Neutral Citation Number: [2016] EWHC 2583 (Comm)

Case No: CL-2015-000846

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2016

Before:

THE HON. MR JUSTICE CRANSTON

Between:

OJSC BANK OF MOSCOW	**Claimant**
- and -	
(1) ANDREY VALERIEVICH CHERNYAKOV	**Defendants**
(2) ANASTASIA EROKHOVA	
(3) NORWIND SHIPPING LIMITED	

Stephen Auld QC (instructed by **PCB Litigation LLP**) for the **Claimant**
Zoe O'Sullivan QC (instructed by **Grosvenor Law**) for the **Defendants**

Hearing dates: 20 and 21 September 2016

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.

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THE HON. MR JUSTICE CRANSTON

Mr Justice Cranston:

Introduction

1. OJSC Bank of Moscow, now called BM-Bank PJSC ("the Bank"), is a subsidiary of VTB Bank, the second largest bank in Russia and majority owned by the Russian government. It applies for summary judgment against the first defendant, Andrey Valerievich Chernyakov ("Mr Chernyakov") to enforce three judgments against him of Judge Gorodilov sitting in the Meshchansky District Court, Moscow ("the first, second and third Russian judgments"). The judgment sums total approximately £150 million. Mr Chernyakov was president of OOO Nauchno-Proizvodstvennoe Obedinenie Kosmos ("Kosmos"), the holding company of a large construction group in Russia, which he founded in the 1990s. Kosmos was declared insolvent on 20 March 2015. It had a number of major infrastructure contracts with the City of Moscow.

2. The first of the three Russian judgments is dated 5 February 2015. An appeal from it to the Moscow City Court was dismissed on 8 December 2015, and a subsequent application to challenge it through cassation was refused on 23 June 2016. There are ongoing proceedings about a further challenge by way of cassation. The second and third of the Russian judgments are dated 19 November 2015. Appeals against these judgments were to be heard this August, but they have been adjourned. Both sides accept that the focus should be on the three judgments, despite the appeals so far and any challenges still pending in the higher Russian courts.

3. The Bank contends that the proceedings in the Commercial Court are straightforward claims to enforce three binding, conclusive and final judgments of the Russian court to which Mr Chernyakov has no arguable defence. The judgments are based on personal guarantees which Mr Chernyakov gave as part of the security the Bank took to support facility agreements it entered with Kosmos and a bank guarantee it gave at Kosmos's request to a third party, OJSC Mostotrest ("Mostotrest"). The Bank's argument is that Mr Chernyakov is playing the system both in England and in Russia as part of an overall strategy to delay the inevitable.

4. Mr Chernyakov accepts that the English court has jurisdiction over him in these enforcement proceedings by reason of his residence here. However, he resists summary judgment on the grounds that there are triable issues that the judgments were procured by the fraud of the Bank, that they were given in violation of the principles of natural justice and in breach of the right to a free trial in Article 6(1) of the European Convention on Human Rights ("ECHR" or "the Convention"), and that their enforcement would be contrary to public policy. Apart from these arguments, Mr Chernyakov contends that there are compelling reasons why the claims should not be disposed of without a trial.

The legal principles

Enforcing foreign judgments at common law

5. The legal principles applicable in this case were not in dispute. The general common law rule is that a foreign judgment *in personam* given by the court of a foreign

country with jurisdiction to give that judgment may be enforceable by the courts of England and Wales by a claim for the amount due, provided it is a judgment for a debt or definite sum of money and is final and conclusive: see *Dicey, Morris and Collins on Conflict of Laws*, 15th edition, 2012, Rule 42(1) ("*Dicey*"). Moreover, it is also generally the case that a foreign judgment which is final and conclusive on the merits is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either as to fact or law: *Dicey*, Rule 48. However, these rules apply if the foreign judgment may not be impeached at common law. The various grounds on which this can be done are conveniently collected in Rules 49 to 54 of *Dicey*. Rule 50 is that such a judgment is impeachable for fraud; Rule 51 states that it may be impeached on the grounds that its enforcement or recognition would be contrary to public policy; and Rule 52 provides that it may be impeached if the proceedings in which it was obtained were opposed to natural justice.

6. The fraud ground covers fraud on the part of the party in whose favour the judgment is given or fraud on the part of the court pronouncing the judgment. It extends to every kind of fraudulent conduct. A foreign judgment can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud was alleged in the foreign proceedings: see *Dicey*, para. 14-139. Moreover, it is immaterial that the fraud could have been raised in the foreign proceeding but was not raised at that point.

7. The public policy ground is not easy to demarcate from the fraud and natural justice grounds. Its ambit is not precise and it may extend to an English court's refusal to recognise or enforce a judgment where the foreign court is corrupt or the judgment was obtained by the exercise of improper influence on the judges: see *Altimo Holdings* v. *Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, at [101], [117], per Lord Collins; *Yukos Capital Sarl* v. *OJSC Rosneft Oil Co* [2012] EWCA Civ 855; [2014] QB 458, [90]. However, the principle of comity demands caution, and cogent evidence will be required if a foreign judgment is said to be infected in this way. It is not contrary to English public policy to refuse to recognise a judgment which is obviously wrong. However, if there is evidence of a perverse refusal by the foreign court to apply the law in a judicial manner, it may be possible to oppose recognition on the ground that the behaviour of the court infringed natural justice: Professor Adrian Briggs, *Private International Courts in English Courts*, 2014, p. 480.

8. As to natural justice, first, a defendant must be given the opportunity so that they can put their case in response: *Jacobson* v. *Frachon* (1927) 138 L.T. 386; *Adams* v. *Cape Industries Plc* [1990] Ch 433, 563G. A mere procedural defect in the proceedings will not be sufficient. What is required is a substantial denial of justice: *Aeroflot* v. *Berezovsky* [2012] EWHC 3017 (Ch), [54], per Floyd J. However, a defendant must take all available defences in the foreign court and if they are at fault in not doing so, may not impeach the foreign judgment in England: *Israel Discount Bank* v. *Hadjipateras* [1984] 1 WLR 137, 144 C-H, per Stephenson LJ. A corollary of this is that a defendant may not impeach a foreign judgment by raising defences before the English court where the foreign court has considered and rejected them.

9. Secondly, the defendant must be given notice of the hearing so she is able to put her case. It is not contrary to natural justice that a person "who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in

which that particular mode of notification has been followed, even though he may not have had actual notice of them": *Valle* v. *Dumergue* (1849) 4 Exch 290. If there was service of the notice of hearing on the party in accordance with the relevant foreign law, but actual notice was not given, the question will be whether substantial injustice was caused by the lack of notice, including whether the defendant had a remedy in the foreign court: see *Dicey*, para. 14-166. Also where an alleged procedural irregularity has been raised before the foreign court, and rejected by it, it is less likely that an English court will entertain arguments on natural or substantive justice that are based on it: *Dicey*, para.14-167.

10. In addition to the position at common law, there is a right to a fair trial under Article 6(1) ECHR, which arises by reason of section 6 of the Human Rights Act 1998. It means that there is a duty directly on an English court not to give effect in England to the judgment of a foreign court where to do so would violate fair trial standards. Russia is a party to the ECHR, and so there is a strong presumption that its courts comply with the procedures of the Convention: see *Maronier* v. *Larmer* [2003] QB 620 (CA), [24]-[25], per Lord Phillips MR; *Merchant International Co Ltd* v. *Naftogaz Ukrainy* [2012] EWCA Civ 196, [2012]1 WLR 3036, at [71], per Toulson J, *Joint Stock Co., Aeroflot-Russian Airlines* v. *Berezovsky* [2014] EWCA Civ. 20, [57]-[58], per Arden LJ.

Summary judgment

11. CPR 24.2 provides for summary judgement if the court considers that (a) the defendant has no real prospect of successfully defending the claim or issue and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. The principles which apply are well known. By reference to the commentary in the *White Book* and Lewison J's judgment in *Easyair Limited* v. *Opal Telecom Limited* [2009] EWHC 339 (Ch), [15] (approved subsequently by Etherton LJ in *A C Ward & Son* v. *Caitlin (Five) Limited* [2009] EWCA Civ 1098, [24]), Simon J enunciated the following points in *JSC VTB Bank* v. *Skurikhin* [2014] EWHC 271 (Comm) regarding the assessment of the prospects of success:

> "[15]… (1) The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v Hillman* [2001] 2 All ER 91 , 92. A claim is 'fanciful' if it is entirely without substance, see Lord Hope in *Three Rivers District Council* v. *Bank of England [2001] UKHL 16* at [95].
>
> (2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products* v. *Patel* [2003] EWCA Civ 472.
>
> (3) The court must avoid conducting a 'mini-trial' without disclosure and oral evidence: *Swain* v. *Hillman* (above) at p.95. As Lord Hope observed in the *Three Rivers case*, the object of the rule is to deal with cases that are not fit for trial at all.
>
> (4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without

analysis. In some cases it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents, see *ED & F Man Liquid Products* v. *Patel* (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.

