[2016 Gib LR 359]

OTKRITIE INTERNATIONAL INVESTMENT MANAGEMENT LIMITED, OTKRITIE CAPITAL INTERNATIONAL LIMITED (formerly Otkritie Securities Ltd.) and OTKRITIE HOLDING (formerly Otkritie Financial Corp. JSC) v. URUMOV, DENNING CAPITAL LIMITED, DUNANT INTERNATIONAL SA and BALK

VANDRY INVESTMENTS LIMITED and IVORY KEY HOLDINGS LIMITED (Interested Parties)

COURT OF APPEAL (Kay, P., Rimer and Potter, JJ.A.): December 16th, 2016

Civil Procedure—appeals—matters of fact—Court of Appeal may only rarely overturn Supreme Court's findings of fact if satisfied judge plainly wrong—appeal not re-trial—trial judge has advantage of seeing witnesses give evidence and is experienced fact finder—additional caution required if challenge to judge's finding on allegation of fraud

Evidence—inferences from evidence—non-appearance of witness—court may draw adverse inferences against party for failure to call witnesses—not drawn if court satisfied as to reason for witnesses' absence or silence

The appellants sought to enforce a judgment.

The appellants (collectively, "Otkritie") were three related companies. The group was an independent Russian financial services provider. In February 2014, the English Commercial Court (Eder, J.) had found that Otkritie had been the victim of two frauds committed by Mr. Urumov, whom Otkritie had formerly employed as a senior trader, and others, and that Mr. Urumov's wife, Ms. Balk, had knowingly assisted him in disposing of the proceeds. The English court gave judgment against Mr.

Urumov for just over US$51m. and against Ms. Balk for just under US$37m., plus interest and costs.

Otkritie sought to enforce its judgment against assets held by two Gibraltarian companies: Ivory Key Holdings Ltd. ("Ivory," the respondent) and Vandry Investments Ltd. ("Vandry"). The judgment was registered as one of the Supreme Court of Gibraltar. Otkritie claimed that the assets held by Ivory and Vandry belonged beneficially to the Urumovs.

Ivory was controlled by Mr. Kotton, a successful businessman. In May 2012, Mr. Kotton had transferred US$5m. to Vandry (the money derived from the proceeds of legitimate share sale agreements). Vandry had invested US$4.9m. of the money in a portfolio of securities. Subsequently, the portfolio and an amount of cash had been transferred to Ivory's bank account, under Mr. Kotton's control. The dispute before the Supreme Court concerned the nature of these transactions.

Ivory alleged that the US$5m. had been a loan by Mr. Kotton to Mr. Balk (Ms. Balk's father), with whom he had a long-standing business relationship. It had been transferred to Vandry (at the request of Mr. Balk) for the purpose of a joint venture for the development of land in Russia. There was no documentation showing the initial discussions about the project and Mr. Kotton said that his dealings with Mr. Balk were conducted in an informal manner. When problems arose with the development because of squatters on the land, Mr. Kotton requested the return of his money. The transfer of the portfolio and cash to Ivory represented the repayment of the loan by Mr. Balk to Mr. Kotton. Although Mr. Kotton knew Ms. Balk, he had had no contact with her since 2008, and he did not know Mr. Urumov.

Otkritie alleged that the loan was a sham and that the US$5m. had been transferred for the benefit of the Urumovs as part of a money laundering exercise. There was evidence that the Urumovs had previously used Vandry for money laundering and there was no evidence that it had ever been used for lawful trade. Otkritie claimed that Mr. Kotton had transferred his "clean" money to Vandry in return for a benefit or promised benefit from the Urumovs. Otkritie claimed that steps had been taken to return the money to Ivory (and so to Mr. Kotton) when it became apparent to the Urumovs and Mr. Kotton that Otkritie had been about to discover Mr. Kotton's payment to Vandry and obtain a freezing order in respect of Vandry's account. Otkritie claimed that, following the transfer of the portfolio and cash to Ivory, those assets remained beneficially the Urumovs' property and that its judgment was therefore enforceable against Ivory which, like Vandry, held them as trustee or nominee for the Urumovs.

A major part of Otkritie's case against Ivory was based on the deficiencies in its disclosure. Mr. Kotton gave evidence on behalf of Ivory. He said that, because of security concerns, his practice was to keep emails on a server run by a longstanding friend and to instruct him to destroy the server every two years. His last server had been destroyed in July 2013, shortly after Ivory's Gibraltar bank account had been frozen. Otkritie

argued that this was a deliberate concealment of disclosable documents. Otkritie also criticized Ivory's failure to call witnesses to support Mr. Kotton's account. The judge considered, however, that there were reasons why the witnesses had not been called and that no adverse inferences could be drawn.

The Supreme Court (Jack, J.) held that the Urumovs had no interest in the assets and that Otkritie's judgment was not enforceable against Vandry or Ivory. The judge found Mr. Kotton to be an honest, credible witness. The judge expressly recognized that there were many suspicious features but found that Otkritie had not proved its case.

