrue*". This is one of the areas where it seemed quite credible that the absence of documentation had caused confusion or wish-fulfilling recollection.

205. But the result is that this payment falls to be treated as the repayment of an informal short-term loan, not as a repayment of principal.

The Second Oral 2015 Agreement, the US$3.5 million payment and the EM Employment Agreement

206. Although neither party organised the issues in this way, I have found it best to take these three issues together. This is because they all occur within a very narrow window of time and there is a danger when looking at them discretely that facets which interplay between them are lost.

The US$3.5 million payment - introduction

207. The next payment in time is the US$3.5 million paid in December 2015. Mr Magdeev's case is that this is not a payment of principal, but effectively the repayment of a loan to Mr Mayorov.

208. This is, regarded in isolation, the most peculiar of an unorthodox set of payments. On a purely pedestrian level, Mr Magdeev's case on the loan was inconsistent. It was pleaded as an oral agreement, and that initially appeared to be his oral evidence. However later in his cross-examination he stated repeatedly and clearly that there was a written loan agreement, but that he and Mr Mayorov had agreed to destroy it.

209. Then the rationale for the payment into Equix Dubai was elusive. Mr Magdeev said that for some reason - which was not quite clear - it made sense for Mr Mayorov to pay this (unrecorded) loan to Equix Dubai instead of Mr Magdeev (or Equix Cyprus) because Mr Magdeev was contemplating further investment in Equix Cyprus. There was a suggestion that this was impelled by a cash flow problem in Equix Dubai, but the basis for this was never demonstrated, and was inconsistent with the ultimate use of the funds. At the other end of the story there was another oddity, this time about timings; Mr Mayorov paid the money in mid-late October 2015, yet the payment to Ashaja did not occur for another two months.

210. Finally, Mr Magdeev's account of the Mayorov loan involved a detailed description of it being made in cash – complete with sketches in the air of the size of the sports bags in question, and miming of the way they were carried. His case was overtly regarded as verging on the comical by those acting for Mr Tsvetkov; though my own impression from watching this passage of evidence was that Mr Magdeev would probably not have produced such a detailed and circumstantial description if he had not at some point seen a very significant sum of money (though of course not necessarily this sum, or at this time) in cash.

211. Ironically, Mr Tsvetkov's own account of this payment was scarcely less mind-boggling. He contended that although it was a payment of principal, pursuant to the recent Second Oral Agreement, it was (for some reason) disguised to look like a payment of remuneration for advisory work under a services agreement. Meanwhile, the payment by Mr Mayorov into Equix was plainly not a payment for the jewellery which was described in the documentation; it was accepted that these documents were fakes, and Mr Tsvetkov was completely unable to assist as to for what Mr Mayorov was paying.

212. Thus the evidence on the US$3.5 Million Payment is best described as universally unsatisfactory.

The parallel story: Second Oral Agreement

213. Before pursuing the evidence on this payment further it is salient to “pan out” to the issue of the Second Oral Agreement. This is because, as with the First Oral Agreement, any conclusion on this may feed into the relevant background for and shed light on the US$3.5 million payment issue. The parties were not operating on a ring-fenced issue by issue basis, but in a continuum.

214. It was common ground that there was a discussion at this point and that this concerned at least a possibility that Mr Magdeev and Mr Gaynulin would invest additional monies, in Mr Magdeev’s case US$20 million, in the Graff Business and that a future 40:40:20 shareholding was mentioned. But according to Mr Magdeev there was

no agreement as to definitely making the investment, as to investment specifically in a Vienna franchise, as to the proposal for a 40:40:20 shareholding split or as to the agreement, if any, as regards the US$ 10 Million Loan.

215. On this issue it was originally Mr Tsvetkov's case that this agreement, said to have been concluded on 7 and 8 December 2015, meant that the US$10 Million Loan was not repayable at all. However the case advanced before me in closing was that it was more a case of a "tweak" to the First Oral Agreement and that was that (i) the repayments would be reinvested in Equix Cyprus and (ii) there would be further payments via the EM Employment Agreement. Mr Tsvetkov said that the earlier case arose out of a misunderstanding which crept in when his proof of evidence was slimmed down from its original 2,000 pages to more manageable dimensions (*"my witness statement as it initially was in the first draft, would constitute over 2,000 pages"*).

216. My conclusion on the Second Oral Agreement is that both sides pushed their case somewhat too far. So Mr Magdeev's case that there was no agreement to a concession in Vienna seemed to sit ill with the documents evidencing consideration of a Vienna concession from some time earlier and the fact that by early 2016 negotiations were at an advanced stage – indeed Graff apparently regarded the Vienna concession as close to a finalised deal. And in February 2016 someone within Equix had told Mr Anastasiou that "*our shareholders have decided to proceed with a new GRAFF shop in Vienna".*

217. There also appears to be a compelling case that a 40:40:20 split was agreed or at least very much contemplated, rather than being controversial. That conclusion seems fair based on the absence of protest at the February 2016 Proposal - which featured reference to 40:40:20 - and the April 2016 Memorandum's description of the December 2015 meeting as having reached an agreement on the points of Vienna, investment and split.

218. This case was further supported by "the Magic Table" (a working spreadsheet setting out each item of stock bought and sold by the business). This Magic Table, in which certain columns refer to a 40:40:20 split, was exchanged between Mr Tsvetkov and Mr Slizikov; and this exchange appears to suggest that Mr Slizikov was operating (under instructions) on the basis that accounting was to be done in this way.

219. Reliance was also placed by Mr Tsvetkov here and elsewhere on the May 2016 email to Francois Graff. This was said to be a document in the credible "off the cuff" category. However this document has an important distinction from the internal exchanges between the parties – it was a document which was not seen by the other shareholders, and was made in circumstances where one might well

conclude that Mr Tsvetkov had a motive for "spinning" the facts at least a little – his business was reliant on the Graff connection and he would naturally wish to appear well in their eyes. I do not therefore place any reliance on it as to the nature of the arrangement come to between him and Mr Magdeev. It is however not without significance, in that it speaks fairly clearly as to the climate of the discussions. On this it speaks loudly as to Mr Tsvetkov feeling under pressure from his colleagues, and in need of support from Graff: *"I need your advice!"* is the message title and the message runs to three closely typed pages, the account makes a fairly developed conflict with Mr Magdeev clear, and the conclusion demonstrates that he has no solution: *"What do you advise my strategy should be? ... I would be grateful if you can find time and advise me."*.

220. So much for the case for some kind of agreement in December 2015. However, Mr Tsvetkov's case of a fully finalised deal in December did not fit well with the absence of any signed document, given Mr Magdeev's own practice of having some documentary record (upon which Mr Tsvetkov of course relies elsewhere). And on any analysis, the April 2016 Memorandum was not an accurate depiction of the agreement, if any, reached.

221. Before reaching a conclusion I should also note that the case for a consensus of some sort via the Second Oral Agreement also harmonises with the fact that the EM Employment Agreement was entered into at this stage (indicating some sort of larger agreement on something) and that if Mr Tsvetkov's case on this agreement is correct it forms another limb of evidence which is supportive of a conclusion of an overarching agreement at this time.

The EM Employment Agreement

222. It will be recalled that Mr Ernest Magdeev entered into an employment contract with Equix Dubai, paid US$5 million to Equix Cyprus at about this time, and that in the months which followed Equix Dubai paid him regularly sums which claimed to be salary.

223. It was Mr Magdeev's case, supported by himself and Mr Ernest Magdeev, that Mr Ernest Magdeev entered into an investment agreement with Equix Dubai and Equix Cyprus by which:

    i) He entered into the EM Employment Agreement with Equix backdated to 15 October 2015 at a salary of AED 182,500 per month, i.e. US$600,000 per year (equivalent to interest at 12% per annum on the US$5 million), later amended to provide for a salary of AED 228,125, i.e. US$750,000 per year, equivalent to 15% per annum.

    ii) He transferred US$5 million to Equix Cyprus. This was initially intended to be a payment made to Equix Dubai, but this was

switched to Equix Cyprus for an intended issue of preference shares. The salary was therefore in effect a 15% return on this investment.

224. He contends that for some reason the loan paperwork was not completed and, when this came to light, the parties sought to regularise the loan by signing a loan agreement backdated to 25 December 2015.

225. On this aspect I accept Mr Tsvetkov's case. The case that Mr Ernest Magdeev loaned money to Equix Cyprus is one which emerged late in the day – when witness statements were served. There is no contemporaneous evidence which supports it; it appears as a reverse engineered proposition, perhaps because of the existence of the later loan agreements, though it is fair to say that there were some references consistent with this in (for example) the April 2016 Memorandum.

226. Quite apart from the fact that it was never asserted or pleaded until so late, the structure for which Mr Magdeev contends makes no sense against the broader narrative. Equix Cyprus at the time was looking for investment and was getting it from Mr Gaynulin. Mr Magdeev was certainly discussing investment in Equix Cyprus. The contemporaneous documents (including emails as well as an agreement) call the payment one for a subscription for preference shares, which is an entirely distinct concept and consistent with the correspondence. The spreadsheets treat the salary payments the same as the payments under the RM Employment Agreement - as repayments of capital.

227. Looked at from the other perspective, the payment and the EM Employment Agreement make perfect sense: Mr Magdeev had just been discussing a further substantial investment in Equix Cyprus, and this could be structured via Equix Dubai to obtain for Mr Ernest Magdeev a collateral benefit, namely a Dubai visa.

228. I therefore conclude that the EM Employment Agreement was in essence a vehicle for some of the proposed investment in Equix Cyprus, and that the “salary” payments were in fact repayments of principal in respect of the US$10 Million Loan (with a view to their reinvestment in Equix Cyprus by Mr Magdeev). Like the RM Employment Agreement, it was a sham. Not only was this the likely conclusion based on the sham nature of the RM Employment Agreement, but the evidence of Mr Dovgan supported this conclusion.

229. In this connection I will record that not only do I not accept the evidence of Mr Magdeev and Mr Ernest Magdeev on this topic, but also that this was an area where I concluded that their evidence was not honest. It might just be the case that an attempt to recreate a memory against the background of the existence of the 2016 EM Loan

Agreements might lead to an erroneous recall. However when it came to evidence, proffered by both, that the EM Employment Agreement was a genuine employment agreement, and that Mr Ernest Magdeev performed meaningful services under it, I was unable to conclude that this was evidence which conformed either with their recollections or their subjective beliefs in what had occurred.

The Second Oral Agreement and the US$3.5 Million Payment - conclusions

230. My conclusion based on this rather contradictory welter of evidence concerning the events of this period is that the parties did have detailed and serious discussions in December 2015, and that all of the items relied on by Mr Tsvetkov formed part of these discussions. A deal was agreed, at least in principle. But there appears to have been some degree of conditionality about it – perhaps because there were issues as to the funding of Mr Magdeev's investment – and I do accept his evidence that he raised his financial issues at this point.