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

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

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

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

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

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

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

12. As to Part 24.2(b), and whether there is a compelling reason for trial even though the court is not satisfied about a triable defence, Megarry J spoke of a case being one "for

investigation and so not for summary decision" in *Miles* v. *Bull* [1969] 1 QB 258, 266F; see also *Global Marine Drillships Ltd* v. *Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), [55] to [56], per Henderson J.

Background to the Russian judgments

13. The Bank provided finance to Kosmos under various loan facilities and letters of credit. Mr Chernenko from the Bank explains in a witness statement that throughout 2013 to March 2014 the Bank constantly restructured the loan facilities provided to Kosmos and provided the additional financing requested since Kosmos faced increasing financial difficulties. Each time the restructurings were approved by the Bank's credit committee and usually its risks department made recommendations to protect the Bank's position. There is a report from July 2013 by the vice-president of the Bank's risks department identifying the risks and steps to be taken to mitigate them, including the security available to protect the Bank. By reference to this document Mr Chernenko states:

> "The financial position was clearly deteriorating and as it continued to deteriorate, more security was required by the Bank when advancing funds, including the personal guarantees from Mr. Chernyakov... in relation to the loan facilities and guarantees which are the subject matter of the current dispute."

14. In particular there was a facility agreement dated 11 June 2013 in the sum of RUB 1.5 million ("the June 2013 facility"), and a facility agreement dated 5 September 2013 in the sum of RUB 2.5 million ("the September 2013 facility"). The facilities were signed on behalf of Kosmos by Mr Chernyakov and contained jurisdiction and dispute resolution provisions providing that the contracts were subject to Russian law and disputes would be referred to the Arbitrazh Court in Moscow. In June 2014 Kosmos drew down some RUB 1.5 million under the June 2013 facility, and between September 2013 and April 2014 it drew down RUB 2,152,725,763 under the September 2013 facility. Further, at the request of Kosmos, the Bank provided a bank guarantee dated 11 September 2013 to Mostotrest in the sum of RUB 1.8 million ("the Bank's Mostotrest guarantee"). Demand was made to the Bank under that bank guarantee a year later, in September 2014, which the Bank met. As a result, Kosmos became indebted to the Bank for over RUB 1.8 million, the full amount with the Bank's commission added.

15. To support the facility agreements and the Bank's Mostotrest guarantee, Mr Chernyakov executed three written guarantees in favour of the Bank, the first on 25 July 2013 in respect of the Bank's Mostotrest guarantee ("the July 2013 guarantee"), and the second and third on 27 November 2013 in respect of the two facility agreements ("the November 2013 guarantees") (together "the 2013 guarantees"). Then on 20 March 2014 Mr Chernyakov executed a further guarantee by which he guaranteed the amount of RUB 10,912,630,742 due to the Bank from a member of the Kosmos group pursuant to an assignment agreement dated 18 March 2014 ("the March 2014 guarantee"). All the guarantees were notarised. Each guarantee was expressed to be subject to Russian law and Russian jurisdiction. All the guarantees described Mr Chernyakov as being registered at the address Bryusov Lane, 2/14, flat 49-50, Moscow, Russia ("the Moscow address"). Each contained a clause along the lines of that in the July 2013 guarantee, namely:

> "5.2 The surety undertakes to inform the Bank in writing about changes in its reference details (address etc) within 5 (five) business days following the date when such changes took place..."

16. As well as being given as the registered address in the guarantees, the Moscow address is the address given in Mr Chernyakov's passport and the address identified in divorce papers, and on the appeal documents dated 22 January 2016 for the appeals against the second and third of Russian judgments. Mr Chernyakov purported to transfer the Moscow address property to his ex-wife, Ekaterina Alexandrovna, under a settlement agreement dated 28 January 2015. That also gives the Moscow address as Mr Chernyakov's address. On learning about this agreement the Bank filed an application to invalidate it. That was rejected by the first instance court in November 2015 but was successful on appeal in August 2016. An application for cassation is still possible. The Bank obtained papers in the divorce proceedings listing various properties in Russia, Germany and Italy which Mr Chernyakov owned.

17. On 4 September 2014 Kosmos went into insolvency related supervision. The Bank proceeded against Mr Chernyakov in the Russian courts and eventually obtained the three judgments the subject matter of the current application. In addition it pursued Mr Chernyakov and his assets in other jurisdictions, including Germany and Italy.

18. In Germany the Bank applied to the Regional Court of Potsdam on 30 January 2015 for the attachment and garnishment of Mr Chernyakov's assets. It contended that that court had jurisdiction because he was domiciled in Germany at a specific address in Michendorf, near Berlin ("the Berlin address"). The application was sent to that Berlin address. On 3 February 2015 the Potsdam court held that it lacked jurisdiction since Mr Chernyakov was not domiciled in the area and in any event he had waived local jurisdiction because of clause 5.2 of the guarantees. The Bank appealed to the Higher Regional Court of Brandenburg on 9 February 2015, referring to the fact that Mr Chernyakov, his then wife, Ekaterina Alexandrovna, and their two children had registered the Berlin address as their sole residence in July 2010. That, the Bank's German lawyers argued, showed that the Berlin address was his family residence and centre of interest. His status as a Russian oligarch was not inconsistent with that. Mr Chernyakov conducted his main business in Germany, for example as half owner of shares in Cewimex GmbH. For the German proceedings the Bank obtained the opinion of a Russian expert, Ms Varvara Knutova. She stated that the jurisdiction clause in the guarantee did not establish exclusive jurisdiction in the Russian courts and the issue of the writ of attachment and garnishment in Germany was possible.

19. Mr Chernyakov's evidence is that he left Russia in July 2014. A credit card statement obtained as a result of a freezing order of Mr Chernyakov's assets shows that over the period from October 2014 to 31 July 2015, his card was identified with a wide variety of locations, Germany, Vienna, Dubai, Zurich, St Moritz, Hong Kong, Fiji, Paris and London, and most of these a number of times. On his behalf it is said that this is not indicative of the extent of his travel: payment may have been made remotely, at airports and as a result of use by his assistants.

The Russian judgments

20. The three Russian judgments forming the basis of this application were given by Presiding Judge Gorodilov in the Meschansky District Court, Moscow. That court has a general jurisdiction covering claims such as those under a guarantee. Mr Chernyakov accepts that the Meschansky District Court had jurisdiction over him in respect of the Bank's claims by reason of the express submission to jurisdiction contained in the guarantees.

The first judgment

21. The first judgment is dated 5 February 2015 in the amount of RUB 3,038,642,183.78 and based on the November 2013 guarantees. Its procedural origins lie in the Bank's letter of demand sent to the Moscow address on 7 October 2014, followed by the Bank's claim filed a week later, on 15 October 2014. The detailed particulars of claim had attached a considerable number of documents. The Bank gave the court Mr Chernyakov's registered address, the Moscow address, as the address for service. On 20 October 2014 the court accepted the claim, ordered that the particulars of claim, with documents attached, be forwarded to the persons in the case, and fixed a pre-trial conference. On 28 October 2014 the court send a telegram to the Moscow address.

22. The pre-trial hearing was conducted on 25 November 2015. There is an undated court letter on the court file notifying Mr Chernyakov about this. The pre-trial conference scheduled the hearing of the claim for 22 December 2014. After the pre-trial hearing the court sent a letter to the Moscow address, but it was returned to the court on 8 December 2014 without receipt being acknowledged. Apparently the court notified Kosmos of the claim because on 19 December 2014 it sent a telegram to the court informing it that it was not possible to notify Mr Chernyakov of the court proceedings since he was in Austria receiving medical treatment.