On appeal, Otkritie challenged Jack, J.'s findings and conclusions. It submitted, *inter alia*, that (a) Mr. Kotton had deliberately suppressed documentation that could otherwise have enabled a proper testing of his case, and the alleged reason for the destruction of all contemporaneous documents relating to the alleged entry into the Russian development was incredible; (b) the judge's acceptance of Mr. Kotton's evidence as to the loan transaction was erroneous; and (c) Ivory's disclosure deficiencies and its failure to call any witnesses who could have supported its case were such that the judge should have drawn adverse inferences against it.

Held, dismissing the appeal:

(1) An appellate court would only rarely overturn a trial judge's findings of fact and could only do so if satisfied that the judge was plainly wrong. An appeal was not a re-trial. A judge had the advantage of seeing the witnesses give evidence and was experienced in the determination of fact. An appellate court should exercise added caution in respect of a challenge to a judge's finding in relation to an allegation of fraud. It would rarely be justified in overturning a finding of fact by a judge that turned on the credibility of a witness. When trying cases of alleged dishonesty, it was essential to test the credibility of witnesses by reference to objective facts proved independently of their testimony, in particular by reference to documentary evidence, and also to pay particular regard to their motives and to the overall probabilities (paras. 44–48).

(2) Otkritie's appeal would be dismissed. Its case against Ivory had been weak. As it had disclaimed any suggestion that the US$5m. was dirty money derived from the Urumov frauds it had had to advance the suggestion that there had been an arrangement between the Urumovs and Mr. Kotton involving the swapping of their dirty money for his clean money. That was evidentially hopeless and made more difficult by the judge's finding that Mr. Kotton was a reputable person of good character who had no known connection with Ms. Balk since 2008, did not know Mr. Urumov and had done business with Mr. Balk for years in an informal manner. The judge had been expressly aware of the many suspicious circumstances surrounding the alleged loan transaction but accepted Mr. Kotton's evidence. The judge had been entitled to make the findings that he did and the appeal, effectively inviting the court to find that Mr.

Kotton's evidence had been false and that Otkritie's evidentially weak case should succeed, would be dismissed (para. 99).

(3) In respect of the disclosure deficiencies, the judge had not erred in failing to consider overtly whether the evidence as to the destruction of the server was a lie, or in failing to find that it was. Mr. Kotton's evidence that he ordered the destruction of the server had been volunteered to explain why there was no written documentation relating to earlier events and had not been challenged as untrue. It could not be said that the evidence was obviously untrue and the judge had not erred in accepting it. The judge's finding that Mr. Kotton had caused the relevant server to be destroyed was one he was entitled to make and it was not for the present court to re-decide the matter. There was no doubt that the judge had been fully aware of the serious disclosure deficiencies on the part of Ivory or Mr. Kotton and that he accepted the evidence as to the destruction of the server. The judge nevertheless found Mr. Kotton to be a truthful witness. It was not for the present court to decide that the disclosure deficiencies required the making of a different finding (paras. 79–84).

(4) Nor could the court interfere with the judge's rejection of Otkritie's case that the alleged US$5m. loan was a fiction. The judge had accepted Mr. Kotton's account, notwithstanding the existence of many suspicious features. Otkritie had failed to prove that the US$5m. had been paid to Vandry for the benefit of the Urumovs and there was no evidence providing any reason why Mr. Kotton should have made a payment to Vandry for the benefit of the Urumovs. The judge had regard to all the circumstances, including the fact that the claimed loan was between two very wealthy businessmen who had known each other for years and conducted their business relationship in an informal manner. The loan was for investment in a Russian project which did exist and in respect of which there had been a genuine problem with squatters. The judge had not overlooked the fact that Ivory's disclosure deficiencies meant there was an absence of corroborating contemporaneous documentation but held that there was no basis for inferring that the unavailable material would have supported Otkritie's case and believed Mr. Kotton's account (paras. 87–89).

(5) Furthermore, Ivory's conduct of the case was not such that the judge should have drawn adverse inferences against it. The fact that a party had improperly destroyed documentation would not justify a presumption as to liability but it might justify the drawing of adverse inferences in relation to the determination of liability. The judge considered whether Ivory's disclosure deficiencies justified an adverse inference and concluded that there was no basis for an inference that the documentation that had previously existed would have supported Otkritie's case that the transaction was a money laundering operation. There was no basis upon which the present court could properly conclude that he should have decided differently. In respect of Ivory's omission to call any witnesses, however, Otkritie raised a legitimate question as to whether adverse inferences

should have been drawn. In certain circumstances, a court might 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. Such inferences might go to strengthen the case of the other party or weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. There must, however, be a case to answer on the issue before an adverse inference could be drawn. No adverse inference would be drawn if the court were satisfied by the reason for the witness's absence or silence. In many cases the decision whether to call a witness would be the subject of privileged legal advice and an explanation as to why he was not called would, if it were to be evidence of the whole truth, require the waiver of that privilege. It must be open to the court to make its own assessment as to whether any putative witnesses might reasonably have been called. In the present case, the judge considered that in respect of all the potential witnesses there was a credible explanation as to why each of them might not have been called. His assessments were reasonable and he was entitled to take account of them (paras. 90–97).