231. It also seems credible that there was a question mark over the shareholding split, with Mr Magdeev and Mr Gaynulin wishing to conduct their audit before any final agreement was reached. I conclude that it was however contemplated that repayments of principal of the US$10 Million Loan would be invested, and that the EM Employment Agreement would be a vehicle for repayment of some more of the principal. I also conclude that the agreement was sufficiently firm for some steps (such as the conclusion of the EM Employment Agreement) to be taken in accordance with that consensus.

232. Against this background I revisit the issues on the US$3.5 million payment. Absent this context, I would (just) have preferred Mr Tsvetkov's case. But with the broader context, while the story remains less than satisfactory in some respects, I conclude on the balance of probabilities (and without the need to rely on the burden of proof) that the US$3.5 million was indeed a repayment of principal. It is unsurprising that, even if the terms of a deal were not absolutely final, and with question marks over the running of the businesses, Mr Tsvetkov should do what he could to ensure that Mr Magdeev was in a position to make the investment which was contemplated – and to try to restore some of the harmony which had clearly been lost between them by this stage. Repaying Mr Magdeev US$3.5 million of the US$10 million would make perfect sense at this stage.

233. Overall this reading of the evidence is by a long distance more satisfactory than the alternative one, which involves (i) a highly confused and inconsistent story about a loan from Mr Mayorov (ii) a very odd structure for the repayment of that loan (iii) a very odd gap in time between the payment by Mr Mayorov in October and the repayment to Ashaja.

234. Again in relation to this element I reject Mr Magdeev's evidence and conclude that his account of the Mayorov loan was not an honest one.

The US$1.2 million

235. Into this period also falls the US$1.2 million payment made by Equix Dubai to Mr Magdeev on 12 January 2016, under the description "Employee Bonus". Mr Tsvetkov of course contends that this is, like the other payments at this time, a payment of principal under the US$10 Million Loan. Mr Magdeev's case is that the payment was made to discharge the liability of Equix Cyprus to pay interest under the December 2014 Agreement.

236. He points to Clauses 5 and 6 of that agreement which provide:

> "5. The Parties have agreed that RM shall provide the funds mentioned in the p. 1 and p. 2 of the present Agreement … subject to the following terms:
> a. Before the 31st of March 2015 RM and DT shall reach an agreement (to be in writing in the form of shareholders agreement between RM and ELKH and could be directly or between affiliated with them third parties) regarding the participation of RM (or third parties affiliated to him) in the business of [Equix Cyprus] …
> b. As soon as the agreement between RM and DT is reached which is determined by p. 5.a of the present Agreement, the Loan or an Investment agreement shall be signed between RM and [Equix Cyprus] which should stipulate the conversion of funds in the total amount of 20 (twenty) million US Dollars stipulated by p. 1 and p. 2 of the present Agreement into a Loan for 3 (three) years plus validity and the interest rate not exceeding 9.00 (nine) %. Which should be accumulated in arrears starting from the 1st of May 2015;
> 6. Should by any reason RM and DT fail to reach an agreement stipulated by the p. 5 of the present Agreement, [Equix Cyprus] shall undertake an obligation to repay on or before the 1st of May 2015 full amount received from RM in the total amount of 20 (twenty) million US Dollars and to pay the penalty of 0.04 (4/100) % per each day that [Equix Cyprus] actually had the possession of the funds stipulated by p. 1 and p. 2 of the present Agreement".

237. Mr Magdeev argues that this payment was a substitute for this unperformed obligation, that "*Mr Tsvetkov proposed that he could make a payment to* [him] *equivalent to the rate of 9% that had been envisaged would be paid from 1 May 2015 if the December 2014 Agreement had been fully implemented. The figure of USD 1.2 million represented 8 months' worth of interest payments (1 May 2015 to 1 January 2016) at 9% on USD 20 million. Mr Tsvetkov said that this payment would have to come from [Equix Dubai] and he described the payment as a "bonus*".

238. On this payment there is certainly something to be said for Mr Magdeev's case. If a payment were to be made at very nearly the same time as the US$3.5 million which was to be a payment of principal under the US$10 Million Loan, there is no good reason why it could not be paid under the same cover story. There are also the factors of (i) the strange co-incidence of the amount and a calculation of 9% interest on the Equix Cyprus US$20 million loan and (ii) the lack of any consistent narrative, on Mr Tsvetkov's case, for the accounting for the 9% interest which was (on its face) due under the December 2014 Agreement, when it was not Mr Tsvetkov's case that interest under that loan was waived as at December 2014.

239. However, there are issues with Mr Magdeev's case which give weight also to Mr Tsvetkov's case. The period for interest is not right – interest was due from December 2014, and the interest rate notionally due was not 9% if payment were not made by May 2015, but nearer to 15%. There is also the issue of why the payment is made by Equix Dubai if it relates to Equix Cyprus. And when asked about this payment Mr Magdeev did not himself seem to support this case. He said that the money came to him more or less out of the blue and he raised a query about it, asking what it was. Mr Tsvetkov replied: "*Well, that was convenient to me. Maybe – I had some money available to me*".

240. And of course the question of the different description given to this payment can hardly weigh very heavily in circumstances where the parties employed such a variety of inaccurate descriptions for what I have found to be payments of principal.

241. In the end, having considered both sides' evidence on this, I have concluded as follows:

    i) There had been discussions in December as noted above, and the question of further investment by Mr Magdeev had been discussed;

    ii) However, he was having cash flow issues, which he mentioned. The repayment of the US$10 Million Loan was discussed. He also complained about what he saw as the lack of interest payments for the Cyprus US$20 million loan;

    iii) The parties arranged the EM Employment Agreement as one way of increasing the repayments to Mr Magdeev of principal.

    iv) Mr Tsvetkov arranged the US$3.5 million payment of principal.

    v) Mr Tsvetkov then found he could spare another US$1.2 million a few weeks later, and paid it to Mr Magdeev (this echoes Mr Magdeev's evidence as to what Mr Tsvetkov said). There was no prior agreement about this payment. It was simply a payment against that background. Given the situation, both

> parties regarded it as having the potential to be characterised in a number of ways, depending on how the situation developed. Mr Magdeev may well at later stages have regarded it as capable of being thought of as payment in respect of interest under the Equix Cyprus Loan, or as compensation for early termination of the RM Employment Agreement. That does not however mean that that is what the payment was – at the time it was made.

242. The question I must decide is, given the lack of any prior or subsequent agreement as to its characterisation, how is it properly to be regarded? Absent any better designation, the background, the way it was characterised by Mr Tsvetkov as linked to the RM Employment Agreement and the payment being from Equix Dubai, the facts best fit with a payment made in respect of principal under the US$10 Million Loan.

243. It was the submission of Mr Magdeev that the law relating to appropriation was relevant here. I was reminded that when a debtor pays money to a creditor, the debtor has up to the time of payment of the money a right to stipulate that the payment must be applied in a particular way and that if the debtor does not so communicate, the right to appropriate devolves upon the creditor (per Lord Macnaghten in *The Mecca* [1897] AC 286 (HL), 293-4).

244. The applicable principles were summarised by Neuberger LJ in *Thomas v Ken Thomas Ltd* [2007] Bus LR 429 (CA), [19], approving the following passages from *Chitty*:

> "Rights to appropriate payments. Where several separate debts are due from the debtor to the creditor, the debtor may, when making a payment, appropriate the money paid to a particular debt or debts, and if the creditor accepts the payment so appropriated, he must apply it in the manner directed by the debtor; if, however, the debtor makes no appropriation when making the payment, the creditor may do so …
>
> Debtor's right to appropriate. It is essential that an appropriation by the debtor should take the form of a communication, express or implied, to the creditor of the debtor's intention to appropriate the payment to a specified debt (or debts), so that the creditor may know that his rights of appropriation as creditor cannot arise … It is not essential that the debtor should expressly specify at the time of the payment, which debt or account he intended the payment to be applied to. His intention may be collected from other circumstances showing that he

> intended at the time of the payment to appropriate it to a specific debt or account ...
>
> Creditors' right to appropriate. Where the debtor has not exercised his option, and the right to appropriate has therefore devolved upon the creditor ... he may exercise it at any time 'up to the very last moment' ... or until something happens which makes it inequitable for him to exercise it".

245. The relevance here is said to be that (as was common ground) in the absence of any appropriation by the debtor or the creditor, the law presumes that the interest has been discharged ahead of principal.

246. Mr Tsvetkov's first enunciated case on appropriation was that the payment had been appropriated by him to principal in the pleadings. That, it seemed to me, had some difficulties. This is because the right of the debtor to appropriate lasts only up until payment, whereas the right of the creditor to appropriate lasts from payment until the very last moment unless *"something has happened which would render it inequitable for [him] … to do so"*: *Seymour v Pickett* [1905] 1 KB 715.

247. However, his second case on appropriation was more convincing. That was that the right to appropriate only applies when there are several debts (or a choice between principal and interest). Here, on the basis that I have accepted Mr Tsvetkov's case on the First Oral Agreement, namely that there was an agreement to waive interest and treat these payments as capital, then of course that agreement is enforceable as such and is also an appropriation of those payments.

248. The more interesting point arises only contingently, if I had not reached that conclusion (i.e. if interest had run on the US$10 Million Loan). That was the submission that there was in fact no interest due at any point on that loan, up to and including August 2016 because the US$125,000 interest/salary was regularly paid according to the tenor of the agreement, every month. Had this arisen I would have rejected this submission, essentially because of the wording of the Agreement. The Agreement when closely examined provides that Equix Dubai is obliged to pay AED16,425,000 within three years, and if the employment contract is terminated the liability is accelerated:

> "An Employment Agreement shall include the condition according to which the Investor shall be receiving salary from the account of the Trading Company within 3 (Three) years in the total amount of 16,425 … AED …
>
> In case the Employment Agreement has been terminated by the Trading Company before its expiration the Trading Company undertakes an

> obligation to repay the Investor immediately the difference between the Total Amount of the Salary and the amount that the Investor has received by the time of such termination…"

Trombachev Payment 1

249. The next payment in line is Trombachev Payment 1: the "contribution from Ilya Sales" of $1,014,885 made on 1 May 2016. Was this another repayment of capital or, as Mr Magdeev contended, a payment made essentially "*to demonstrate that the business was doing well and to make amends for the complaints we had raised"*? At another point his evidence was "*Dmitry said, 'If you like, you take it. The most important thing is for you not to worry. All is well with us. Business is flourishing'. Then we had some increase in our distrust and he was trying to demonstrate that, "All is well, just take the money"*."