23. The hearing on 22 December 2014 went ahead. Mr Chernyakov's lawyer, Ruslan Koblev, was there. In his witness statement he states that he had acted for Mr Chernyakov from 2001 on various matters. He had a widely drawn power of attorney to do so. Mr Koblev states that at this point he was acting for Mr Chernyakov in his divorce, but after Mr Chernyakov left Russia in July 2014 it was increasingly difficult to obtain instructions from him. He only learnt of the 22 December 2014 hearing a day or so beforehand from Ekaterina Alexandrovna's divorce lawyer. His account is that he had been informed about the Bank's claim and attended the hearing. However, he had no instructions and was unable to make submissions. Because of this the hearing was adjourned until 5 February 2015. The court posted a notice of that hearing to the Moscow address on 22 January 2015 and there is a print out from the Russian post office's website which states that it was delivered to the addressee on 28 January 2015.

24. At the hearing on 5 February 2015, Mr Chernyakov was not represented. Mr Koblev states that he did not attend because, despite attempts, he could not obtain instructions from Mr Chernyakov. Judge Gorodilov gave judgment for the Bank. After outlining the background to the claim, the judge noted Mr Chernyakov's absence, despite having been properly notified of the time and place of the hearing. The judge held that under Article 118 of the Code of Civil Procedure ("the CCP") the parties to a case must notify the court of any change of address occurring during the proceedings. The

court, he said, had sent multiple notices of the date and time of the hearing but they had been returned and not served on Mr Chernyakov. The judge said that he had concluded, in accordance with the disposition principle, that Mr Chernyakov had chosen not to appear and that, guided by Article 167 of the CCP, the matter could be heard in his absence. The judge then considered the Bank loans and concluded that the Bank had taken all necessary steps to attempt to recover them. He then turned to whether the Bank could proceed against Mr Chernyakov as guarantor. In particular he noted that Mr Chernyakov (in translation)

> "voluntarily assumed the obligation under them to enter into guarantee agreements, which is testified by its (sic) signatures therein, and the defendant produced no evidence to the contrary."

25. There was an appeal from this, the first Russian judgment, heard by three judges of the Judicial Panel for Civil Cases of the Moscow City Court on 8 December 2015, Judges Vyshnyakova (presiding), Kazakova and Yefimova. There is no need to explore the procedural background in detail, except to note that Ekaterina Alexandrovna applied to appeal the judgment in March 2015 as an interested party. Some time later Mr Chernyakov applied to extend the deadline so he could appeal as well. Although the deadline was past, Judge Gorodilov granted Mr Chernyakov's application on 30 August 2015.

26. Mr Chernyakov was represented during the appeal proceedings by Mr Koblev and a colleague, Mr Tolstyakov. Mr Koblev states that his firm was notified during the summer of 2015 that the Bank was attempting to freeze Mr Chernyakov's assets in Germany and Italy and they received instructions to appear in the appeal. The appeal submissions they filed dated 30 August 2015 raised the absence of proper notification of the proceedings and hearing leading to the first judgment, the failure by Judge Gorodilov to investigate this, and Mr Chernyakov having entered the guarantees in extremely unfavourable circumstances.

27. The appeal was heard on 8 December 2015 over some two hours. Mr Koblev made a recording of the proceedings, which has been transcribed. Apparently this is a common practice and no objection is taken to it. Mr Koblev had filed supplementary appeal submissions, with letters from the City of Moscow to the Bank requesting it to extend the guaranteed facilities to Kosmos. He submitted that the court should accept this fresh evidence. In response the Bank's lawyer submitted that the additional material did not rebut Judge Gorodilov's decision. The court ruled that the evidence was inadmissible at the appeal stage when it had not been shown that it could not have been produced at the first instance hearing.

28. Mr Koblev and Mr Tolstyakov then made submissions to the court on the points in the appeal submissions. In relation to the notification point their arguments included that the Bank knew Mr Chernyakov was in Germany because of the settlement negotiations with him there. Mr Chernyakov was not at the Moscow address and the court certainly knew that from Kosmos's telegram of the 19 December 2014. The advocates returned to this point on several occasions. There was also the second argument, about the guarantees being unduly onerous transactions under Article 179 of the Civil Code, including the pressure on Mr Chernyakov because of the threats of criminal prosecution. That was a reference amongst other things to the pressure

constituted by his criminal prosecution for the non-payment of employees' salaries when Kosmos was in financial difficulties. Mr Koblev also submitted that Mr Chernyakov's right to a fair trial was being fundamentally breached because of the Bank's status as a part of VTB Bank, whose operation was essential to the state budget.

29. The Bank's lawyer rebutted these arguments. On the issue of notification he stated that the Bank did not have an address other than the Moscow address, and that it knew only that Mr Chernyakov was registered and permanently resident at the Moscow address. The Bank and the court had followed the procedure in Article 118 of the CCP by sending notice to the last known address. Further, the Bank's lawyer argued, Mr Koblev had been at the hearing on 22 December 2014. As to Mr Chernyakov signing the guarantees, the Bank's representative explained that nobody was maliciously intending to make Mr Chernyakov take on the debt in order, figuratively speaking, "to send him down". Instead, Kosmos was being extended extremely large loans and in the circumstances it was natural that the Bank took security, including the guarantees. In any event, he added, Mr Chernyakov could have challenged the guarantees as unduly onerous transactions in a separate claim.

30. The court rejected Mr Chernyakov's appeal in a judgment given the day of the hearing, 8 December 2015. The judgment recalled that Mr Chernyakov had not appeared before Judge Gorodilov but had been informed about the time and place of the hearing in a proper manner. After a consideration of the factual background to the guarantees and of various provisions of the Civil Code relating to the claims under them, the court stated that it completely agreed with the first judgment, which was justified and made on examining the evidence and properly assessing it.

31. Turning to the submission that the guarantees were one-sided and in breach of Article 179 of the Civil Code, the court rejected it. Mr Chernyakov had not adduced evidence as he was obliged to do under Article 56 of the Civil Code that the guarantees were executed on extremely unfavourable terms and that the Bank took advantage of such adverse circumstances. Under Article 421(1) of the Civil Code he was free to enter the guarantees and if he had not been happy with their terms he could have refused to sign.

32. As to the submission that Mr Chernyakov had not been notified of the proceedings, the court said (in translation):

> "It can be seen from the files that the defendant was notified about the date and time of the court hearing more than once by means of sending writs of summons to the place of residence of the defendant, which is the same place that was stated by the defendant in his appeal (case file sheets 112 and 190). Pursuant to Article 165.1 of the Civil Code of the Russian Federation, applications, notifications, summons, claims or other legally relevant messages…shall result, for this party, in these consequences from the moment of delivery of a proper message to this party or its representative. The message is considered to be delivered also in those cases when it was delivered to the party, to which it was sent (addressee), but was not handed over to this party or the addressee did not get acquainted with it due

> to reasons within this party's control. Sending a writ of summons, pursuant to Article 113 of the CCP of the Russian Federation, is one of the methods of notification of the parties in a case".

Thus, the court concluded, the court of first instance had been right in its conclusion about notification of the proceedings.

33. There was an application for cassation lodged on the 6 June 2016 by Mr Tolstyakov on Mr Chernyakov's behalf, two days before the deadline for doing so (six months after the judgment i.e. 8 December 2015). At the head of the written submissions in this application was the Moscow address, listed as Mr Chernyakov's "registered address". In summary the submissions were that Mr Chernyakov had not received the court notification of the 5 February 2015 hearing and could not have done so because he was outside Russia. The Meschansky District Court had received the Kosmos telegram of 19 December 2014 that he was in Austria for medical treatment. The Meschansky District Court had continued to hear the case in breach of Articles 113(1) and 165 of the CCP. The court's application of Article 118 was erroneous.

34. In a judgment dated 23 June 2016 Judge Knyazev refused to transfer the case to the presidium of the court. He said that Article 387 of the CCP required fundamental breaches of procedural and substantive law for cassation. He referred to the reasons of the appellate court in rejecting Mr Chernyakov's case on notification. He held that its findings were reasoned and had not been refuted by the submissions on Mr Chernyakov's behalf. These identified no material breaches of substantive or procedural law. The judge said:

> "These findings were agreed by the judicial panel, which left the decision of the court unchanged on the basis of the grounds set out in the appellate ruling, further indicating that the defendant had been repeatedly notified on the date and time of the court hearing by sending him services to the defendant's place of residence, which coincides with the address indicated by him in the appeal petition; according to Art. 165.1 of [the Code of Civil Procedure of the Russian Federation], applications, notices, notifications, claims or other legal messages, which relate to civil consequences for another person, involve such consequences for that person since the delivery of the relevant message to him/her or his/her representative; a notice is considered delivered in cases if it has been received by the person to whom it was sent (addressee), but due to circumstances under the control, it has not been handed to the addressee or the addressee has not read it; a citizen is obliged to enable the timely receipt of mail correspondence to freely chosen address (sic); by virtue of Art. 113 of the Code of Civil Procedure of the Russian Federation, sending a summons is one of the ways of notification of the persons participating in the case; therefore, the Court of original jurisdiction was entitled to consider the case with the existing appearance."