Cases cited:

(1) *Armagas Ltd.* v. *Mundogas S.A.*, [1985] 3 W.L.R. 640; [1985] 3 All E.R. 795; [1985] 1 Lloyd's Rep. 1, applied.
(2) *British Sky Broadcasting Group plc* v. *Sky Home Servs. Ltd.*, [2006] EWHC 3165 (Ch); [2007] 3 All E.R. 1066; [2007] F.S.R. 14, applied.
(3) *Cook* v. *Thomas*, [2010] EWCA Civ 227, applied.
(4) *JSC BTA Bank* v. *Ablyazov (No. 8)*, [2012] EWCA Civ 1411; [2013] 1 W.L.R. 1331; [2013] 2 All E.R. 515, referred to.
(5) *McGraddie* v. *McGraddie*, [2013] UKSC 58; [2013] 1 W.L.R. 2477; 2014 S.C. (U.K.S.C.) 12; 2013 S.L.T. 1212, applied.
(6) *Mutual Holdings (Bermuda) Ltd.* v. *Hendricks*, [2013] UKPC 13, applied.
(7) *Prest* v. *Petrodel Resources Ltd.*, [2013] UKSC 34; [2013] 2 A.C. 415; [2013] 3 W.L.R. 1; [2013] 4 All E.R. 673, applied.
(8) *R.* v. *Lucas*, [1981] Q.B. 720; [1981] 3 W.L.R. 120; [1981] 2 All E.R. 1008, referred to.
(9) *Watson Farley & Williams* v. *Ostrovizky*, [2015] EWCA Civ 457, referred to.
(10) *Wiszniewski* v. *Central Manchester Health Auth.*, [1998] P.I.Q.R. P324; [1998] Lloyd's Rep. Med. 223, applied.

N. Pillow, *Q.C.* and *A. Dudnikov* for the claimants/appellants;
N. Calver, *Q.C.* and *R. Triay* for the respondent.

1 **RIMER, J.A.:**

Introduction

The parties to these proceedings are as follows. The claimants/appellants (together "Otkritie") are three related companies, each including in its name the word "Otkritie," one incorporated in the British Virgin Islands, one in England and Wales, and one in Russia. The group is an independent Russian financial services provider. The defendants are: (1) Georgy Urumov ("Mr. Urumov"), (2) Denning Capital Ltd. (a BVI company, "Denning"), (3) Dunant International SA (a Panamanian company, "Dunant"), and (4) Yulia Balk ("Ms. Balk"). Ms. Balk is Mr. Urumov's wife (together "the Urumovs") and Denning and Dunant are companies they own and control. There are two interested parties: (1) Vandry Investments Ltd. ("Vandry") and (2) Ivory Key Holdings Ltd. ("Ivory"), both Gibraltarian companies. Ivory, the respondent to the appeal, is under the control of Alexander Kotton. The control of Vandry at the time material to these proceedings was in dispute at the trial that resulted in the order the subject of the appeal.

2 On February 10th, 2014, Eder, J. in the English Commercial Court gave judgment for Otkritie against Mr. Urumov for just over US$51m. and against Ms. Balk for just under US$37m., plus in each case costs and interest. Eder, J. found that (i) Otkritie had been the victim of two frauds committed by Mr. Urumov (whom Otkritie had formerly employed as a senior trader) and others in October 2010 and March 2011, the frauds causing losses of some US$176m.; and (ii) Ms. Balk had knowingly assisted her husband in disposing of the proceeds of the frauds. The outcome of Eder, J.'s judgment was contained in an order of March 14th, 2014. Otkritie has made substantial recoveries but has still not achieved full recovery.

3 By an order of June 17th, 2014, Dudley, C.J. registered Eder, J.'s judgment as one of the Supreme Court of Gibraltar. At the trial of an issue in these proceedings directed by Dudley, C.J. as to whether Otkritie's judgment is enforceable against either or both of Vandry and Ivory, Otkritie sought to establish its right to enforce the judgment against a portfolio of securities and cash together worth some US$5m. held by Ivory in its accounts at Jyske Bank (Gibraltar) Ltd. ("Jyske Bank"). Otkritie's case was that these assets belong beneficially to the Urumovs. After a five-day hearing between April 18th–22nd, 2016, Jack, J. held in his reserved judgment (Claim No. 2012 O–10; Supreme Ct., June 9th, 2016, unreported) that the Urumovs have no interest in such assets and that the registered judgment is not enforceable against Vandry or Ivory. The only active parties at the trial were Otkritie and Ivory. The Urumovs and Vandry took no part. Neither did Denning or Dunant, their companies.