250. Mr Slizikov's evidence was that this payment was made after complaint by Mr Magdeev that Mr Gaynulin was getting more payments than he was: "*Mr Magdeev was kind of annoyed and he was, you know, counting which – 'Do I have to receive any valid payments?' And if he was complaining to Mr Tsvetkov, like, you know, Gaynulin receiving so many payments, and he said, 'You know, relax and take –' and, as I understand, he took this amount in relation of these circumstances."*

251. Although as regards the second Trombachev payment the question of termination of the RM and EM Employment Contracts comes into the equation, this could not have been the case for this payment. Nor was it suggested that there was an initial payment for one purpose and a subsequent reassignment of the payment to something else by agreement.

252. As a result, this payment can be relatively swiftly dealt with. I conclude that it was made with no agreement as to what it represented, but against the background set out above of a somewhat disgruntled Mr Magdeev, and also that of payments being made periodically to pay down the outstanding US$10 Million Loan. The payment appears in one of Mr Slizikov's spreadsheets in August 2016 as a repayment of capital, albeit he contended that he prepared these spreadsheets as part of proposals for the supposed buyout. I conclude that it was indeed a repayment of principal, and there was no subsequent agreement to treat it otherwise.

Trombachev Payment 2

253. Trombachev Payment 2 was for US$760,000 on 6 October 2016. In relation to this payment, which Mr Tsvetkov says is again a payment of principal, Mr Magdeev has variously stated it to be "*amends for the*

complaints", "*treated as compensation for early termination of our employment contracts*" and "*if the Buyout Proposal went ahead, these payments would have been treated as repayment of capital*".

254. In his evidence he appeared to favour the employment contract approach (though the evidence elided the two Trombachev payments), saying: *"we agreed that at some meeting, that the issue was going towards dismissal and I said, 'Well, look, I have to resign, but there is not enough money. I have to resign with some interest on the 10 million' He said, 'Okay, we'll reflect it as this, this money, and you'll be calm". That's the way he did it. …'".* He also indicated, and I accept that there "*is not any real allocation of this payment*".

255. On the evidence, the indications in favour of the payment being made as a payment of principal, like the previous payments, appears to me to be considerably stronger than the case that the payment in October was a pre-agreed payment for the later termination of the RM and EM Employment Agreements.

256. The termination was requested in September 2016, but was not agreed until in or around November 2016. Early termination, as noted above, cannot explain the making of Trombachev Payment 1. But on this timeline, nor can it satisfactorily explain Trombachev Payment 2. Nor, if it was in effect agreed as "amends", was there any satisfactory account of an agreement to re-brand it later as "*compensation for early termination*".

257. As regards that part of the early termination case which related to the EM Employment Agreement, the payment makes even less sense as a payment for termination of an agreement representing interest on money never received by Equix Dubai at all – particularly in the context of Equix Dubai being by this stage owned by Mr Gaynulin.

258. As for the Buyout Proposal explanation, even on Mr Magdeev's case this only featured as a later construct; and as I have found above, the evidence for this supposed agreement was not satisfactory.

The accepted payments - conclusions

259. It follows from the above that I accept that (in approximate terms) the following payments were made by way of repayment of principal in relation to the US$10 Million Loan.

Payment	**Amount**
Employment contracts US$110,000 payment	3,312,000
3.5 million payment	3,500,000
Bonus	1,200,000
Trombachev 1	1,014,885
Trombachev 2	760,000

US$9,786,
885

260. That would mean that of the US$10 Million, and considering only the payments which it is accepted were made, nearly – but not quite - all was repaid.

The disputed payments

261. There were also a number of other disputed payments:

    i) "Trombachev Payment 3", a payment of US$432,000 noted in one of Mr Slizikov's spreadsheets (Slizikov/Skachko, sent 9 August 2016);

    ii) Payments of US$30,000 and US$500,000 noted as capital repayments in a later iteration of the same spreadsheet (Slizikov/Sagura, metadata October 2018);

    iii) "End of Service Entitlements": Mr Magdeev and Mr Ernest Magdeev each signed a document to be submitted to the UAE authorities which stated that they had been paid AED577,356 and AED125,137 (equivalent to US$153,961.60 and US$33,269.87) as end of service entitlements.

262. It was submitted (principally by Equix Dubai) that in relation to each of these "disputed" payments I should infer that these payments were made, and that they fell to be counted as repayments of principal.

263. In my judgment these sums have to be scrutinised individually, and the answer which emerges is not the same for all of them.

264. So as regards the US$500,000 and US$30,000 payments I am not satisfied on the balance of probabilities that such payments were made. The essential problem here is that (apart from the absence of any banking records demonstrating receipt, which would not weigh too heavily, given the absence of disclosure on this topic) the document relied on for them, was plainly in essence a later document – dating to after the proceedings were commenced. That document's provenance is not clear. They do not appear on any of the contemporaneous documents. So far as these payments were concerned indeed, Mr Tsvetkov did not rely on them – even in closing submissions.

265. The position is different for the sum of US$432,000 (Trombachev payment 3) which appears in the Slizikov/Skachko spreadsheet which was exchanged in August 2016. Here there are no such questions about whether the entry is contemporaneous, it is in a spreadsheet which Mr Slizikov, who was Mr Magdeev's details man, considered and exchanged without comment, and his answers as to its presence in

the spreadsheet were not helpful. I conclude that it was made as a payment of principal.

266. As regards the end of service entitlements, there was clear evidence from Mr Dovgan that the AED577,356 figure had not been paid at the time that Mr Magdeev signed the official "End of Service Entitlements" form which he lodged with the Dubai authorities which on its face stated that he had received this sum. His recollection was that Mr Gaynulin said that he would pay this sum. Of course, Mr Gaynulin was not before the Court, and Mr Magdeev has not made full disclosure of his financial records, so the evidence base for this was lacking. Given that (i) Mr Magdeev signed this document in apparent anticipation of being paid and (ii) Mr Dovgan's evidence was that he understood payment was to be made, either the *Wisneiwski* principle operates (because there is some evidence and it was possible for Mr Magdeev to produce evidence dealing with this) or the burden of disproving receipt shifts to Mr Magdeev. In either event the conclusion is that on the balance of probabilities on the material before me, this sum was paid.

267. The same conclusion follows in relation to the payment acknowledged by Mr Ernest Magdeev in the amount of AED125,137.

The Resignation Letter Issue

268. Mr Tsvetkov and Equix Dubai contend that Mr Magdeev entered into a contractual release in November 2016 by way of the First RM Resignation Letter. Mr Tsvetkov and Equix Dubai contend that the effect of the First RM Resignation Letter was to release Equix Dubai from its liability to repay US$10 million to Mr Magdeev under the First Agreement.

269. Mr Magdeev denies this contention. His position is that the resignation letter was only ever intended to relate to his rights under the RM Employment Agreement and was never intended to extend more widely. In particular, it was not intended to affect Mr Magdeev's right to the repayment of the US$10 million.

270. He says this was a simple case of a mistake - the First RM Resignation Letter was prepared by Mr Dovgan of Equix Dubai, who used a standard form document. Mr Magdeev (who, it will be recalled, speaks very little English) assumed that Mr Dovgan had prepared a resignation letter in appropriate terms and signed it. When Mr Slizikov had a chance to consider the First RM Resignation Letter, he saw that its terms were inappropriate, and he explained this to Mr Magdeev, who arranged for a cancellation email to be sent to Mr Dovgan, revoking the First RM Resignation Letter. Over the next few days, Mr Slizikov prepared an accurate version of the resignation letter, the Second RM Resignation Letter which he shared with Mr Dovgan, before Mr Magdeev signed it. That letter is drafted in terms which are

expressly limited to Mr Magdeev's rights under the RM Employment Agreement. Mr Dovgan then accepted the Second RM Resignation Letter and proceeded on the basis that it was the only legally effective version of that document.

271. The issue turns on the question of what Mr Magdeev told Mr Dovgan about the First Resignation Letter, and how it was used. In the end, while the argument for Mr Tsvetkov initially struck me as highly unattractive, it has on reflection seemed to me that the evidence points fairly clearly in the direction of a conclusion that this was a genuine waiver by Mr Magdeev; and further, that in the circumstances this is not surprising.

272. Although in this case documents provided to third parties have to be treated with some care, the documents do reveal that the essential terms of the First Resignation Letter were confirmed to the Dubai authorities by an "End of Service Entitlement" falsely dated July 2016 which on its face confirmed the receipt of the AED577,356 sum referred to above and recorded that Mr Magdeev had received his full entitlements under his employment contract. This document may deserve that some credence be given to it for two reasons. The first is that it was putting into the outside world a document which was against Mr Magdeev's interests if it was not true.

273. The second point is that it is consistent with Mr Dovgan's evidence. The question is whether Mr Magdeev told Mr Dovgan that the letter was not to be provided to the Dubai authorities but would operate as between Mr Magdeev and Equix Dubai or whether (as he contends) he said that it was to have no effect at all.

274. This was an area where the conclusion was effectively driven by the competing witness evidence. Mr Dovgan was by some measure the most impressive witness who appeared in this case. I accept his evidence. His written evidence was that the Second RM Resignation Letter "*was for official/external use for the DMCCA and all others to see, while the First Resignation Letter was for internal use between EK Diamonds and Mr Magdeev*".

275. His oral evidence was that Mr Magdeev told him: "*that this first version … shouldn't be uploaded to anywhere … And the second one is the for official use that I can upload and distribute, whatever, the requirements for the visa and employment resignation procedure … the message that I do remember was that the first letter shouldn't be used in any case, and I will have the .. additional letter edited by Mr Slizikov*". Although it was submitted that this marked a retreat from his written evidence, I conclude that in essence it dovetails with it. His evidence was emphatically not that the First Letter was an error and should be destroyed; it was that the First Letter was not for official use. Or as Mr Dovgan said later: "*the first resignation letter should be, like, hided*".

276. Thirdly however this narrative makes perfect sense against the events as I have found them above. A letter of waiver might be an eye-opening proposition at a time when the full US$10 million was outstanding. But as at November 2016 the position was as follows:

    i) Mr Magdeev had received very nearly all of the US$10 million based on the accepted payments (and all, if Trombachev Payment 3 is included), and was expected to receive a further AED577,356, which would take him to being (at worst) very nearly fully reimbursed;

    ii) Those payments had been received in a somewhat messy fashion and under labels which might lead (as they have done) to argument and confusion;

    iii) Mr Gaynulin was now effectively in charge of Equix Dubai with Mr Magdeev, and seems to have wanted to get the position clear. In this context the investigation as to Mr Tsvetkov's dealings, the Note for Emil, and the spreadsheets all have a significance.

277. Against this background the idea of Mr Gaynulin wanting a document which would draw a line under the question of Mr Magdeev's entitlements makes perfect sense; and the idea of Mr Magdeev consenting to such a waiver equally so, as he would lose nothing or next to nothing by it.

278. There is also the fact that there is a potential narrative which makes sense of the Second Resignation Letter. Mr Dovgan referred to Mr Magdeev having concerns about its impression on the Russian Tax Authorities. Looked at through this prism, the textual alternations made between the two versions of the letter are pertinent: the question of the employment contract, and Mr Magdeev's notional role under it are imported.