The court could not consider new circumstances or give its own assessment of the case. A different view of the outcome could not justify interference.

35. There was an application lodged on the 7 July 2016 to extend the time for a further cassation application. This was one day before the expiration of the deadline, although Mr Chernyakov's Russian lawyers have said that they were caught out because they were not told of the 23 June 2016 decision and it was not on the court's website. On 29 July 2016 Judge Gorodilov rejected the application. His reasoning was that there were no documents reliably proving the inability to lodge a timely appeal against the judgment or the cassation ruling of 23 June 2016.

The second judgment

36. The second judgment, dated 19 November 2015, is in the sum of RUB 1,822,426,027.40 and based on the July 2013 guarantee. The Bank's letter of demand was sent to the Moscow address on 4 February 2015, the claim was filed on 25 August 2015 and the court accepted the claim. The pre-trial hearing was set for 9 November 2015. According to Mr Koblev's witness statement his colleague, Mr Tolstyakov, learnt for the first time about this claim on 19 October 2015. That was when he had attended a hearing that day on behalf of Mr Chernyakov relating to the proceedings which ultimately led to the third judgment. He requested time to prepare Mr Chernyakov's case for this second claim but Judge Gorodilov retained the pre-trial hearing date of ten days later, 19 November 2015. In his witness statement, Mr Koblev contends that the short time period seriously prejudiced the defence.

37. The hearing of the case occurred on 19 November 2015. Mr Tolstyakov represented Mr Chernyakov. He advanced various defences. The judgment records that these included the absence of evidence that the principal debtor, Kosmos, had failed to perform its obligations and that Mr Chernyakov's suretyship had terminated. Judge Gorodilov gave judgment that day. He considered the defences, referred to various provisions of the Civil Code and rejected Mr Tolstyakov's arguments. He found for the Bank as to the entirely of its claim.

38. On 28 December 2015, Mr Tolstyakov made submissions that the court record of the 19 November 2015 hearing did not accurately represent what had occurred. The record showed that he had raised abuse of right and that the Bank acted in bad faith in exacerbating Mr Chernyakov's position as guarantor. He said that in fact he had raised a defence of duress of circumstances under Article 179 of the Civil Code and this had not been addressed in the judge's reasons. Judge Gorodilov rejected these submissions on 25 January 2016: the court record contained all the applications and submissions of the parties.

39. Mr Chernyakov appealed against the second judgment. His detailed grounds of appeal dated 22 January 2016 give the Moscow address as his address. One of the grounds of appeal is that the first instance court did not properly consider the arguments about the unduly onerous nature of the transaction due to oppressive existential circumstances and the pressure from the Bank. The appeal hearing was due to take place on 26 July 2016, was adjourned until 12 August 2016, but was then adjourned again as a result of the intervention of Mr Chernyakov's former wife, Ekaterina Alexandrovna.

The third judgment

40. The third judgment is also dated 19 November 2015 and is in the sum of RUB 10,902,603,742. It is based on the March 2014 guarantee. The Bank's letter of demand was sent to the Moscow address on 17 October 2014, the claim was filed on 25 August 2015, the court accepted the claim on 28 August 2015 and a pre-trial conference was conducted on 23 September 2015. No one was there for Mr Chernyakov. On 7 October 2015 Mr Tolstyakov notified the court that he was acting for Mr Chernyakov. There was a further hearing on 19 October, postponed until 9 November. Mr Chernyakov was represented by Mr Tolstyakov. Again the full hearing was postponed.

41. The hearing occurred on 19 November. Mr Tolstyakov put forward defences on behalf of Mr Chernyakov. Judge Gorodilov found for the Bank. Amongst other things, he said (in translation):

> "The Court dismissed the argument made by the defendants' representative that there were elements of the abuse of right on the part of the Plaintiff when it executed the Surety Agreement with Mr. Chernyakov and collection from the latter of unjust enrichment as unreasonable and not acknowledged by the documents in the case... The court took into account that the Surety Agreement was notarized..."

As with the second judgment, Mr Chernyakov appealed. The detailed grounds of appeal, also dated 22 January 2016, give the Moscow address as his address. As with the appeal hearing on the second judgment, the hearing has been adjourned.

The current proceedings and the expert evidence

42. The application for summary judgment is part of proceedings by the Bank in this jurisdiction against Mr Chernyakov, the second defendant, Anastasia Erokhova, Mr Chernyakov's wife from 2015, and the third defendant, a BVI company owned and controlled by Mr Chernyakov, Norwind Shipping Limited. As part of the proceedings against Mr Chernyakov, there is a worldwide freezing order by Cooke J, imposed on 27 November 2015, and there have been further, related orders of this court.

43. The Bank's claim is supported by two witness statements by Leonty Chernenko, managing director of the VTB Bank's debt collection arm, VTB DC, another subsidiary in the VTB group. There is also an expert report from Ms Knutova, a Russian lawyer, who until recently was with the Russian practice of Berwin Leighton Paisner, Goltsblat BLP, but who is now an independent practitioner. Ms Knutova has appeared regularly before the Russian courts since 2005 and still does so. She gave expert evidence earlier in this court for the hearing of the application for a freezing order.

44. In the second of her reports for this application, dated 25 August 2016, Ms Knutova states that the Russian judicial system is not lacking in due process either generally or in this case. As in this case, litigants who claim that a decision is wrong have the opportunity to appeal and matters can be corrected. In her view Judge Gorodilov and the three judges in the appeal against the first judgment in the Moscow City Court are

very experienced and of good standing. Allegations of impropriety or corruption against them would, she states, be unfounded and unfair.

45. There is a draft defence, which contends that the English court should not recognise or enforce the Russian judgments on the grounds of fraud, public policy, natural justice and breach of Article 6 ECHR. As to fraud, the draft defence alleges that the 2013 facility agreements and the Mostotrest guarantee were entered into by Kosmos as a result of a fraudulent conspiracy between Mostotrest and the City of Moscow (under its new mayor, Sergei Sobyanin, after dismissal of Mayor Yury Luzhkov by President Medvedev in 2010). The aim was to force Kosmos into insolvency so that Mostotrest could obtain Kosmos's construction contracts with the City and its expert staff and equipment, and the City of Moscow some of Kosmos's skilled workforce and equipment. The draft defence states that Mostotrest is controlled by Arkady Rotenberg, a childhood friend and close associate of President Putin and it can be inferred that the conspiracy was known to and endorsed by the President. The draft defence also alleges that the Bank was a party to or at least knew about the conspiracy.

46. The alleged conspiracy is set out in greater detail in Mr Chernyakov's own witness statement. Suffice to add that in this account Mostotrest was awarded a number of construction contracts with the City of Moscow by the presidential decree of President Medvedev in April 2011, shortly before he vacated his office in favour of President Putin, without any tender process. On Mr Chernyakov's account the conspiracy operated by forcing Kosmos into a position where it had to take out increasingly larger loans from the Bank to fund its extensive construction works in Moscow. After the change in mayor in 2010, the City stalled in awarding Kosmos the contract for the second stage of a highly ambitious road tunnel project on which it had been working for some years. It did this knowing that the company would not be able to stop work mid-project because of the risks to public safety and because the tunnel would become impossible to complete. The City then withheld payment for existing works, while at the same time directing the Bank to make more and more loans to Kosmos to increase its dependence. Mr Chernyakov says that the Bank knew of the conspiracy and complied with its instructions.

47. Mr Chernyakov states that the crisis came after the mayoral elections in September 2013, which were won by Mr Sobyanin. By this time, Kosmos had completed the second stage of the tunnel and was therefore dispensable. In what Mr Chernyakov alleges was a pincer movement by the conspirators, the City stopped paying sums due to Kosmos. Mr Chernyakov himself came under pressure from Mr Rotenberg's right hand man, Pasha Balsky, to hand over his business to Mr Rotenberg. After restructuring Kosmos, Mr Chernyakov hoped that it might still repay its debts by winning a tender to carry out work on the St Petersburg Metro in advance of the World Cup. However, Kosmos was removed from the tender panel and the Bank then acted to demand payment under the facilities. Mr Chernyakov alleges that Mr Balsky attended the settlement discussions between the Bank and Mr Chernyakov in Germany in April 2015, and Mr Balsky promised him that criminal and civil proceedings against him would be withdrawn if he made payments to him as well as the Bank.