Jack, J.'s findings and conclusions

Preliminary

4 Otkritie's appeal challenges Jack, J.'s findings of fact. It recognizes the difficulty appellants usually face in seeking to upset a judge's findings of fact but its criticism of the judge's decision is that he is said to have made basic errors in his approach to the determination of the central factual issues. The nub of the complaint is that the disputed evidence of Mr. Kotton, Ivory's sole witness, was uncorroborated by any documentation or by the evidence of other witnesses whom it is said Ivory could have called but did not. The reason for the absence of any documentation was because (as Mr. Kotton said in his oral evidence) he had given instructions for the destruction of the server on which any relevant documentation would or might have been located, although following such claimed destruction he had produced a statement in response to a specific disclosure order that (it is said) dishonestly implied that all potentially relevant documents remained in existence but that his search of them had produced a nil return. His statement is said to have been a lie. Otkritie also asserts (perhaps a little inconsistently) that Mr. Kotton's evidence as to his destruction of the server was also a lie. It says that, in all the circumstances, it was perverse for the judge to accept as true what it says was his incredible and improbable evidence. As the challenge to Jack, J.'s conclusions is wholly based on his findings of fact, I must first explain his findings and conclusions. The summaries under the sub-headings that follow, down to that introducing this appeal, derive from various parts of Jack, J.'s judgment.

Otkritie's and Ivory's respective cases at the trial

5 The undisputed facts relating to Ivory's portfolio and cash are that, on May 30th, 2012, Mr. Kotton transferred US$5m. to Vandry's account at Jyske Bank. By, at the latest, early 2015, Otkritie had accepted that the US$5m. had come from Morenco Ltd., a Cypriot company in which Mr. Kotton had a 50% interest, and was derived from the proceeds (totalling over US$53m., of which part had been paid to Mr. Kotton in dividends) of two wholly legitimate share sale agreements of July 5th and August 5th, 2011. Vandry invested US$4.9m. of the money so transferred into the portfolio of securities. On January 28th, 2013, the portfolio (then valued at US$4,998,547.62) and cash of US$12,962.80 were transferred to Ivory's account at Jyske Bank, that is, back to an account under the control of Mr. Kotton. The dispute before Jack, J. was about the nature of these transactions.

6 Ivory's case was that the US$5m. (indisputably "clean" money) was a loan by Mr. Kotton to Ms. Balk's father, Iosif Balk ("Mr. Balk"), whom he had known since 1995. The loan was, Mr. Kotton said, for the purposes of

a joint venture with Mr. Balk (and others, although Mr. Kotton did not know who they were) for the development of land in or near Moscow ("the Profsoyuznaya land"). The money was, at Mr. Balk's request, paid to Vandry. The intention was that, once the land project came to fruition, the loan was to be converted into Mr. Kotton's share in the project on terms to be agreed. In the event, because of squatters on the land, the progress of the project was destined to be significantly held up and when, in about September 2012, Mr. Kotton discovered this, he wanted his money back. To that end, he and Mr. Balk agreed to record the US$5m. loan as one by Mr. Kotton to Vandry, following which a loan agreement dated November 15th, 2012 was created, one probably signed by Vandry on December 6th, 2012. The transfer of the portfolio and cash to Ivory made in January 2013 represented the repayment to Mr. Kotton of that loan.

7 Otkritie's case was that all this was untrue, that Mr. Kotton's claim to have advanced the US$5m. as a contribution to the Moscow project was a fiction, that his purported loan to Vandry was a sham and that the true explanation of the US$5m. payment to Vandry was that it was made for the benefit of the Urumovs personally as part of a money laundering exercise. The evidence showed that the Urumovs had previously used Vandry for what the judge inferred were money laundering transactions on a major scale; and (subject to the issue as to the propriety or otherwise of the Kotton/Vandry transaction) there was no evidence that Vandry had ever been used for a lawful trade. Whilst Otkritie accepts that the US$5m. payment derived from clean money, it invited the judge to draw the inference that the consideration for the payment was either (i) the prior conferring by the Urumovs of an unidentified benefit upon Mr. Kotton that earned the payment to them of the US$5m., or (ii) a promise that they would so benefit him in the future. Otkritie's case as to why later in 2012 steps were taken to return the money to Ivory (and so to Mr. Kotton) was because it had become apparent to the Urumovs and Mr. Kotton that, following the obtaining in November 2012 by Otkritie in Gibraltar of a *Norwich Pharmacal* order requiring Jyske Bank to disclose information about Vandry, Otkritie was about to discover the making of Mr. Kotton's allegedly dishonest payment to Vandry, following which Otkritie would be bound, as it did, to obtain a freezing order in respect of the Vandry account. Otkritie's case was that, following the transfer of the portfolio and cash to Ivory, those assets still remained beneficially the Urumovs' property and that the Otkritie judgment was therefore enforceable against Ivory, which, like Vandry, held them as a trustee or nominee for the Urumovs.

8 It was Jack, J.'s task to decide between these opposing accounts. He accepted the truth of Mr. Kotton's and rejected Otkritie's.