279. As for the use of the document – if it was indeed intended to be internal, it might be expected to be found on Equix Dubai's files (which it was not), but its location in Mr Dovgan's records makes perfect sense, since Mr Dovgan was at that point running Equix Dubai with Mr Gaynulin. The absence from Equix Dubai's files itself even makes a degree of sense given that it was important that it should not be used externally and keeping it off the files could ensure that.

280. I accordingly conclude that the First Resignation Letter was a genuine letter. To the extent that any sums remained unpaid in respect of the US$10 Million Loan, Mr Magdeev waived payment of them.

Conclusion on the Claim

281. It therefore follows from the decisions which I have made so far that:

i) Nearly all of the US$10 Million Loan was repaid to Mr Magdeev on the basis of the "accepted" payments;

ii) Once "disputed" payments are taken into account the full US$10 million was repaid; and

iii) If and to the limited extent it was not, Mr Magdeev waived payment of the remainder.

282. That being the case, there is no need to decide the remaining issues, and in particular:

i) Illegality;

ii) The Pear-Shaped Diamond Counterclaim;

iii) The Conspiracy Counterclaim.

The former would be relevant to any live obligation to repay. The latter are advanced as counterclaims to extinguish any live obligation to repay.

283. However, for completeness I will cover these issues below. Illegality, to which much attention was given, which was in essence Equix Dubai's main point, and which raises interesting legal issues, is covered in detail. The other points are dealt with much more briefly.

Illegality

The UAE law on the Employment Agreements

284. The starting point for the illegality argument is whether as a matter of fact there was any illegality.

285. To the extent that it is not common ground I have firmly concluded that the Investment Agreement involved the entry into of the RM Employment Agreement, and that a purpose of this structure was to secure a UAE visa for Mr Magdeev. As drafted indeed the Investment Agreement positively required this. Further I have concluded without any difficulty at all, that the RM Employment Agreement was not a real employment agreement. Essentially the original plan to have interest payable on the Investment Agreement was "dressed up" as an interest free investment, together with a payment of salary under the RM Employment Agreement.

286. Was this contrary to UAE Law? I heard expert evidence on this subject and on that evidence I have no difficulty in concluding that the RM Employment Agreement was indeed contrary to UAE law.

287. The relevant provisions of UAE law are Articles 216, 217 and 22 of the Penal Law. Those provide (as relevant) as follows:

> "Article 216. Forgery of a document is the alteration of truth in which the following outlined means resulting in a damage with intention to use it as a genuine document.
>
> The following are considered means of forgery:
>
> 1. ....
>
> 7. Alteration of truth in an instrument, upon its execution, in connection with what it was designed/intended to establish.
>
> Article 217. Forgery of an official written instrument shall be punished with imprisonment for a period not exceeding ten years, and forgery of a non-official instrument shall be punished with confinement.
>
> Article 218. An official instrument is that which a public officer has the competence to prepare or to interfere in its making or to grant it an official quality. Any other instrument shall be considered as non-official writing. ...
>
> Article 222. Whoever knowingly uses a forged instrument shall be punished by the penalty prescribed for the crime of forgery as the case may be."

288. As I have already noted, the expert evidence in this case was helpful. It included a good deal of common ground. So, the experts were agreed that:

    i) Article 216 sets out what constitutes forgery, Article 217 makes forgery an offence and Article 222 makes knowingly using a forged document an offence.

    ii) The three elements which must be established to make out the commission of the offence of forgery are that:

        a) The defendant must produce or alter a document by one of the means set out in Sub-articles 216(1) to (7). The relevant provision in this case is Article 216(7).

        b) The production or alteration of the document by that means must result in harm or damage.

c) The defendant must produce or alter the document in that way with the intention of using it as a genuine document.

iii) Where what is forged is an official instrument within the meaning of Article 218 harm or damage will be presumed because forgery of official instruments reduces confidence in such documents, which are relied on to prove their contents.

iv) Where what is forged is not an official instrument, damage must be proved but the requirement is simply that at the time the forgery took place it can be shown that there was the possibility of harm or damage resulting in the future.

v) Use of a forged document knowing it is forged is an offence under Article 222. It is not necessary to prove damage or the risk of damage arising from such use under Article 222.

289. There was some apparent disagreement in the reports as to the difference between a forgery and a sham and as to the question of harm, in particular as to whether harm to a third party could satisfy the element of damage.

290. Professor Al-Aidarous appeared to be approaching the question, both in his report and initially in cross-examination, on the basis that the answer to the question must be no because he could not imagine that there was harm to someone who created this document. However, in cross-examination this issue was satisfactorily resolved. Professor Al-Aidarous clearly agreed with the proposition that if two parties create a fictitious document with the intent to deceive a third party that document would be a forgery within the ambit of the Penal Code, and the creation of that document would be a crime.

291. So far as the expert evidence was concerned, there may therefore not have been any need to prefer the evidence of one expert over another. To the extent it was necessary to do so I preferred the evidence of Mr Bajamal. Not only was his expertise as regards the question in issue stronger, in that he had experience of UAE criminal practice, but he had deconstructed the legal provisions clearly and logically. My impression was that Professor Al-Aidarous had looked globally at a particular question (which as matters transpired was not the key question) and was then somewhat unwilling to “unpack” and test the strength of the links in the chain leading to that conclusion. When under pressure in cross-examination on one element of the argument he tended to leap back to the facts of this case, or to his overall view. However it is fair to say that when it was made clear to him that the court would be best assisted by answers on the law only without application to his understanding of the facts of the case, he gave that assistance frankly and fairly.

292. In the light of the evidence I conclude:

i) Article 216 of the UAE Penal Code creates an offence in relation to the forging of documents.

ii) Article 216(7) provides that there is a forgery if there an "*alteration of the truth in an instrument, upon its execution, in connection with what it was designed/intended to establish*".

iii) For there to be a forgery, it does not matter that both parties had knowledge of, or agreed to, such alteration.

293. The RM Employment Agreement involved the "*alteration of the truth in an instrument, upon its execution, in connection with what it was designed/intended to establish*". The fact that the "salary" payments under the RM Employment Agreement were not in fact "salary" payments (as is common ground) constitutes an alteration of the truth. So too does the fact that no employment relationship was in fact intended.

294. There was the possibility of harm or damage at least to a third party in the form of the UAE state. The document therefore constitutes the forgery of an ordinary document, which is a crime under Articles 216/217 of the UAE Penal Code.

295. In addition, the use made of the RM Employment Agreement (to secure a UAE visa for Mr Magdeev), was itself a crime under Article 222 of the UAE Penal Code.

296. There was a secondary argument, as to whether the RM Employment Agreement was also an "official instrument" within the meaning of that term in Article 218 of the UAE Penal Code, given that it was a standard form employment contract generated by the Dubai Multi Commodities Centre ("DMCC"), a public authority, through its employees acting through an online/portal. On this although I had some initial doubts, I was persuaded by Mr Bajamal's evidence that it was an official instrument within the meaning of Article 218 of the UAE Penal Code.

The relevant legal principles

297. The debate on illegality focussed on four authorities. The first of those is the well-known Court of Appeal decision of *Ralli Bros v Compania Naviera Sotay Aznar* [1920] 2 KB 287. It is authority for the proposition that the Court will not enforce a contract if the performance of that contract necessarily requires an act in a friendly foreign state which would be unlawful by the law of that state. The rule does not require the parties to intend the illegality or even to be aware of the fact that what they have bargained for will involve an act unlawful by the place of performance. It simply requires it to be established that their bargain necessarily involves such an act.

298. *Ralli* was a case concerning carriage of jute for delivery in Barcelona where freight was to be paid in Spanish currency to a Spanish company. The freight for delivery in Barcelona of a cargo of jute fell above the maximum price set by Spanish law. The receivers of the cargo declined to pay above that threshold and the Spanish owners sued in London for the balance. The Court (Lord Sterndale MR, Scrutton LJ and Warrington LJ) cited the passage in the then current edition of *Dicey* which said: "*A contract…is, in general, invalid in so far as…the performance of it is unlawful by the law of the country where the contract is to be performed*". The Court did not decide which freight the shipowner could have enforced – i.e. whether the obligation to pay the freight up to the limit was severable.

299. The basis for the decision, it is fair to say, has been somewhat controversial. In *Ryder Industries Limited v Chan Shui Woo* (2015) 18 HKCFAR 544, [2016] 1 HKC 323, [42]-[43] Lord Collins (the modern author of *Dicey*) endorsed the view that the decision turns on the doctrine of impossibility of performance in English law and that it is not actually a branch of the English law on illegality. I flag this point here because this is a point which becomes relevant at a later stage in the argument.

300. The second principle is known as the rule in *Foster v Driscoll* - a divided decision of a very distinguished Court of Appeal: [1929] 1 KB 470. This principle is in some ways the "flip side" of the *Ralli Bros* principle, in that while *Ralli* looks to action, *Foster v Driscoll* looks to intention.

301. The case concerned a cunning plan hatched by Sir Harry Foster, a knight, member of Parliament and financier, with two shipbrokers Messrs Driscoll and Miller, shipbrokers, Mr Lindsay, a distiller (aided by his agent Mr Berry), and Mr Attfield, a retired schoolmaster from Worthing. The syndicate's plan was to acquire a steamship and, load it with Scotch whisky, and sail it across the Atlantic for sale in Prohibition era United States or (failing that) at another point from where the whisky might be smuggled into the US. The syndicate entered into a contract to purchase equip the steamship "Wearhome"[2] , drew up two memoranda of agreement of which the primary one ("the primary memo") committed the parties to the proposed venture and set out arrangements for its financing and insurance. The plan having run into difficulties at an early stage, and the whisky never having left Scotland, various members of the syndicate commenced a total of three sets of proceedings against each other, which were heard together in the Commercial Court by the future Lord Wright. Mr Attfield pleaded that the primary memo

[2] Whose photograph can be found at https://www.shipsnostalgia.com/gallery/showphoto.php/photo/363584/title/havhestur/cat/500

was illegal and void and contrary to public policy to the knowledge of all the parties. The Judge was able to dispose of the case on the basis of arguments which logically preceded the question of illegality, but the issue came to the fore on appeal.

302. The Court of Appeal split, with Sankey LJ (the future Lord Chancellor) and Lawrence LJ holding that the contract was unenforceable for illegality, whereas Scrutton LJ held that it was not. However, that dissent was substantially on the facts. He considered that "*the main contract [was] for the sale of whisky in the British Isles between British subjects for a price to be paid by bills in England [which] by itself [was] legal"*. He thus concluded that:

> "While I should like to arrive at the same result, I think that on legal principles, as the adventure could be carried out lawfully or unlawfully, and the parties have not agreed how to carry it out, the Courts can deal with the legal results as if it were carried out lawfully."