48. The expert report supporting the defence case is by Dr Vladimir Gladyshev, a Russian lawyer who has practiced in the Russian courts, representing Western and Russian

companies. He is now permanently resident in London. As part of his report of 18 July 2016, Dr Gladyshev opines that while in the vast majority of Russian cases lawful decisions are pronounced, in specific cases powerful interests do influence the decisions. He states that if Mr Chernyakov is correct is assessing the role of Mr Rotenberg in the case, an allegation of interference "might be plausible". Later, he concludes that the defects he identifies in the three judgments of the Meschansky District Court – what he characterises as containing a radical departure from a settled line of judicial interpretation, the consistent failure to address defence arguments, and "bizarre loops of logic" – coupled with what he regards as the attempts of the Moscow City Court (on the appeal from the first judgment) to "cover" for them, "strongly suggests that the judgments were improperly procured". The defects he identifies in the judgments are examined further below.

49. In the current proceedings, Mr Chernyakov resists summary judgment with submissions which would impeach the three Russian judgments. Before me the focus was mainly that the judgments obtained by the Bank were given in breach of natural justice. Fraud by the Bank on the Russian court, and the three judgments being procured by "action behind the scenes", were secondary.

Natural justice

The first Russian judgment: service and notice of hearings

(a) Mr Chernyakov's case

50. Mr Chernyakov's case challenging the first judgment as being obtained in breach of natural justice is that he was not validly served with the claim or notified of the hearing in accordance with Russian procedural rules and constitutional protections. He had left Moscow in mid-2014 and did not receive notice of the proceedings prior to the hearing, indeed at any time prior to the middle of 2015. If service was effected by the court in accordance with the CCP rules, the court record should contain the necessary proof of service, but none has been exhibited. Indeed there was no evidence that the court ever sent the claim and the attached documents to the Moscow address. Apart from the notice of 28 January 2015 – and a postal print-out is not evidence that the addressee actually received it – there is no evidence that notice of the hearing was sent to the Moscow address.

51. When the court inquired if Mr Chernyakov had been served with notice of the hearing, the Bank's lawyer replied that it was not aware of his current whereabouts. This was untrue, Mr Chernyakov says, because only a few days earlier it was petitioning the Potsdam Regional court, asserting that that court had jurisdiction because Mr Chernyakov was domiciled in Germany and residing at the Berlin address. In the absence of any explanation of who knew what in the Bank, the inference to be drawn is that the Bank deliberately failed to inform the Russian court so as to obtain a default judgment against Mr Chernyakov.

52. Mr Chernyakov's case is that the Meshchansky District Court was in serious error in failing in its duty to investigate whether there had been proper service of the proceedings. Judge Gorodilov concluded, incorrectly, that the court had sent multiple notices of the date and time of hearing to Mr Chernyakov and that he had deliberately chosen not to appear. The fact is that there was no evidence that he had been served,

and there was the Kosmos telegram of 19 December 2014 sent to the court that he was in Austria. Yet actual not deemed service at the start of the proceedings is mandatory under Article 113 of the CCP. Judge Gorodilov did not make any ruling as to when service occurred. He applied Article 118 of the CCP, which is not relevant for initial service but only when a case is on foot. In as much as it applies, he made no reference to Article 165 of the Civil Code as to deemed service. The judge compounded his errors by proceeding to give judgment against Mr Chernyakov in his absence.

53. The challenge continues that the subsequent appeal to the Moscow City Court and the cassation applications were summarily dismissed without criticism of Judge Gorodilov, and without proper examination of the evidence of service and notification. There is simply a recitation that numerous notices were sent to the Moscow address. The Kosmos telegram was mentioned in the submissions but not addressed in the judgment. Article 165 of the Civil Code was mentioned for the first time, and so clearly the court did not support Judge Gorodilov's reliance on Article 118 of the CCP. The rejection of the arguments on notification led in turn to the appeal courts wrongly refusing to admit evidence going to the substantive defence of duress, or to consider that defence on its merits.

(b) The expert evidence

54. The expert evidence was in conflict as regards the Russian law on service and notification of the hearing of a case. In his report dated 18 July 2016 Dr Gladyshev states that Russian courts interpret Article 113 of the CCP as guaranteeing constitutional rights of due process. Article 113(1) provides that the defendant must be

> "notified or summoned to the court by a registered letter with return receipt, by a telephone message or telegram, by facsimile communication or with the use of other devices of communication and delivery ensuring the fixation of the court notice or summons and of handing it in to the address."

Dr Gladyshev also quotes Article 116 of the CCP, stating that a court summons must be handed to the person; Article 118, to the effect that during a case persons must keep the court informed of their address, otherwise court notices can be sent to the last known address; and Article 233, as a result of which a case may be heard in absentia when the defendant has been notified and fails to give a good reason for absence.

55. Dr Gladyshev distinguishes between what he characterises as primary and secondary notification. He says that what is required in Russian law is proof of actual, not deemed, service of the primary notification that proceedings have been brought against a respondent. Mere delivery to the address of a person in the case of primary notification is not sufficient. He adds that the position is different once proceedings have been validly served and are pending. For such secondary notification Article 118 permits deemed service at the last known address of the respondent. If a defendant is aware of the proceedings and chooses, intentionally or negligently, to ignore the summonses then he may have to bear the adverse consequences inherent in his strategic choice or negligent behaviour.

56. In his report, Dr Gladyshev refers to a number of decisions of the Russian courts and attaches translations of these to support his opinion. They include a 2015 decision of the Transbaikal circuit. A state agency obtained judgment against a dismissed civil servant who was mistakenly paid compensation twice. She said she was temporarily away from her residence and knew nothing about the judgment until the bailiff arrived. The court said that it did not appear from case materials that she was sent a court notification of the time and place of the proceedings. The court referred to Article 46 of the Constitution (the guarantee of protection of legal rights and liberties) and Articles 113(1) and 116 of the CCP. It held that in absentia proceedings were only possible if the absent person had been duly notified as to the time and place of the hearing.

57. An emblematic case, Dr Gladyshev states, is a 2012 decision of the Supreme Court, *Milyukova.* A bank claimed against a guarantor who to the court's knowledge was undergoing lengthy medical treatment. The case materials showed that the telegram notifying her of the time and place for the hearing was never delivered. The Supreme Court held that the lower court should have adjourned to make inquiries before proceeding in her absence.

58. Another case Dr Gladyshev refers to is the *Ritz bank* case, on appeal in the Moscow City Court in 2015. There a claimant was seeking reinstatement of employment and compensation from the Ritz bank. The bank was absent at the first instance hearing and it did not appear from the case materials that it had been notified of the time and place of that hearing. The court referred to Article 113(1) of the CCP and held that the first instance court was in breach of it. The post office receipt of notification could not be deemed as service.

59. What Dr Gladyshev describes as another emblematic case is the 2009 decision of the Supreme Court, *R* v. *S.* There the court sent primary notice to the respondent's registered address, but this was returned and there was a telegram to the court from his wife that the defendant was undergoing medical treatment. The court held that the lower court was wrong to proceed against the respondent in absentia.

60. Dr Gladyshev also refers to a 2005 decision of the federal Arbitrazh court of Volga-Vyatka, which held that the lower court decision in default of the defendant's appearance should be set aside when he did not live at the address the claimant gave the court; the Russian Supreme Court decision of *Pyatkin* in 2012 which held, with reference to Articles 113(1), 116 and 233 of the CCP, that a taxpayer's failure to notify a change of address to the tax authorities did not deprive him of his constitutional right to a fair trial, in particular the right to be served; and the setting aside by the St Petersburg City Court in 2015 of a debt judgment for rent and service charges rendered in absentia, since the case materials showed the respondent had not been served, he having moved from his registered address and the claimant housing agency knowing his new address but not informing the court.

61. On the basis of this case law, Dr Gladyshev concludes that Mr Chernyakov was not given proper notice of the proceedings in breach of basic rules of procedural fairness. By using Article 118, Judge Gorodilov confused primary and on-going notification. Ignoring *Milyukova* suggests that the court was guilty of gross judicial error or that there was improper interference with the judge from the top levels of the Russian state. Applying *Pyatkin* to the present case, Dr Gladyshev opines, an in absentia

hearing was only possible if the substantive obligation of strict personal service had been discharged. That proceeds from the requirement of primary notification, which is a basic fair trial guarantee, and cannot be trumped by technical considerations, allegations of constructive service or the invocation of irrelevant collateral rules. Russian laws, he states, do not condition fair trial guarantees on any requirement that a respondent informs his commercial counterparty about his change of address, even though this is set out in a contract between them.