Ivory

9 Ivory was incorporated on May 19th, 2000 by T & T Management Services Ltd. ("TTMS"), the company and trust administration arm of Triay & Triay, Ivory's lawyers. On May 23rd, 2000, TTMS declared that it held the Ivory shares on trust for Mr. Kotton. On May 31st, 2000, Mr. Kotton created the Ivory Key Trust ("the IK Trust"), with T & T Trustees Ltd. ("TTT") as trustee. The original beneficiaries were Mr. Kotton's three children but TTT had the power to re-settle the trusts, so enabling it to add Mr. Kotton as a beneficiary, as it did on January 8th, 2009. At some point (certainly by November 2005) the IK Trust held all the shares in Ivory. It also held all the shares in (i) Plasma Surgical Ltd., a UK company; (ii) Plasma Surgical Investments Ltd., a BVI company; and (iii) Solaria Ltd. It also had a third interest in Knightsbridge Holdings Ltd., which in turn held all the shares in Perth Holdings Ltd., although the judge suggested that by 2011 Mr. Kotton had acquired 100% control of Perth (it appears that was unsupported by evidence but Mr. Kotton accepted, on Day 4 of the trial, that he operated Perth as his "personal vehicle"). The IK Trust was the main vehicle through which Mr. Kotton conducted his business.

Vandry

10 Vandry was incorporated on May 2nd, 2000. Ivory held 71 of its 100 issued shares and the remaining 29 were held by two Swedes, who, on August 8th, 2002, transferred them to Ivory, which became Vandry's sole shareholder. On October 23rd, 2002, Ivory transferred all the shares to Alexander Lundin (not a TTMS employee), who declared that he held them all for the IK Trust. At the time material to these proceedings, Mr. Lundin was the sole director of Vandry. He was not a director of Ivory, but was a director of other of Mr. Kotton's companies. Mr. Kotton's evidence (Day 3) was that, at an early stage following its incorporation, he "gave" Vandry to Mr. Balk, which became held in the Birch structure to which I refer next.

Birch

11 On November 15th, 2002, Mr. Balk created the Birch Key Trust ("the BK Trust"). The trustee was TTT. At all material times the beneficiaries were his two daughters, that is Ms. Balk and her half-sister Sofia, the only child of Mr. Balk's second marriage to Natalia. The trust held all the shares in Birch Key Holdings Ltd., which in turn became the holder of all the shares in Vandry and which had initially also held a third of the shares in Knightsbridge. The other third share in Knightsbridge was, at least initially, held by or for another of Mr. Kotton's business partners, Mr. Rubiner. TTT had the power to re-settle the trusts of the BK Trust. On February 26th, 2013, it appointed all the Vandry shares and also Vandry's funds at Jyske Bank to Mr. Balk absolutely. That appointment, however,

post-dated the material events relating to the Kotton/Vandry transaction in 2012.

The status of Eder, J.'s judgment

12 Whilst Jack, J. held that Eder, J.'s order of March 14th, 2014 was conclusive as to the Urumovs owing Otkritie the sums the subject of the orders against them, he also had to consider a submission by Otkritie that Vandry (not a party to the English proceedings) was bound by Eder, J.'s findings in his judgment of February 10th, 2014. Jack, J. rejected the submission. Otkritie's case in that respect was that Vandry was the privy of Ms. Balk. It so argued with a view to showing that Vandry was bound by Eder, J.'s finding that, in relation to various money laundering transactions between 2006 and 2010 (all *unrelated* to the frauds on Otkritie), Ms. Balk had shown that (together with Mr. Urumov) it was she who had the ownership and control of Vandry, and Eder, J. found that Ms. Balk had lied in her assertions that Vandry was her father's (Mr. Balk's) company. Jack, J. said that Eder, J.'s findings about these transactions were not necessary for his decision and so could not create an issue estoppel and that anyway, even if Ms. Balk had used Vandry as a dishonest front during those earlier transactions, there remained the possibility that, by the time of the later frauds on Otkritie, Vandry was no longer in her control but was the vehicle of Mr. Balk and his wife Natalia. Jack, J. also rejected what he called a "boot-straps" argument that Eder, J.'s finding that Ms. Balk had ownership and control of Vandry could be said to bind Vandry. He held that he had to make his own determination as to the true ownership and control of Vandry.

The evidence before Jack, J.

13 The only witness for Otkritie was Neil Dooley, of Otkritie's solicitors, who was not cross-examined on his witness statement. The only witness for Ivory was Mr. Kotton, who was cross-examined over 2½ days. He is 51, and the judge found him to be extremely intelligent, a successful businessman, a talented linguist and a man of good character. He lived in the USSR from birth to 1973, when his family moved to Israel. In 1976, the family moved to Sweden and, in 2004, Mr. Kotton moved to Switzerland. His business interest is in property development and investment. Since 1988, he had built up contacts in Russia where he was successful in providing high class residential accommodation and he had more recently extended his operations into commercial property. He had also had a number of developments in Spain, around Malaga. His method of doing business was to use single purpose vehicles.