303. In a later passage he put it this way:

> "The adventure, it appears to me, could be carried out in a legal way and could be carried out in an illegal way, and the adventurers had not bound themselves to either way. In my opinion the law is correctly stated by the late Mr. Dicey in his work on the *Conflict of Laws*, 4th ed. (1927), p. 620: 'It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country'"

304. The principle as today relied on was set out by Sankey LJ at 521:

> "An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally".

305. The emphasis on the intention of the parties and the characterisation of the venture is seen in the following extracts, to which I was referred in the course of argument:

i) Lawrence LJ: "*the documents in respect of which relief is sought were documents drawn up for the purpose of dressing up in a legal garb such of the terms of an illegal joint adventure as the parties deemed it prudent to record in writing*". He also noted that while in theory the contract could have been performed legally, the real object of the parties (to get the enormous profit from selling in the US) could only be obtained by a performance which involved illegality.

ii) Lawrence LJ:

> " I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; .... The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality…. am of opinion that, in view of the main object of the Contract of Partnership between the parties in the present case, it is not saved from illegality merely because the partners may have contemplated the event of not being able themselves to import the whisky into the United States, and may have considered the possibility of having to deliver the whisky to the illicit buyers on the high seas or at such other convenient place as might be arranged between themselves and their buyer consistently with their being able to obtain the high price ruling on the illicit market in which they intended to sell the whisky."

iii) Sankey LJ:

> "I have come to a conclusion on the evidence that all the parties concerned were actively engaged in an enterprise to import whisky into the United States of America. It is not a case where one or other of them merely knew that the whisky was going to the States; they were all working to get it there."

iv) Sankey LJ:

> " Here the adventure was for the express purpose of violating the law of the United States of America. I cannot think that where parties intend to deliver in America, if possible, and take all steps to enable them to do so, that the contract is rendered less obnoxious because they have provided that in a certain event, which by the way has not happened, they will sell the cargo to persons in Canada who may be able to do what they themselves cannot effectuate."

306. This principle therefore does not require it to be shown that the performance of the contract between the parties will necessarily involve an act in a friendly foreign state unlawful by the law of that state. It is sufficient that the real object and intention of the parties is that such an illegal act should be undertaken, even if the contract can be performed in a different and entirely lawful manner.

307. The *Foster v Driscoll* and *Ralli Bros* principles differ in this way: the latter is concerned only with whether the contract between the parties necessarily involves performance of an act which is illegal by the law of the place of performance, irrespective of the object and intention of the parties; the former is only concerned with whether the object and intention of the parties is to perform their agreement in a manner which involves an illegal act in the place of performance, and is not concerned with whether the contract necessitates the undertaking of such an act. As Robert Goff J concluded in *Toprak Mahsulleri v Finigrain* [1979] Lloyd's Rep. 98 at 107, "*… these principles are distinct, though related in the sense that they spring from the principle of comity…".* One might indeed say that they are complementary aspects of comity as it applies to foreign illegality.

308. This common basis of international comity takes one to the House of Lords decision of *Regazzoni v KC Sethia* [1958] AC 301, in which both principles were considered and approved.

309. This was another jute case. In this one the illegality involved the jute itself. The parties had respectively agreed to sell and deliver to the appellant jute bags, both contemplating that they should be shipped from India to Genoa for resale in South Africa. The parties were also aware that the export of jute from India to South Africa was prohibited by Indian law. The seller having repudiated the contract, the buyer sued. Sellers J in the Commercial Court held that the contract was unenforceable. That view was upheld by the House of Lords.

310. Viscount Simonds saw the case as being a simple application of the *Ralli Bros* principle. He said at 318 - 319:

> "It is … nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damage for the breach of, a contract which involves the violation of foreign law on foreign soil.…Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state, and it will do so because public policy demands that deference to international comity."

311. Lord Keith, though apparently seeing more of an analogy with *Foster v Driscoll*, said at 327:

> "… to recognise the contract between the appellant and the respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognize."

312. Lord Reid, apparently applying both principles, added at 323 that:

> "The real question is one of public policy in English law: but in considering this question we must have in mind the background of international law and international relationships often referred to as the comity of nations. This is not a case of a contract being made in good faith but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held to be unenforceable, it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it."

313. Lord Somervell and Lord Cohen did not analyse the authorities or provide any consideration of the comity aspects.

314. The final case for consideration is the *Ryder* case referred to above. That was a case where there was a contract in connection with the manufacture of mobile phones governed by Hong Kong law. It was performed in such a way as to infringe a Chinese regulatory provision on the outsourcing of bonded materials; in essence goods imported duty free were used by a company which had not imported them. There was a wide range of potential penalties for this infraction, depending on the seriousness of the breach. Neither party intended

to commit an illegal or unlawful act, and the act which was performed was not even a necessary part of performing the contract.

315. During the course of the judgment Lord Collins said this:

> "[56] It has been suggested (obiter) that a contract which is valid by the governing law of the forum, English law, or in this case, Hong Kong law, may be refused enforcement if it has been 'performed in such a way that one party (or both parties) commits a legal wrong': *Barros Mattos Jnr v MacDaniels Ltd* [2004] EWHC 1188, [2005] 1 WLR 247, [30] (Laddie J). But, …, this obiter suggestion states the principle much too widely.
>
> [57] There may nevertheless be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state or separate law district may be such that it would be contrary to public policy to enforce a contract. But there is no basis in authority or principle for holding that every breach of foreign law would come into this category."

316. On this basis he concluded that there was no basis for refusing enforcement: there was no necessary illegality involved, and no intention to breach the law. The contravention was not serious, being mere "*administrative contraventions*". He concluded that to reach the opposite result would be "*contrary to commonsense and justice*".

317. I note that this authority is not, of course, binding on me. However given what one might regard as the personal authority of Lord Collins on such a subject it was not suggested that I should do anything other than to regard this passage as reflecting the law in this country; and had it been so suggested, I would in any event have concurred with his reasoning. It appears to reflect perfectly the line to be discerned in the authorities.

318. I should also add that in the course of the judgment Lord Collins drew a line between domestic illegality principles and foreign illegality principles – a point which has a resonance for one of the arguments which emerged. In particular Lord Collins stated at [55]:

> "No principle can be derived from [*Servier*] (or the *Lilly Icos* case) which is relevant to the present case, or which suggests that purely domestic rules of illegality can be applied to the consequences of the illegal performance of a contract in a foreign country."

319. I should also make some reference to *Patel v Mirza* [2017] AC 467 because it has become relevant as the submissions have developed. The first passage which is useful to cite is the following passage from Lord Toulson's judgment at [99] relating to the underlying policy in this area:

> "there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

320. The second concerns the test discerned by the court; at [101] Lord Toulson addressed the question thus:

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy."

The rival cases

321. Although the case was opened high by both sides, it was by the time of closing effectively common ground that the present case does not fall four squarely within the ambit of any of the existing authorities. During the course of argument Mr Adkin QC for Equix Diamonds admirably summarised the issues which present themselves in this case; which relate to, but remain undecided by these authorities.

322. The first, arising out of *Ralli Bros* is: does the existence in a contract of a term which can only be performed in a manner which is unlawful in the place of performance render unenforceable a different obligation, the fulfilment of which would not necessarily be unlawful in the place of performance?

323. The second is: how is the principle in *Foster v Driscoll* to be applied where the parties have more than one object and intention in reaching their arrangement, one of which objects necessitates the performance of an act unlawful by the place of performance and one of which does not?

324. Equix Diamonds (supported by Mr Tsvetkov) argued that the case effectively fell the wrong side of both lines and that both the *Ralli Bros* and *Foster v Driscoll* principles are engaged in the present case.

325. So far as *Ralli Bros* is concerned, the essence of the case was that the true agreement between the parties necessitated the creation of the fictitious employment contract and its use to obtain a UAE visa, and that both of these aspects had to take place in the UAE, where they were illegal. Further it was contended that no severance of the afflicted provisions was either possible or permissible.

326. In addition Equix Diamonds submits that the *Foster v Driscoll* principle is also engaged because the object and intention of the parties in entering into their arrangement was that such illegal acts, which were inseparably bound up with the accomplishment of the illegal objective, should take place in the UAE: "*because, without the loan, there would have been no interest, without the interest there could have been no fictitious salary payments, and without the fictitious salary payments there could have been no effective deception of the UAE authorities*".

327. For Mr Magdeev it was argued that even if the employment contracts were illegal as a matter of UAE law, that should not mean that the principles in *Ralli Bros* or *Foster v Driscoll* were engaged. On the former it was contended that the principle was inapplicable where what was being sought to be performed was not the employment contract (performed and terminated) but a separate loan agreement. On the latter reliance was placed on a related point – that the main purpose or intention was the loan – which was not illegal. The use of the employment contract was incidental – an "optional extra" and not, in the words used in *Foster v Driscoll* "the whole adventure". In essence, it was submitted, that were I to find this adventure illegal I would be falling into the error identified in *Ryder*. It was submitted in addition that the *Ryder* approach is essentially the same as that multifactorial approach adopted in *Patel v Mirza* and that I should therefore effectively adopt that approach as being the latest and most authoritative guidance. In essence it was said that public policy now demands a unified approach whether the illegality is domestic or foreign, and that that is exhibited both by what Lord Collins said in *Ryder* and what Lord Toulson said in *Patel v Mirza*.

Discussion

328. One point to note at the outset is that this issue is capable of arising against more than one background. It might arise if I had found (as I have not) that Mr Magdeev retained an entitlement to interest, or that there had been no repayments. It also could arise however on the basis that I have found that the original agreement between the parties was later varied such that the entitlement to interest disappeared, and that there had been numerous repayments of principal (though not, as I have found, full repayment). In the former case it would go to the whole claim; in the latter, to a smaller sum. For present purposes I shall consider the argument as it would have been in its most acute form – i.e. if I had accepted Mr Magdeev's submissions thus far.

329. For much of this argument I find myself in sympathy with the contentions advanced skilfully by Mr Robins for Mr Magdeev. To the extent that the submission for Equix Dubai was that the Employment Agreement was central to the adventure I would reject that submission firmly. This was not a relationship about an employment contract; the employment contract was used essentially synergistically – it was a pleasant add-on or fringe benefit. While structuring the parties' real deal, for the loan, it was possible also to give Mr Magdeev something which he valued, namely the visa. The essence of the agreement was the loan. The employment relationship facilitates an additional benefit.

330. The greater concern is, as I pointed out in argument, produced by the passage at [57] of *Ryder*. While this case may not fall squarely within either *Ralli Bros* or *Foster v Driscoll* is it that side of the line because what is in issue is a "*sufficiently serious"* breach of UAE law which reflects "*important policies of the foreign state*"?