62. In her report dated 25 August 2016, Ms Knutova contends that Dr Gladyshev's report fails to deal with recent changes to legislation, in particular the introduction of new Article 165 to the Civil Code, which came into force on 1 September 2013 and which applies to courts of general jurisdiction such as the Meshchansky District Court. Article 165 reads:

> "1. Applications, notifications, notices, requirements, or other legally significant messages with which the law or a transaction with civil law implications for the other person shall entail for such person such implications from the moment of delivery of such message to this person or his/her representative.
>
> A message shall be deemed to have been delivered also in cases when it arrived to the person to which it was sent (the addressee) but through the circumstances depending on this person was not handed over or the addressee omitted to read it.
>
> 2. The rules of Clause 1 of the present article shall apply unless otherwise provided by law or conditions of a transaction as follows from a custom or business usage established between the parties."

63. Ms Knutova states that the introduction of Article 165 is to combat a common, abusive tactic whereby addressees of a court summons seek to avoid the consequences of its receipt by giving the appearance that they do not reside where it would be expected that the summons was to be delivered. Then, after judgment is given against them, they appeal because they allegedly were not able to participate in the case. Ms Knutova states that, in practice, she has regularly encountered cases where defendants pretend not to have received court service and summonses. It was to tackle such abuses that Article 165 establishes a presumption that a message is deemed to have been delivered if delivered to the person's address.

64. Article 165 of the Civil Code has been addressed, Ms Knutova continues, in Resolution No.25 of the Plenum of the Supreme Court, dated 23 June 2015. Paragraph 63 summarises Article 165, and then states (in translation):

> "In this respect, it should be considered that a person, an individual entrepreneur or a legal entity shall bear the risk of consequences of non-receipt of the legal communication served at the addresses listed in the first and second paragraphs of this clause, as well as the risk of absence its representatives at the specified addresses. The citizen, who reported to creditors and others, the information on another place of residence, bears the

> risk of these effects caused thereby (para. 1 Article 20 of the Civil Code of the Russian Federation). Messages delivered on the mentioned addresses are considered received even if a person does not actually reside (is not located) at the specified address."

Paragraph 68 of the Resolution confirms that Article 165 is to apply to court notices and summons unless the civil procedure legislation and Arbitrazh procedure legislation should provide otherwise.

65. In her report Ms Knutova also refers to Article 3 of the Law dated 25 June 1993, that Russian citizens must have a registered address to ensure the proper collection of correspondence, including court summons, and must notify changes in the registered address provided to a contractual counter-party such as a creditor. If a Russian citizen leaves Russia the registered address remains valid unless official notification is given to the contrary. Ms Knutova opines that the introduction of Article 165, coupled with the requirement of the 1993 Law, mean that a claim, notice or summons may be deemed served on a person if delivered to their registered address. The suggestion is incorrect that a defendant with a registered address, more so when that is also an agreed contractual address, has to be chased to other jurisdictions.

66. To illustrate the part which Article 165 plays, Ms Knutova refers to an appellate decision of the Moscow City Court of 22 April 2016, *P* v. *NN Miller*. That was a claim on a loan agreement. The judgment of the first instance court was upheld despite the defendant being absent from the hearing. The defendant argued that he was not notified of its time and place. After referring to Article 113.1 of the CCP and Article 167 of the Civil Code, the court said:

> "As follows from the case files, the court of the first instance has taken appropriate measures to notify the defendant, a telegram with the notice of the court hearing scheduled for July 01, 2015 was sent by the court to the address: *** (case file sheet ***) that the defendant himself stated as the address of registration at the place of residence in the loan agreement (case file sheet ***) and that is the same as the address indicated by the defendant in the appeal (case file sheet ***). The aforementioned telegram was not delivered with a mark made by the mail service operator stating that the house was closed, the addressee stated in the notice did not come to receive the telegram (case file sheet 34).
>
> In accordance with art. 35 of the Civil Code of the Russian Federation, persons involved in the case shall conscientiously exercise their procedural rights and shall not abuse them."

67. The court referred to paragraph 67 of Resolution No.25 of the Plenum of the Supreme Court, 23 June 2015, adding that the risk of correspondence not arriving lies with the addressee. It then referred to paragraph 68 of that Resolution and Article 118 of the CCP and said:

> "In such circumstances, the Court of First Instance has rightly considered the case in accordance with the provisions of art. 167 of the Code of Civil Procedure of the Russian Federation in the absence of the defendant. No evidence was presented by the defendant stating that the defendant was absolutely unable to receive court notices. There are no grounds for the unconditional cancellation of the court decision...
>
> In addition, the consideration of this civil case in the absence of the defendant did not lead to absence of investigation of the circumstances. The lodger of the appeal did not present any additional evidence that could affect the conclusions of the court."

68. In response to an argument that what had happened had violated the defendant's rights, the court stated:

> "The argument of the appeal petition stating that the court in the course of consideration the present case not in absentia proceedings, violated the defendant's rights, the judicial board deems it insolvent (sic) and aimed at reinterpreting the rules of procedural law, since the Court has considered the case in compliance with the requirements of art. 167 of the Code of Civil Procedure of the Russian Federation. According to the Ruling of the Constitutional Court of the Russian Federation dated March 22, 2011 No. 435-O-O consideration of the case in absentia proceedings is the right of the court but not its obligation, arising from the principle of autonomy and independence of the judiciary. In resolving the issue of the order and the procedure required for consideration of the issue, the court evaluates in aggregate all the circumstances taking into account the available files and opinions of the persons present and involved in the case, based on the objectives of the civil justice and its obligation to make a legal and a reasoned decision. Having assessed the established circumstances of the case, the trial court resolved on the possible consideration of the case according to the standard procedure, without issuing a default judgment. The court has violated no procedural law or the rights of the defendant."

69. In her report Ms Knutova states that the Russian civil courts do not have the capacity to ensure the physical handing over of a summons. The courts deliver documents by post and send messages by post or telegram. Ms Knutova refers to the Records Management Instruction for District Courts issued by an order of the Supreme Court in 2004. Ms Knutova states that she has seen no evidence that the court failed to provide Mr Chernyakov with a copy of the lawsuit and relevant documents. The indication in Judge Gorodilov's judgment of 5 February 2015, that the notifications were returned without acknowledgment of their receipt by the addressee, reflects the court's apparent view that Mr Chernyakov's tactics in pretending that he was never notified of the hearing was an abuse, and is not an indication of a failure to notify

him. From the case files it is seen that the court exhausted all measures envisaged by the CCP to notify him of the process and to ensure his interests were protected.

70. Ms Knutova opines that the cases that Dr Gladyshev relies upon to support his opinion that actual service of a claim, notice or summons is necessary either predate the introduction of Article 165 or are not relevant to the issue. *Milyukova*, *R* v. *S* and the 2005 decision of the Volga-Vyatka Arbitrazh court fall into the first category. Ms Knutova then distinguishes the other cases on their facts. For example, as to the *Ritz Bank* case, she asserts that it was the parties', not the court's, communications in issue in the case.

71. There are two supplemental reports dated 20 July 2016 and 13 September 2016 from Dr Gladyshev, where he addresses Article 165 of the Civil Code. He states that as provided for in Article 165.2, it only applies to plug a lacuna in the statutory law. In his opinion, there is no such gap in respect of the detailed, primary notification provisions of the CCP in Article 113. Moreover, Article 165 only applies where the recipient of correspondence decides not to receive it in circumstances over which he has control. Deemed service, without evidence that it came to his attention, is not in his opinion adequate notification. Failure of a Russian citizen to register an address does not mean that they lose their fair trial rights.

(c) Analysis

72. Given that this is a summary judgment application, I have not of course heard oral evidence from the experts or from other witnesses such as the Bank's counsel or Mr Koblev, which might throw light on the issue. In my view, however, Ms Knutova is clearly correct to say that Dr Gladyshev did not engage with Article 165 of the Civil Code in his 18 July 2016 report. The Moscow City Court had invoked it as a basis to dismiss the appeal from the first judgment. Due to circumstances "within [Mr Chernyakov's] own control", the appellate court said, he was not served with the proceedings.