14 Mr. Kotton said he had never met Mr. Urumov and did not even know what he looked like. On the other hand, he did know Ms. Balk, who, between October 2003 and August 2008, had been the company secretary

of Plasma UK, of which he was a director until January 14th, 2013 and which (in contrast to the summary taken from Jack, J.'s judgment in para. 9 above) he said was the 100% subsidiary of Plasma BVI. He said he had not seen Ms. Balk since 2008 and there was no evidence of any contact between them since then. He accepted, however, that he knew her father, Mr. Balk, well. He had known him since 1995 and it was he who, in 2003, had asked Mr. Kotton if he could offer Ms. Balk a job. Mr. Balk was and is an extremely wealthy man. He and Mr. Kotton had done property deals together (that was not challenged), including a US$100m. project. Many of Mr. Balk's projects were in Russia and Mr. Kotton said that Mr. Balk acted as a freelance consultant to him. He said Mr. Balk opened doors, sought out projects, evaluated them and proposed them to Mr. Kotton, who said that over the years he had paid Mr. Balk "hundreds of thousands." The judge said that Mr. Kotton's explanation of their relationship had no inherent implausibility about it and that there was no evidence contradicting it.

15 Mr. Kotton said that he and Mr. Balk were friends as well as business associates and that it was he who introduced Mr. Balk to TTMS in 2002, when Mr. Balk set up the BK Trust. He said that once that trust was set up, he was happy to give Vandry to Mr. Balk, which was one of numerous companies he had "on stand-by." I understand his evidence to have been to the effect that he gave Vandry to Mr. Balk soon after the establishment of the BK Trust, although it was pointed out in cross-examination that TTMS continued to send correspondence about Vandry to Mr. Kotton and a letter of October 24th, 2005 was identified. Otkritie submitted that this showed that Vandry was still Mr. Kotton's company. As to this, Jack, J. said there was no evidence of Mr. Kotton giving any instructions in relation to Vandry after he had given it to Mr. Balk and, as Mr. Balk did not speak English, it made sense for TTMS to send documents in that language to Mr. Kotton, who had introduced Mr. Balk.

Disclosure deficiencies

16 A major part of Otkritie's attack on Mr. Kotton's credibility at the trial was based on the deficiencies in his and Ivory's disclosure. The same point is central to this appeal. Mr. Kotton's evidence was that he kept his emails and attachments on a server run by a long-standing friend, David Wilson, and that his practice was to instruct him to destroy the server every two years. His claimed reason was his fear of intrusion by the Russian state and others: as he summarized it, "security, security, security." The judge found that the last server was probably destroyed on about July 7th, 2013, following instructions that Mr. Kotton probably gave after May 2013. Jack, J. said that "Mr. Kotton's ostensible reason for having the server destroyed seems improbable" but he continued (at para. 56):

> ". . . I do, however, have to bear in mind Mr. Calver's observation that it is dangerous to look at evidence of Russian business practices through Western eyes. Mr. Kotton is an extremely wealthy business-man operating in a place where such people, I am prepared to accept, are potentially vulnerable to state and non-state interference. I am not therefore prepared to reject out of hand Mr. Kotton's explanation for changing servers in such a dramatic fashion. However, the improbability of his explanation is something which I will need to take into consideration when deciding whether Mr. Kotton is a witness of truth."

17 It was argued by Otkritie at the trial that the destruction of the server amounted to the deliberate concealment of disclosable documents. Mr. Kotton was not a party to the proceedings but Jack, J. assumed that, as Ivory's controller, he did potentially owe personal duties of disclosure and to preserve documentation. On May 13th, 2013, Dudley, C.J. had made a *Norwich Pharmacal* order directed to Jyske Bank and an asset-freezing order in respect of Ivory's money at Jyske Bank, at which point it became apparent to Ivory that litigation with Otkritie was likely. Jack, J. assumed that Mr. Kotton permitted the destruction of the server after his duty to preserve documents had arisen and (so he also assumed) after that duty had been explained to him by Ivory's lawyers. In addition, Jack, J. noted other disclosure deficiencies by Ivory, which included that its lawyers had left it to Mr. Kotton to do the searches for documents and also (at para. 67)—

> ". . . the failure to identify the memory stick used by Mr. Kotton to hold information from the server and a wholesale disregard for the need to disclose documents which had been but no longer were in the control of [Ivory]. Mr. Kotton's witness statement of 5th October 2015 is deficient and misleading. Even if I were wrong about the server, these other deficiencies would have been serious."

18 Jack, J. noted that Otkritie had made no application to strike out Ivory's case in consequence of the destruction of documents but he referred to the suggestion in *Hollander on Documentary Evidence*, 12th ed. (2015) that such destruction might at least justify the drawing of adverse inferences against the destroyer. Jack, J. said he would explain his approach when discussing "individual items."

Otkritie's case

19 Jack, J. said that Otkritie's primary case was that the Urumovs were established fraudsters, who had committed major frauds in Russia prior to October 2010 (when the first fraud on Otkritie was committed) and had laundered money from those earlier frauds through various companies. He said that Otkritie invited him to draw the inference that (at para. 73) the

Urumovs "passed at least US$5 million to Mr. Kotton for him to launder. It is this money which was returned to [the Urumovs] via the fake loan made by Mr. Kotton to Vandry on 30th May 2012."