331. On this I cannot follow Mr Robins along the line to *Patel v Mirza*. On this it seemed to me that Mr Adkin was right to say that the approach advocated for Mr Magdeev involved conflating two different iterations of public policy. The public policy underpinning the law relating to domestic illegality is as noted above: *ex turpi causa* and consistency. But that underpinning both *Ralli* and *Foster v Driscoll* is international comity.

332. Having said that I do not consider that this involves (as Mr Robins suggested) a perverse dichotomy with a flexible rule in one context and a rigid and inflexible rule in another. *Patel v Mirza* does provide a guide in this sense. Surely it is right in both cases that a balancing exercise has to be performed, though the elements in the balancing exercise will at least in part be different because the public policy which underpins the question in the foreign illegality cases is different to that which affects *Patel v Mirza* type cases. One does not go to the questions at which Lord Toulson arrived via a consideration of the caselaw and academic thinking on domestic illegality. One does not specifically invoke proportionality, because that assumes an

understanding of the questions of weight and gravity which may not be available in respect of a foreign court's or foreign judicature's priorities. But where the clear answer is not given by either of the main principles, one balances the relevant factors discernible from the case law in the light of the underpinning principle. It is thus that one gets to the factors which Lord Collins set out in *Ryder*. These are the kind of factors which are relevant to the particular public policy.

333. Thus I come back to the questions posed in this case:

    i) Does the existence in a contract of a term which can only be performed in a manner which is unlawful in the place of performance render unenforceable a different obligation, the fulfilment of which would not necessarily be unlawful in the place of performance?

    ii) How is the principle in *Foster v Driscoll* to be applied where the parties have more than one object and intention in reaching their arrangement, one of which objects necessitates the performance of an act unlawful by the place of performance and one of which does not?

334. The approach which seems to me correct in answering these two entwined questions is the approach adopted by Lord Collins in the latter paragraphs of *Ryder*. Considering the questions he poses there, the question of whether performance of the contract in accordance with its terms was prohibited by UAE law is debatable, depending on whether one characterises the contract as the loan, or the employment agreement or a more elaborate arrangement including the employment agreement. Both agreements in this context have to be given due weight; and based on an overall view of the two agreements I would tend to characterise it as partaking far more of the nature of a loan (its real or dominant nature) than an employment agreement (the sham originally designed to cover the interest element, with fringe benefits). The performance of the dominant part of the contract did not involve illegality; it was only the structure employed to add a synergy which led to this result.

335. Turning then to intention, there was of course an intention by the parties to do something which was in fact contrary to UAE law. But this is a case where there is no evidence that they actually knew it to be so; to that extent the situation is far closer to *Ryder* than to *Foster v Driscoll*. At the same time, the inference that this must have been to some extent appreciated is more or less irresistible. Submitting false documents to state authorities is unlikely to be legal anywhere. Visa rules exist for a purpose and if there were a legitimate way of getting a visa, this could have been done instead. Indeed, Professor Al-Aidarous described one method via partnership in a company or setting up a company: *"you don't need to commit a crime to secure a visa in UAE"*. It follows that Mr Magdeev must, at least on some

level, have understood that this was not a legitimate approach, whether he consciously engaged with this reality or not.

336. As to seriousness, there is some difficulty. On the one hand I have clear evidence as to the sanctions applicable to forgery: it is an offence which can result in imprisonment for up to ten years. The offence relating to official documents has a slightly greater tariff. That speaks on its face of a degree of seriousness. So it is not possible to say here, as it was in *Ryder,* that these were mere administrative contraventions.

337. There is then the related question of "iniquity". Here, although I understand the points made for Mr Magdeev, I would be minded to conclude that there was a degree of iniquity. Visa fraud is a serious matter; it need not be a situation where the granting of the visa deprives another person of it. It is a crime which has the capacity to affect not just the economy of a state but also its national security.

338. On the other I have no evidence about how serious or iniquitous that makes the conduct so far as UAE law is concerned – where on the scale of seriousness it ranks. I have the sentencing range; but it would be a false analogy to compare the sentencing equivalents in this jurisdiction, because UAE law may operate on a different scale of seriousness. I have no evidence which enables me to decode this. As in *Ryder,* there has apparently been no prosecution or enforcement proceedings by the UAE authorities.

339. Further I do accept that not only is there some anecdotal evidence that breach is common – by reference to the replacement RM Employment Agreement, the EM Employment Agreement and Mr Tsvetkov's own "employment" by Mr Dovgan. But also there was a suggestion in Professor Al Aidarous' evidence, which was not challenged, that the UAE authorities might not take this kind of breach too seriously. In one passage of his evidence he contrasted the position of Mr Magdeev, who was in a position to invest US$40 million, with a rather different situation:

> "...in UAE, as you know, this is attracting a lot of expatriate employees from different parts of the world, okay, and there is a restriction under the immigration law or labour law, people from -- trading in -- somebody creating fictitious companies to hire people and they are getting money for them and issuing them fictitious contracts, then this is definitely falling under the certain sanction imposed immigration law."

340. This suggested that a less serious view might be taken of such a device used by an affluent investor, to what would pertain as regards someone who was not in a position to make meaningful investment

as a counterbalance to what was gained by the visa. Certainly, there is no evidence that there has been an investigation or prosecution in relation to this breach.

341. All of which considerations go to illustrate that the answer is by no means as clear cut as it was in *Ryder*. This is not a case where one can say with the same robustness as Lord Collins that refusing enforcement would be contrary to common sense. However in the overall balance in the light of the requirements of comity, the fact of the intent to deceive in the context of what is plainly some way more than an administrative default is outweighed by the fact that this was a small incident of a perfectly legitimate transaction and with no apparent intent to break the UAE's laws, which has attracted no sanction from the UAE authorities. That balance indicates that it would be contrary to justice to refuse enforcement in this case – even on the basis of the contract as originally envisaged, and not as it was later amended to be. If one looks at it from the latter perspective, the position is *a fortiori*.

The Mitsubishi Variation

342. This does not quite bring the arguments in this area to a close, because Mr Tsvetkov, while adopting the submissions of Equix Dubai, also offered his own variation on the theme: the *Mitsubishi* Variation. While in the light of my conclusion on the earlier issues this does not arise, it is worth considering because of the comparison which flows from this variation, and which has intent to deceive at its heart.

343. The submission was that this was an example of a contract which was drafted or structured to deceive the UAE government and that where deception of third parties is planned via a contract governed by English Law, including where deception is planned to or does take place abroad and is deception of a foreign government, the Court will not enforce that agreement. Reliance was placed in particular on the judgment of Steyn J in *Mitsubishi v Alafouzos* [1988] 1 Lloyd's Rep 191. That was a case where there was a shipbuilding contract for US$4 billion but there was a side agreement by which the price was reduced in order to effect a deception on the Japanese authorities and obtain export permits. At pages 194-195 the judge said this:

> "… in an age in which commercial fraud is increasing, it seems imperative that the Court should refuse to allow a party to rely on a contract which was drafted or structured to deceive third parties. And the fact that what is alleged to have happened in this case is by no means unknown in the shipbuilding trade makes the stringent application of that public policy in this area a matter of the first importance …".

344. The key point here was that neither agreement was unlawful – the agreement as concluded or the true agreement for a shipbuilding contract at the lower price. But the Court would not enforce either because of the structuring to deceive the third parties.

345. Also cited was *Alexander v Rayson* [1936] 1 KB 169. The position here was said to be analogous to that case, where there was an agreement for a lease and services at £1,200 pa, which was lawful. However, having deliberately split the consideration into £750 for the lease and a wholly unrealistic £450 for almost non-existent services, for the purposes of lowering the rateable value of the flat, it was a held that neither agreement was enforceable. It is perhaps worthy of note that the plan was described in the judgment as an attempt "*to perpetrate a gross fraud upon the rating authorities and through them upon the Inland Revenue*".

346. In that case it was said that:

> "It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy."

347. It was submitted that there was little to choose between the present case and *Alexander v Rayson* in that it could equally well be said here:

> "the documents themselves were dangerous in the sense that they could be and were intended to be used for a fraudulent purpose, without alteration, and the splitting of the transaction into the two documents was an overt step in carrying out the fraud. We cannot think that the plaintiff is entitled to bring these documents into a court of justice and ask the Court to assist him in carrying them into effect."

348. While I debated with Mr Berry QC in closing whether there was a distinction, in that both of these cases effectively involved falsifying amounts which might be relevant to a government department's consideration, whereas in this case there was no such quantum issue, the reality is that there is in this case a less obvious but real quantum issue – the amount of salary, which is pertinent to the decision to grant a visa for an employee, is false, because the payment does not reflect salary but something else.

349. Mr Robins suggested that I should not regard this line of authority as good law, relying on a reference in *Patel v Mirza* to the case as "*the high watermark*". He also directed my attention to the case of *21st Century Logistic Solutions v Madysen* [2004] EWHC 231, [2004] 2 Lloyd's Rep. 92, a decision of Field J, who said:

> "I agree with Professor [Furmston] that there must come a point when the connection with the plaintiffs' intention to the contract is too remote for the contract to be held unenforceable. In other words, not every contract entered into with the intention of committing an illegal act is illegal and unenforceable. I think Lord Justice Simon Brown may well have had this proposition in mind when he said in *Skilton v Sullivan*: '*Had the plaintiff, however, even at the time when the contract was made, merely harboured an intention not thereafter to account for VAT on the supply, then, whether that intention was achieved by submitting false invoices such as were here submitted or indeed by concealing entirely the making of the supply, I am not myself satisfied that such an intent alone would involve the performance of this contract in an unlawful manner.*'"

350. I do not consider this point to be well founded. I consider that *Alexander v Rayson* remains good law. The reference to it in *Patel v Mirza* does not impugn the reasoning as regards unenforceability. The reference to it as "*the high watermark*" refers to it in the line of cases dealing with restitution where there has been voluntary withdrawal. That, of course, is a rather different point and not pertinent in this context. Nor does *21st Century* show that (as Mr Robins attempted to persuade me) "*the tide has fully retreated*". What *21st Century* does is to formulate in a slightly different way a balancing exercise akin to that adopted by Lord Collins in the foreign illegality cases, and akin to that now seen in *Patel v Mirza*.

351. At the same time I do not consider the cases relied on on behalf of Mr Tsvetkov to be truly on point, despite Mr Berry QC's persuasive argument. *Alexander v Rayson* was a case where the *raison d'etre* of the structure was to deceive the authorities. So too was *Mitsubishi v Alafouzos*. Deceit was at their heart – as the dictum from *Alexander v Rayson* cited above makes clear. Both did involve at least a more direct deceit as regards a financial aspect which was the business of the relevant authority. In iniquity terms both are much closer to *Foster v Driscoll,* where the plan had its origins in an attempt to evade Prohibition (albeit that there may have been a legitimate Plan B).