73. In supplementary instructions from Mr Chernyakov's London solicitors, Dr Gladyshev was asked specifically about Article 165. I do not accept that Dr Gladyshev's response can be correct that Article 165 of the Civil Code has no role with what he calls primary notification. On his interpretation of Article 165.2, Article 165 only applies when there is a lacuna and there is no lacuna in light of Article 113 of the CCP. That interpretation of Article 165.2 would render Article 165 of no effect. Moreover, it flies in the face of the explanation of the deeming effect of Article 165 given in paragraph 63 of Resolution No.25 of the Plenum of the Supreme Court of 23 June 2015.

74. Dr Gladyshev's approach is also belied by the decision of the Moscow City Court of 22 April 2016, *P* v. *NN Miller*, litigation quite separate from the present, where Article 165 was given effect notwithstanding Article 113 of the CCP. Dr Gladyshev downplays this decision as a lower level appellate decision and one in conflict with a line of Russian jurisprudence. I note in passing that in support of his own opinion he cited cases at that level of appeal. To my mind the decision in *P* v. *NN Miller* is of additional interest because as well as holding that there was no breach of procedural law, it rejected the submission that the result of applying Article 165 denied the defendant his rights.

75. Judge Gorodilov found (and he had the court file) that the court staff had sent multiple notices to the Moscow address. It is difficult to see that this conclusion could be subject to examination in an English court. As to service on the Moscow address, the fact is that the Moscow address was the address of property Mr Chernyakov owned, and apparently still owns after the court recently upset the settlement agreement with his ex-wife, Ekaterina Alexandrovna; the Moscow address was the address Mr Chernyakov gave as his registered address in the guarantees, under clause 5.2 of which he also undertook to notify changes within 5 business days and never did; the Moscow address was the address on his passport; and the Moscow address was the only address featuring on court documents filed on Mr Chernyakov's behalf, both at the time and subsequently. Mr Chernyakov's Berlin address has never appeared in documentation for the three Russian judgments. It is not surprising against this background that Judge Gorodilov also held that Mr Chernyakov "had chosen not to appear in court as a form of defence…".

76. Much was made of the Kosmos telegram, which said that Mr Chernyakov was in Austria for medical treatment, and it was also submitted that there is a triable issue as to whether the Bank abused the process of the Russian court by not informing it that it actually knew that Mr Chernyakov was living in Germany at the time of the trial. In my view the Bank was entitled to say that it did not know Mr Chernyakov's whereabouts. Certainly its German lawyers were attempting to claim to the German court that he was domiciled there and living at the Berlin address, perhaps unsurprisingly when he claimed in German registration documents that the Berlin address was his only residence. That said nothing about his exact whereabouts.

77. Further, there are clear contradictions in Mr Chernyakov's own case. The German registration documents state that from 2010 his and his family's sole residence was the Berlin address, whereas his evidence is that he was running Kosmos in Russia until he left in mid-2014 to divide his time between Germany and Dubai. There is no explanation as to the arrangements he made for forwarding mail and other communications from the Moscow address. Further, the Kosmos telegram said that he was in Austria, but the case of abuse is premised on his being in Germany. The fact is that Mr Chernyakov had many addresses, but the only one which he would have known was relevant for any proceedings the Bank would take following Kosmos's collapse was the Moscow address. To put it in broad terms, the risk lay with Mr Chernyakov if he did not receive court documents.

78. In my view there is no triable issue as to whether the first judgment is flawed because the proceedings which led to it were not served on Mr Chernyakov in accordance with Russian law. My clear conclusion is that there was no breach of natural justice and that as a result of Article 165 of the Civil Code notice of the claim and about the various steps in the proceedings were properly deemed to have been served on Mr Chernyakov since they were sent to the Moscow address.

The first Russian judgment: other vitiating factors

79. Mr Chernyakov's case is that even if notice of the February 2015 hearing is deemed to have been validly effected sometime in October/November 2014, he did not have adequate time in reality to prepare his defence. That argument was advanced on the assumption that even if he received the 28 January notice, he could not possibly have had a fair trial only 7 days later on 5 February 2015. This was a claim for more than 3

billion roubles and the defence that the guarantees were voidable as onerous transactions required far more time to prepare.

80. Quite apart from anything else, the defence that the transactions were onerous transactions did not emerge as a major focus until much later, not even in the written submissions for the appeal from the first judgment over six months later. Moreover, the submission overlooks the role of Mr Koblev, Mr Chernyakov's lawyer. He learnt of the proceedings some days before a pre-trial hearing and then attended it on 22 December 2014. His account is that he had no instructions. Because of this the hearing was adjourned until 5 February 2015 so he could obtain them. Mr Koblev's evidence is that he could not obtain instructions from Mr Chernyakov over what, it would seem, was a considerable period. Despite his wide power of attorney, his account is that he could not attend at the hearing to challenge the Bank's case. The Bank contends that it is implausible that Mr Chernyakov was not told of the proceedings and that it all smacks of a tactical game.

81. Certainly there is no explanation how, around the same time of the hearing, Mr Koblev was able to complete arrangements for Mr Chernyakov's divorce, leading to the settlement agreement on 28 January 2015. The suggestion put to me was that the divorce was a matter on which instructions had been given months earlier. Nor is there any full explanation how finally Mr Koblev's firm obtained instructions some months later to defend the Bank's claim leading to the third judgment. There is no need for me to come to any conclusion on Mr Koblev's role, since it is accepted on Mr Chernyakov's behalf that unfairness in the proceedings leading to the February 2015 judgment would not have rendered it unenforceable if there was a proper opportunity to remedy it on appeal.

The first Russian judgment: appeal and cassation

82. Mr Chernyakov's case is that the judgments of the Moscow City Court on appeal on 8 December 2015 and Judge Knyazev on the cassation application on 23 June 2015 did not remedy the injustices at first instance. First, the Moscow City Court made no attempt to review the evidence of service on Mr Chernyakov, in particular the judge's failing to address the submission that the Bank and the Meshchansky District Court knew from the Kosmos telegram of December 2014 that he was not in Russia. Further, the Bank falsely told the court that the only information which it had about Mr Chernyakov's registered address was the Moscow address, when it had taken part in without prejudice negotiations with him in Germany in April 2015.

83. As regards Mr Chernyakov's substantive argument about duress, the appellate court refused him permission to adduce new evidence – according to Dr Gladyshev, a serious deviation because on Dr Gladyshev's analysis Mr Chernyakov had not been properly served with the first instance proceedings – and then dismissed the defence of duress because Mr Chernyakov had failed to adduce evidence. The court's reasoning, that if the terms of the surety agreement did not suit him he could have refused to sign, would deny the possibility of a duress defence ever arising. That was not simply a mistake of law on Mr Chernyakov's case but such an egregious departure from recognised principles of Russian law as to indicate a fundamental lack of fairness in the court's treatment of him.

84. Further criticism by Mr Chernyakov was of the conduct of the 8 December 2015 hearing by the Moscow City Court: it was very short; the judges repeatedly cut short his counsel, Mr Koblev and Mr Tolstyakov; the judgment was given only a few minutes after argument was finished, suggesting that the judges had made up their minds in advance; and the court protocol failed to record important aspects of his case. In his report, Mr Chernyakov's expert, Dr Gladyshev, describes the conduct of the hearing as shocking. In his supplementary report of 20 July 2016 he says it was unfair, wrong, mistaken about relevant Russian law and unreasoned, and a judgment which "confirms the conclusions of my first opinion on the possibility of high level interference with the judiciary".

85. In my view none of this raises any triable issues that the appeal was conducted in violation of the principles of natural justice. At the outset it should be noted that Mr Chernyakov was only able to bring his appeal because Judge Gorodilov allowed him to file late. On the appeal, notification at first instance was considered. The fact is that the Moscow City Court held that Mr Chernyakov had been duly notified about the claim and hearing as a result of the deemed notification provision of Article 165 of the Civil Code. That provision overrode the Kosmos telegram, along with what the Bank had told the German court. The Moscow City Court certainly refused Mr Chernyakov's advocates permission to adduce new evidence and a re-hearing, but along with many appellate courts, on many occasions, the judges concluded that the new evidence should have been produced before the first instance court.

86. Admittedly, the court was crisp in rejecting the submission about duress under Article 179 of the Civil Code. Its analysis in this regard is not an issue for me, although one can well appreciate a court giving the argument fairly short shrift when (1) Mr Chernyakov was a very successful businessman, running a large company; (2) there was a substantial time lag between the time the facility agreements were entered and when he signed the guarantees; (3) the guarantees were notarised; and (4) Mr Chernyakov did not apply to set them aside, as under Russian law he was entitled to do, at any point after he signed them.