20 Mr. Pillow disputed before this court that Otkritie advanced any such case at the trial and I shall come to what he says was the more limited case it did make. Jack, J. said (at para. 75) that the first problem with what he had described as Otkritie's "primary" case was that Mr. Dooley's multiple hearsay evidence in his witness statement of the alleged pre-2010 frauds was not admissible. In consequence, such frauds were not proved. Moreover, there was also no evidence showing that any money from such alleged frauds went to any company connected with Mr. Kotton. Jack, J. noted that Mr. Kotton's control of Vandry had ended long before Ms. Balk had used Vandry as a money laundering vehicle. He continued (at para. 77):

> "In these circumstances, whatever view I take of Mr. Kotton's credibility, Otkritie has not established this element of their primary case. Nor can they, on this aspect of their case, rely on inferences from the destruction of the server. Firstly, a *Wiszniewski* inference [see *Wiszniewski* v. *Central Manchester Health Auth.* (10)] can only be drawn if a claimant establishes a case to answer, and Otkritie have not. Secondly, there is no reason to suppose that in May 2013 there would have been any documents on the server to show a pre-October 2010 transfer of tainted money to Mr. Kotton. Quite apart from the inherent unlikelihood of such documents existing where there is no case to answer, the relevant previous server would have been destroyed on Mr. Kotton's evidence two years earlier in 2011."

21 Jack, J. also said that if the US$5m. represented the proceeds of the alleged earlier frauds it would have belonged to the victims of those frauds; it would not therefore have belonged to the Urumovs and so could not be the subject of execution by Otkritie.

22 Jack, J. described Otkritie's secondary case as "more pared back." He explained it by reference to a citation from Otkritie's final submissions. It amounted to an assertion that the US$5m. transferred by Vandry to Ivory in January 2013 was not by way of the repayment of any genuine loan and so gave rise to a resulting or constructive trust in favour of the Urumovs "because, at the time of receipt by Vandry of US$5 million from Mr. Kotton in May 2012, the Urumovs' relationship with, and use of, Vandry—and their control of its bank accounts for their personal purposes—was such that the proper conclusion is that the US$5 million were received for the benefit of, and were due to, the Urumovs." Alternatively, in light of the explanation by Lord Sumption, JSC in *Prest* v. *Petrodel Resources Ltd.* (7) ([2013] UKSC 34, at para. 28) as to when, by reason of the "evasion principle," the court may pierce a company's veil of incorporation, this was a case in which the money could and should

be regarded as belonging to the Urumovs "through Vandry." Jack, J. deferred until later his consideration of the application of this principle to the case.

Ms. Balk's use of Vandry for money laundering purposes

23 Although Jack, J. held there was no proof of the alleged pre-October 2010 frauds, he did refer to the transactions shown by what Eder, J. had called "the VTL material" insofar as it concerned Jyske Bank or Vandry. That material related to apparently sham transactions involving various companies (including Vandry); its provenance was a safe deposit box at a bank in Geneva that had been rented by Dunant (an Urumov company) and searched under the authority of a warrant obtained by a Swiss prosecutor. Jack, J. said:

> "89. The sixty agreements are particularised in Otkritie's schedule to their Particulars of Claim. The metadata obtained off a memory stick, also found in the box by the prosecutor, shows most of the agreements were backdated. The first agreement can be treated as representative. It is a four year loan, ostensibly for US$164,000, from Mr. Urumov to Vandry and is dated 10th April 2006. The metadata shows it was created on 23rd September 2009 by 'George.' The agreement is clearly a backdated sham. It was prepared at the same time as a purported 'loan prepayment agreement,' which was used as a cover for the transfer of to Mr. Urumov. As I have noted above, because Otkritie have not proved any pre-2010 frauds involving the Urumovs, there is no evidence as to how these monies came to be tainted. However, the number and size of these transactions is such that an improper purpose can be inferred.
>
> 90. In earlier interlocutory proceedings in this matter, Mr. Lundin made an affidavit dated 12th December 2013 on Vandry's behalf as Vandry's sole director deposing to the genuineness of the loans and their repayment. In the light of the above, Mr. Lundin appears to have been lying on oath.
>
> 91. The independent contractor agreements were equally bogus. Typical are three agreements dated 22nd June 2009, 2nd July 2009 and 13th July 2009 between Tarmilona and Vandry, whereby in consideration of a total of US$2,626,470.17, Vandry agreed to provide 'financial consulting services and general management advice' to Tarmilona. The money due under the third contract, US$1,458,470.17, was paid into Vandry's account at Jyske Bank on 14th July 2009. The third contract was signed by Mr. Lundin on Vandry's behalf, but only after the money had been transferred to Jyske Bank. Mr. Lundin took instructions from Ms. Balk and must have been an accomplice to Ms. Balk's money-laundering efforts.