352. In the present case the focus is very much on maximising benefit to the parties, with no positive intent to deceive that has emerged in the evidence. (There is perhaps an analogy with the intent element in conspiracy where one moves from dominant intent in lawful means conspiracy, to not dominant but definite intent in unlawful means conspiracy, via the "obverse side of the coin" constructive intent, with it being quite possible for someone to do an action which will probably result in harm without necessarily intending it to the degree necessary to complete the tort).

353. What we see in both *Patel v Mirza* and *Ryder* is in effect a sliding scale. That is backed up in this context by the approach in *21st Century*. I conclude that this line of authority does not force a different conclusion to the one reached above, but harmonises with the result reached via the foreign illegality authorities. Even looking at the agreement as originally concluded the intent and the illegal action is sufficiently far from the centre of gravity of the transaction to make it inappropriate to refuse enforcement. That is the more so when one looks at the agreement as varied by the Oral Agreements, and some time after the objectionable employment agreement was terminated.

Severance

354. One further point which should be dealt with is the submission by Mr Magdeev that if illegality were otherwise a problem for him, the part of the arrangement which involved the entry into the RM Employment Agreement and the payment of a fictitious “salary” under it can be severed from the remainder of the agreement between the parties, so that the obligation to repay the US$10 Million Loan can be enforced.

355. On the basis of the decision I have made above this does not arise. Had it done so I should have been slow to accede to it. If the conclusion were that the seriousness of the conduct which was part of the overall scheme did pass the hurdle for being unenforceable for illegality it is difficult to understand how the doctrine of severance can have any role to play. If one views the case as a manifestation of the rule in *Foster v Driscoll*, that rule is not concerned about the terms of the relevant contract at all. Rather, the rule is concerned with the object and intention of the parties to the arrangement, and what matters is that the parties have entered into their arrangement with the object and intention that an act be undertaken which is illegal in the place in which it is to be performed. Having reached the conclusion that the overall evaluation of the transaction offends against comity because of the malign intent, the severability of a contract term cannot alter that object and intention.

356. Similarly, if one characterises the issue as one arising under the rule in *Ralli Bros*. *Ex hypothesi* if we are here, the conclusion has been reached that the entry into the RM Employment Agreement was a

fundamental part of the agreement reached between the parties. A severed contract would be a fundamentally different transaction from the one envisaged by the parties which would remove a main part of the consideration passing to one of the parties under the agreement.

357. Or to put it another way, if the transaction would offend against either rule, to sever the offensive part would itself offend against international comity, the *raison d'etre* of both rules. Thus, in *Regazzoni v KC Sethia* Viscount Simonds said:

> "It is … nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damage for the breach of, a contract which involves the violation of foreign law on foreign soil.…Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state, and it will do so because public policy demands that deference to international comity."

358. Where the deceptive drafting or structure involves splitting the contact into two parts and documents with deceptive intent, no part of the contract is enforceable, and severance is impossible. Thus, in *Alexander v Rayson* both the lease and the services agreement were unenforceable and in *Mitsubishi v Alafouzos* the shipbuilding contract (without the side letter) would have been unenforceable.

359. One might however note that the natural tendency in this case to ask the question about severance goes to reinforce the conclusion to which I have come; the fact that the illegality was not at the heart of this arrangement and the intent to deceive was in a sense incidental both suggests that severance should be possible, and justifies why it is not necessary.

Restitution

360. In his Amended Reply to Defence to Counterclaim, Mr Magdeev stated that even if the Investment Agreement is unenforceable under the doctrine of illegality he was, in any event, entitled to repayment of the $10 Million Loan on a restitutionary basis.

361. Objection was taken to this on the basis that this is an independent cause of action in restitution which ought to have appeared in Mr Magdeev's Counterclaim. No such permission was ever sought, and the submissions advanced at trial did not take this point further.

362. The decision not to attempt to advance the claim in restitution appears to have been a wise one. Such a claim would have faced insuperable difficulties for two reasons. First the Investment Agreement and the arrangement underlying it have been partly

performed and there has been no total failure of basis, without which there could be no valid unjust enrichment claim.

363. Secondly, any restitution of the US$10 million to Mr Magdeev would also require him to give, as a pre-condition, counter-restitution, which in this case would have the effect of requiring him to give Equix Dubai credit for all the sums paid to him or for his benefit. The argument would therefore be circular.

The Pear-Shaped Diamond Counterclaim

364. This arises out of certain transactions in August 2015. It is common ground that:

    i) Mr Magdeev loaned Mr Tsvetkov €5 million and he and his wife then each paid Equix Cyprus €2.5 million on 25 August 2015;

    ii) Mr Magdeev and Mr Ernest Magdeev each paid €2.5 million to Equix on 25 August 2015.

365. The issue relates to whether Mr Magdeev knew that the payment was intended to cover the purchase of the Pear Shaped Diamond from Graff on that date for US$13.2 million, whether the agreement included an implied term that Mr Magdeev would not do anything to impede the sale of the Pear Shaped Diamond by Equix Dubai and whether by procuring a charge over it, or taking possession of it in July 2017 he breached that term.

366. Mr Magdeev gave evidence that he knew nothing about the Pear-Shaped Diamond until well after it had been purchased, and that he would not have agreed to fund its purchase, as it was too illiquid. He suggested that this was borne out by the documents:

> "you could see that in our correspondence and in Tsvetkov letters, that Magdeev's money has to be used to purchase inexpensive stock that has high turnover. That was enshrined in the documents and in the letters. And Gaynulin's investments, Emil Gaynulin's investments will be used for expensive items that have some investment nature that might be bought by wealthy people and maybe to store it, not even to wear it, that type of jewellery, and that was enshrined in our correspondence and documents."

367. There was however no such verification to be gleaned from the documents – though it is fair to say that nor was there support in the documents for Mr Tsvetkov's case. In the end this was very much a case of a dog which did not bark: there was no evidence that there

was a discovery of the purchase in 2016 which was an unpleasant surprise. Overall, while his own evidence on this transaction was certainly not entirely satisfactory not least in his absence of explanation for the black hole in the documents on this subject, I preferred Mr Tsvetkov's account that Mr Magdeev did know about the proposed purchase. Apart from anything else the timeline of the documentation fitted best with this; and there was no other good reason apparent why the money should be injected at this stage if it were not for this purchase.

368. However that forms only part of the claim advanced by Mr Tsvetkov. He asserts that the agreement is subject to the following implied term: "*Mr Magdeev would not do anything to … prevent or obstruct the sale of the Diamond by [Equix Cyprus]*".

369. Mr Tsvetkov accepts that a term may only be implied if the general test set out in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 is met, but says that the test is satisfied because the August 2015 Agreement would otherwise lack commercial or practical coherence. Mr Tsvetkov asserts that because of Mr Magdeev's breach of the Alleged Term, Mr Tsvetkov lost the chance of earning 50% of the profit on the transaction, being approximately €2.1 million.

370. There is no need to cite the multiplicity of authorities which state and restate the need for caution in such a context. It is however helpful to cite the recent decision of the Court of Appeal in *The Law Debenture Trust Corporation plc v Ukraine* [2019] QB 1121 which deals specifically with implication of a term prohibiting prevention of performance:

> "Although in various different contexts the courts have been willing to imply into a contract a term prohibiting one party from 'preventing' the performance of another (see e g *Mackay v Dick* (1881) 6 App Cas 251), …there is no general rule that such a term will be implied. Where there is some agreed precondition for performance that a party to a contract needs the other party's assistance to satisfy, an implied duty not to prevent performance of the condition by failing to provide assistance might follow… But there is no general rule. The implication of such a term, and, perhaps more importantly, its scope, will depend on the contract under consideration, and in particular its express terms. As Cooke J stated in *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17]: 'It is self-evident that any implied term of co-operation or prevention from performance can only be given shape in the light of

> the express terms which set out the obligations of the parties... A duty to co-operate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself.' We agree with this statement...".

371. In the light of this authority Mr Tsvetkov needs to go further than establishing that the loan was for the purpose of buying the diamond; he needs to show that the loan was to be repaid specifically from its resale (rather than from general sales). In this connection the August 2015 Agreement was not helpful to him, as it on its face required repayment in two instalments in October 2015 and February 2016. Then Mr Tsvetkov's evidence both as to how the diamond was to be sold and as to how profit was to be split and how that interacted with the redemption of preference shares was unclear to the point of confusion.

372. In the circumstances had it been necessary to decide this point I would have concluded that the criteria for the implication of a term were not met in this case. There is also considerable doubt over the question of breach, given the *prima facie* obligation to repay by February 2016 and the fact that the alleged acts or prevention considerably post-date this time.

The Conspiracy Counterclaim

373. This issue, though factually complex, can be dealt with very briefly. Conspiracy although often pleaded remains a very serious tort. The constituent parts of it must be carefully evaluated to assess whether each one is established.

374. Those constituent parts are:

> "(1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of

> the unlawful means must cause a claimant to suffer loss or damage as a result."
>
> *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] EWHC 774 (Ch), Annex I, [2] per Morgan J.

375. Or to put it another way: conspiracy occurs where "*two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage"*. *Clerk and Lindsell on Tort*, paragraph 24-98.

376. At the heart of the plea of conspiracy is a meeting of 10 July 2017. It was pleaded that at that meeting Mr Magdeev and Mr Gaynulin agreed to act in concert together to harm Mr Tsvetkov using unlawful means. The means relied upon were: "*(1) removing stock from the possession of* [Equix Cyprus]*; (2) procuring charges over* [Equix Cyprus'] *stock; (3) running down the Graff Business; and (4) withdrawing funds from* [Equix Dubai's] *bank accounts*".

377. There is however a significant problem with this plea in that much of what is alleged has its roots in events well before the combination is said to have occurred. Thus:

    i) the "*procuring [of] charges over [ELG's] stock*" was agreed in the Shareholders' Resolution on 26 June 2017 of which first drafts were circulated on 7 June 2016;

    ii) the "*removing [of] stock from the possession of [ELG]*" by Mr Magdeev occurred pursuant to the charge in his favour, which was agreed in the Shareholders' Resolution on 26 June 2017;

    iii) the "*running down the Graff Business*" is said to have involved the closure of Equix Cyprus' boutique in Limassol, which Mr Tsvetkov says occurred in April 2017; and

    iv) the "*withdrawing [of] funds from [Equix] Diamonds' bank accounts*" is said to have taken place at the end of May 2017: Mr Tsvetkov alleged that "*Mr Gaynulin was in effective control of the bank account of EK Diamonds*" and that *"[at] the end of May 2017 he … procured the withdrawal of US$4.5 million, which represented almost all the funds then in EK Diamonds' account, leaving EK Diamonds with only a token balance*". In addition this did not find any support in the evidence.