87. As to the criticisms or what happened on the day of the hearing, I do not recognise the description painted for me after reading the transcript Mr Koblev has had made. Mr Koblev and Mr Tolstyakov were able to make submissions on the points contained in their earlier written submissions. There were interruptions by the judges, but that is as one would expect with a well prepared panel. I cannot regard a hearing of two hours as short, especially when the ground was covered in the written submissions. The judges may have paused for only a few minutes before giving judgment but with adequate preparation, and their assessment that nothing new had arisen at the hearing, I cannot regard that as in any way unusual, let alone a breach of natural justice.

88. As to the judgment itself, it canvasses what were the important issues raised and proceeds in a straight-forward, rational manner, covering the background and then the legal analysis. The approach to judgment writing may be different from that of an English court, and the analysis more declaratory, but I fail to see how Dr Gladyshev can detect a radical departure from the jurisprudence, a consistent failure to address Mr Chernyakov's submissions, or bizarre loops of logic.

89. In summary, there is no credible evidence that the conduct of the Moscow City Court goes any where near procedural unfairness, let alone what Dr Gladyshev characterises

as a serious breach. That submission does not, in my judgment, accord with the reality.

90. Mr Chernyakov's attack on Judge Knyazev's judgment of 23 June 2016, refusing the application for cassation, identifies what are said to be the same flaws as with the appellate judgment: the reliance on Article 165 of the Civil Code, the omission to mention the Kosmos telegram and the failure to address the error of the first instance court in applying Article 118 of the CCP. For similar reasons to those I have given regarding the judgment of the Moscow City Court, I regard these criticisms as not arguable.

The second and third Russian judgments

91. The argument about lack of fairness as regards the second and third judgments of 19 November 2015 is that, although Mr Chernyakov's lawyers knew about the hearing beforehand, they did not have a fair opportunity to put his case. Firstly, it is said that his lawyers only learnt of the proceedings leading to the second judgment, and received the relevant case papers, at the pre-trial hearing held on 9 November for the proceedings leading to the third judgment. Thus they only had 10 days to prepare, far too little time, Mr Koblev contends, to assemble the evidence for the case. Mr Chernyakov's case is that Judge Gorodilov wrongly refused the application for an adjournment to prepare adequately, given the fundamental right under Russian law to put one's case. In Dr Gladyshev's report the insufficiency of the time for preparation of the defence gives rise to an inference that Judge Gorodilov was collaborating with the Bank to deliver a judgment in the shortest possible time, to the detriment of Mr Chernyakov.

92. Further, it is said, Judge Gorodilov was unfair in his consideration of Mr Chernyakov's case. His lawyer, Mr Tolstyakov, made oral submissions that the guarantees were invalid as onerous transactions, on the basis that Mr Chernyakov was induced to give them by unlawful threats of criminal prosecution, of which the Bank was aware. Yet that defence was not considered on its merits in any of the proceedings leading up to the judgments, and Mr Chernyakov was not permitted to call evidence in support of it. As a result of what Dr Gladyshev characterises as a serious procedural error, these arguments were not recorded in the official record and, although Mr Tolstyakov protested, this was rejected on 25 January 2016.

93. In my view there are no triable issues as to whether Judge Gorodilov's 19 November 2015 judgments were obtained in violation of the principles of natural justice. For the reasons I have already given the court was entitled to regard service and notification as valid so that the responsibility for any short notice regarding the hearing rested with Mr Chernyakov. It is therefore wrong to allege unfairness in the court's refusal to adjourn.

94. As to what is said to be the failure to address oral submissions about the guarantees being onerous transactions under Article 179, it was fairly accepted by Ms O'Sullivan that this was a difficult argument. That, in my view, is correct. Mr Koblev concedes that these were oral submissions, and the Article 179 point was not in Mr Tolstyakov's written submissions. In his ruling of 25 January 2016, Judge Gorodilov stated that Mr Tolstyakov had not addressed him on that issue. In as much as there was anything before him along those lines, it was an abuse of right argument, and

contained in the court protocol. I note in passing that Judge Gorodilov gave reasons for rejecting abuse of right in the third judgment, in the passage I quoted earlier. This does not raise a triable issue.

Article 6 ECHR

95. Mr Chernyakov submits that the evidence discloses a triable case of flagrant breach of the fair trial right in Article 6 ECHR. This was not pursued at length and does not add in any material way to the natural justice arguments.

Fraud

96. Mr Chernyakov says that the Bank knew that he had been forced to give the guarantees under duress, but that in pursuing its claims in the three Russian judgments it impliedly and falsely represented to the Russian court that there was no defence to what were portrayed as ordinary claims. Further, he contends, the Bank fraudulently and dishonestly concealed the true position from the court. At the base of the fraud ground for impeaching the three Russian judgments is the alleged conspiracy between Mr Rotenberg of Mostotrest and the City of Moscow, as outlined earlier in this judgment. Consequently this was not, as the Bank seeks to suggest, a routine commercial transaction. On a specific point, Mr Chernyakov contends that the Bank misled the Russian court at the hearing in February 2015, leading to the first Russian judgment, regarding its lack of knowledge of Mr Chernyakov's whereabouts. These allegations give rise, it is submitted, to a triable issue that the judgments were procured by fraud.

97. There is also a triable issue, the argument continues, as to whether the courts in this case were acting under the influence of powerful parties behind the scene, either the Bank (which is state-owned) or Mr Rotenberg of Mostotrest. Dr Gladyshev's expert report is invoked in support. There was also reference to reports such as that from 2010 of the International Commission of Jurists, which identified so called "telephone justice" as a continuing aspect of the Russian legal system. There is bizarre reasoning in the judgments, it is said, one example being that Mr Chernyakov could have chosen not to sign the guarantees, if they were onerous transactions and, in any event, could have applied later to set them aside. That ignores the quelling effect of duress, it was said, on a person's behaviour.

98. In my view the evidence goes nowhere near being sufficiently cogent to justify a trial of the issues falling under this head. In my view the duress argument has ballooned with time, now netting the Bank in the alleged conspiracy. But as portrayed to me the alleged conspiracy makes little, if any, commercial sense – having Kosmos borrow more money so it would collapse – when the conspirators could have achieved their aims more directly, by depriving it of contracts. As to the Bank's knowledge about the German address, I have already held that there is no triable issue as to whether it misled the court regarding that.

99. There have been concerns about telephone justice in Russian courts. But even Dr Gladyshev accepts that such instances of wrongful behaviour are atypical, and states in his report that interference in this case "might be plausible". Later he hardens up his criticism: the nature of Judge Gorodilov's judgments suggests that they were improperly procured. Judges Vyshnyakova, Kazakova and Yefimova in the Moscow

City Court are said to be implicated because they "cover" for the judge. But the logic of Dr Gladyshev's opinion regarding the possibility of high level interference cannot stop there and one more judge, Judge Knyazev, is implicated since he ruled against Mr Chernyakov on the cassation application.

100. In my view none of this is arguable. Judicial impropriety can be inferred by an English court with departures from normal judicial practice, irrational conclusions and so on: *OJSC Oil Co* v. *Abramovich* [2008] EWHC 2613 (Comm), [496], per Christopher Clarke J. However, my reading of all the judgments is that they are straightforward and rational. There may have been mistakes in the reasoning but there is nothing arguably untoward in their conclusion that there was no defence to what were ordinary claims under guarantees given as security for the Bank when it provided facilities.

Public policy

101. Mr Chernyakov accepts that the public policy basis for impeaching the Russian judgments substantially overlaps with the other exceptions. I see no independent public policy grounds for refusing their recognition and enforcement. In particular, for the reasons I have already given, I cannot see any triable issue as to whether improper pressure was placed upon the three Russian courts to give judgments adverse to Mr Chernyakov.

Other compelling reasons

102. There are no other compelling reasons for trial. In my view the Russian judgments represent a straightforward enforcement of commercial security taken by the Bank in the ordinary way. The defences raised before me have been contrived to camouflage the true position. For the reasons already given I do not accept arguments as to the speed and lack of equality of arms as between the parties, the court being misled about Mr Chernyakov's whereabouts, or a lack of consideration of his defence of duress. The matters raised before me provide no arguable defence for the claims under the three judgments.

Conclusion

103. For the reasons given I grant the Bank summary judgment.