378. Further the evidence of the meeting itself did not suggest any such combination.

379. In tacit recognition of this Mr Tsvetkov's closing submissions shifted ground – it was alleged that the conspiracy had been reached "*by 10 July 2017*". Although Ms Dilnot handled this difficult issue with considerable deftness, recasting it as a question of preparatory steps,

against a background of some disharmony between Mr Magdeev and Mr Gaynulin, leading up to a button being pushed on 10 July 2017, the requisite combination did not emerge with sufficient clarity even for a civil burden of proof. Scrutinising the evidence, it really amounted to a list of the steps which had occurred since it was alleged that Mr Magdeev and Mr Gaynulin had decided in April 2017 to sue Mr Tsvetkov.

380. Further closer scrutiny of the evidence suggested that at the critical date (and in the lead up to it) Mr Magdeev and Mr Gaynulin were, far from being united in turning their forces on Mr Tsvetkov, preoccupied with the disharmony between them, with the question of sacking Harris Kyriakides still live and the agreements reached being focussed on their own individual agendas.

381. Unlawful means also presents a potential problem, though I would incline to the view that this hurdle was capable of being met. Mr Tsvetkov's primary case hinges upon Mr Magdeev and Mr Gaynulin being shadow directors of Equix Dubai, as a springboard for a case of breach of fiduciary duty to Equix Dubai. There remains an issue, with which I will not grapple in any detail here, about whether breach of fiduciary duty can constitute unlawful means for the purposes of the conspiracy tort. The point has been specifically left open by the Supreme Court, but in the meanwhile other authorities such as *Fiona Trust* assume it can. It was contended for Mr Magdeev that *Wagner v Gill* [2014] NZCA 336; [2015] 3 NZLR 157 suggests that it cannot. However, I was persuaded by Ms Dilnot's submissions on this case that the authority is one which turns on its facts. Had I been otherwise in favour of the argument on conspiracy I would not have been held back by this point.

382. More straightforward is the argument that the use of false agreements can itself constitute unlawful means. This was something which Andrew Smith J accepted in *Fiona Trust* could constitute unlawful means. Here what is relied on are the backdated agreements made in August 2016 which were then used as the basis for the consolidated loan agreements, which themselves underpinned the fixed charges and also the payment made in respect of the Pear-Shaped Diamond which was also relied on in this context.

383. Then there is the question of intent. The question of intent in particular requires careful consideration. As Lord Nicholls said in *OBG v Allan* [2008] 1 AC 1:

> “166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's

> conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct."

384. The evidence on intent to harm Mr Tsvetkov was lacking. The starting point is intent to harm Equix Cyprus, because it was through harm to this company that harm to Mr Tsvetkov had to be traced. However the evidence did not suffice.

385. To start with the negative evidence, there was certainly something which appeared dubious at best about the use of false documents to effectively strip assets out of Equix Cyprus. I accept the submission that the circumstances do seem to go beyond using legitimate means to pursue Mr Magdeev's and Mr Gaynulin's legitimate interests. On this basis I would have been minded to hold that any claim in breach of fiduciary duty was not precluded by ratification in the light of the limits on the *Duomatic* principle and the *indicia* that, at least in trading terms, Equix Cyprus was at that time not solvent or was *"likely to become insolvent"* so as to meet the test posited in *BAT Industries plc v Sequana SA* [2019] Bus LR 2178 at [220].

386. As to driving Equix Cyprus or Dubai out of business and hence damaging Mr Tsvetkov, intent to harm this company was not in my judgment sufficiently made out. Looking at the background, what appears to have happened was the pursuit of Mr Magdeev's and Mr Gaynulin's interests fairly ruthlessly and by use of the false documents when other more legitimate means (such as a solvent winding up) might have been used. False documents in some circumstances might raise an inference as to intent to harm; but in this case, with the not infrequent use of such documents, it is less significant than it might otherwise have been. But actual intent to harm Equix Cyprus seems inconsistent with the fact that Mr Magdeev made efforts to keep the business running both in terms of covering expenses, attempts to raise finance and attempts to get the shop re-opened in the latter months of 2017.

387. At best therefore the evidence adduced gets to the foresight or knowledge level. But that is, on the highest authority, insufficient. And looked at overall it would have been my view that the evidence on intent did not even scale so high. In essence it amounted to evidence that the intent behind the move was Mr Magdeev and Mr Gaynulin's own business priorities – securing the assets and avoiding liability for the June appropriation, respectively. There was no intent to drive Equix Cyprus out of business and Mr Tsvetkov and the indirect effect on him do not even seem to have been in focus.

388. As regards causation, in terms of tracing any harm to Mr Tsvetkov, the link between a rather diffuse plan to go after him for a number of things and the specific claim in relation to the US$10 Million Loan appears to be too tenuous.

389. In the circumstances I need not deal with the rather tricky issue as to the loss claimed and whether it is barred by the rule against reflective loss.

The remaining issues on the Claim

390. It follows that there is no need also to deal with the question of an indemnity from Equix Dubai or the guarantee offered by Mr Tsvetkov.

Equix Dubai's Counterclaim

391. By way of coda there remains Equix Dubai's cross claim for roughly US$35,000 for breach of the jurisdiction clause.

392. The Jurisdiction Clause agreed between the parties and set out in the Investment Agreement provides as follows: *"Should there arise any dispute, such disputes shall be resolved in the High Court of Justice in London (United Kingdom) with the UK precedent law being applicable"*.

393. Equix Dubai says that the Dubai proceedings were brought in breach of this clause and that its costs in relation to that action are recoverable as damages.

394. The issues on this have narrowed somewhat during the course of trial. Mr Magdeev wisely no longer seems to contend that this clause was not an exclusive jurisdiction clause. Meanwhile Equix Dubai has essentially merged its arguments as to whether reliance on a hopeless application is a breach and as to whether there was any basis for Mr Magdeev to apprehend that there might be a dissipation of assets. The latter now really forms a limb of the former.

395. The focus has primarily however narrowed to one issue: whether this was a case of seeking security, so as to fall within the exception outlined in a number of authorities.

396. In this regard Mr Robins points me to *Marazura Navegacion SA v Oceanus Ltd* [1977] 1 Lloyd's Rep. where against the background of a clause which stated: *"If any difference or dispute arises ... such dispute shall unless it is mutually agreed to the contrary be referred to Arbitration in London... Such Arbitration shall be a condition precedent to the commencement of action at law..."* Goff J held that this was not breached where proceedings were brought solely for the purpose of seeking security. Reference was also made to other cases in this line of authority, including *Ultisol Transport Contractors Ltd v*

Bouygues SA [1996] 2 Lloyd's Rep 153 and *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm).

397. This is submitted to be an analogous case. It is submitted that the expert evidence is that UAE law prevents English law protective measures from being recognised in the UAE and that Mr Magdeev's only effective interim remedy lay in seeking a UAE protective order; there was no prospect of the Dubai Court ruling substantively.

398. It is worth at this point dealing with the Dubai proceedings in more detail than I have done at the outset.

399. There were two sets of Dubai proceedings. In the First Dubai Proceedings, a substantive claim was issued and there appear to have been three hearings in relation to that. The first two on 28 November 2018 and 16 December 2018 were effectively case management hearings.

400. At the third and final hearing on 15 January 2019, the Court acceded to the parties' request to suspend the First Proceedings. At no point did the Court consider, let alone determine, the merits of the matter and it was not asked to resolve the dispute in any binding way.

401. The Ex Parte Application was issued under this first set of proceedings. It involved an application for *"a precautionary seizure on the movable and immovable assets"* of Equix Dubai including bank accounts held by it. The Court was not invited to consider the merits of any dispute. The Court rejected the Ex Parte Application without giving its reasons.

402. The Second Dubai Proceedings commenced upon Mr Magdeev filing a grievance against the rejection of the Ex Parte Application and involved Mr Magdeev renewing his request for the precautionary seizures the subject of the Ex Parte Application. Again, the Court was not invited to consider the merits of any dispute. There were eight hearings in total, at none of which any issue of substance appears to have been considered. At the final hearing in the matter on 9 December 2018, the Court rejected the grievance. Critically for present purposes, the Dubai court described its role as "*the court to which the Grievance or its appeal is submitted"* in the following terms:

> "Such court shall judge depending on the submitted exhibits without detailing the validity of the debt or searching and explaining, in depth, the exhibits upon which the attachment applicant relies since the court judgment is [temporary] and does not affect the essence of the disputed right which shall be reserved to be disputed over by the litigants before the Court of Trial."

403. There are similar statements in other Dubai judgments, including references to not considering the merits and disputes being considered on the merits before "*the court of subject matter/trial court*".

404. However, while the Dubai Court did not consider the merits of the case in my judgment Mr Magdeev cannot bring himself within the exception delineated in the authorities because those circumscribe an exception where proceedings are started for the sole purpose of obtaining security. Here, the sole purpose of the Dubai Proceedings was not to obtain security; it is common ground that the First Dubai Proceedings was a substantive claim for the repayment of the Investment. Nor is this one of the cases where it can be said that there was a need for substantive proceedings to be issued to obtain access to the relief by way of security – or as Mr Robins put it in closing *"as part of seeking security you have to bring the disputed claim before the court"*.

405. It was Mr Bajamal's evidence that there was no need to file a substantive claim in Dubai until a precautionary attachment had in fact been granted (which it never was since Mr Magdeev lost both at the *ex parte* and *inter partes* stages). When giving evidence, Professor Al Aidarous accepted that this was indeed the position. The short point is that it was open to Mr Magdeev only to seek the *ex parte* relief. Insofar as he pursued substantive relief therefore, he did so in breach of the jurisdiction clause.

406. However, that is an answer which may well not give Equix Dubai much satisfaction, because logically it can only entitle it to the costs caused by the breach; since the Ex Parte Application and the second proceedings were about security, those costs would not be affected.

407. The second point (which could affect the costs of the *ex parte* relief as well as the substantive proceedings) is the point as to hopelessness. Equix Dubai argued that the exception in the authorities is subject to a necessary limitation that the application is not hopeless – otherwise the value of an exclusive jurisdiction agreement could be substantially undermined by an ability to bring hopeless applications for security. Mr Adkin QC pointed me to *Mike Trading and Transport Ltd v Pagnan & Fratelli ("The Lisboa")* [1980] 2 Lloyd's Rep. 546 at 549 where Denning MR referred to a case where *"the cargo-owners had no ground whatever for making any claim against the shipowners – and nevertheless arrested the ship"*.

408. That proposition may well be right. However merely because the application failed both *ex parte* and *inter partes* does not make it hopeless so as to fall within this "no ground whatever" subtype. The question of whether it was hopeless to that degree must be a question of UAE law and will depend upon whether, in the light of the letter which gave rise to the application, there was material which could

arguably fall within the ambit of relief under UAE law. That is not a question on which there is an answer in the expert evidence. I do not consider that my own views of the letter should form the basis for such a decision, particularly when on a reading of it, it is apparent that both parties can have things to say about this point based on its contents. Accordingly, I conclude that the balance of the cross claim fails.