> 92. An example of Ms. Balk's *modus operandi* was a purported ten year loan of US$444,000 made by Lamen (which was her company) to Vandry under an agreement dated 31st October 2009. The bogus nature of the loan can be seen from the fact that Ms. Balk had Lamen liquidated in March 2011 without the loan ever having been repaid or any evidence of the benefit of the loan having been assigned.
>
> 93. There are many other examples of Ms. Balk's use of companies to launder money. They are summarised in Part F of Otkritie's opening submissions. I do not propose to set them out. Ms. Balk and her husband were money-launderers on a grand scale."

24 Jack, J. found that Mr. Balk had given Ms. Balk limited rights, on Vandry's account on June 24th, 2009, which allowed her to move money (at least between currencies) without reference to him. He also found that her money laundering activities at Vandry stopped after 2009, there being no evidence of her giving any instructions in relation to Vandry's account after 2009. Jack, J. said he would return to the question of whether Ms. Balk had control of Vandry in 2012 and 2013. He did return to that matter and found (at para. 163) that Ms. Balk did not control Vandry at that time but that it was in the control of Mr. Balk and his wife and that there was no evidence to show that the former was acting as Ms. Balk's cypher.

The events of late 2011, 2012 and 2013

25 This is the crucial period. The defendants to the English proceedings (including the Urumovs) had been the subject of four world-wide freezing orders made by the Commercial Court in October and December 2011, of which the last two were registered as orders of the Gibraltar court on February 9th, 2012. On the same day, Ramagge Prescott, J. granted *Norwich Pharmacal* relief against Jyske Bank, requiring it to produce correspondence since January 1st, 2011 relating to any account at the bank in the name of the Urumovs or either of them or to which they or either were signatories. Compliance with that order did not reveal the existence of Vandry, which Otkritie did not know of at that stage.

26 On May 29th, 2012, Mr. Kotton transferred US$100,100 from his personal account at Jyske Bank to Mr. Balk's personal account at the bank. The descriptions of that payment on the corresponding bank statements were "payment order" and "remittance order" respectively. On the following day, Mr. Kotton transferred the US$5m. to Vandry's account at the bank, described on Mr. Kotton's payment instruction and bank statement as "loan as agreed."

27 On June 7th, the US$5m. was put into a one-month dollar deposit account, leaving about US$7,800 in the current account. From June 26th, the current account was used for purchases in Nice, Paris and London. The judge said that Mr. Balk and his wife had a house at Nice, that it was not

possible to say who was making the purchases, that it could have been Ms. Balk, but was more likely to have been Mr. Balk and his wife. On June 29th, Mr. Kotton transferred a further US$100,000 from his personal account to Vandry's account, one described as "transfer Alexander Kotton." On July 9th, US$23,678.80 was transferred from the Vandry account to Mr. Balk and his wife and, on July 10th, the US$5m. that had been placed on deposit was repaid to the current account together with just over US$1,000 interest. On August 23rd, Mr. Balk and his wife had a meeting at the bank with Giovanna Wright and a colleague of hers (Mr. Balk does not speak English but we were told that his wife, who does, would have translated for him). The judge quoted Ms. Wright's memorandum of the meeting (at para. 103):

> "Iosif and Natalia came to the bank to meet with us to discuss their accounts . . . We updated ourselves as to their current lifestyle. They mention that due to Iosif's work they will be temporarily moving back to Moscow with the children as work is so demanding on his side. He wants to keep a close eye on his business. They still have the villa in France which they will visit on their family holidays. We spoke at length about investments as they wished to invest USD 4.9m. The suggestion of GDPM [*sic*: stands for Global Discretionary Management Portfolio, hereafter, save in this quotation, "GDMP"] was agreed and accepted by them after we explained how it is invested. They wish to conserve their capital, which they do not need as they have other funds available to them, and wish to diversify from his usual projects, *i.e.* land developments in Moscow. We went thru IVT and they came out as stable to which they agreed to invest this strategy in GDPM. Required documents were signed. Then we went to T&T Mgmt who are the trustees for Iosif's trust. Vandry falls under the trust, although he is also a signatory. They were in agreement as to the GDPM and they have signed the portfolio management mandate. They will eventually close Vandry and transfer all to Mystical Journey, hence paperwork for GDPM and IVTs were also signed under that name."

28 Jack, J. said that Mystical Journey was a company incorporated in Belize in 2006 by TTMS on Natalia Balk's instructions. The shares were held for Natalia Balk, who in turn held them on trust for Birch Key Holdings Ltd. Mr. Kotton was TTMS's nominated addressee for correspondence relating to Mystical.

29 On September 10th, Mr. Balk asked Jyske Bank to transfer US$30,000 from his and Mrs. Balk's joint account to the Urumovs' personal account at Coutts in London. The judge inferred that the bank was worried about money laundering issues but, following a meeting between four bank officers and Mr. Balk on September 19th, it was

apparently satisfied the instructions were legitimate and, on October 2nd, US$90,000 (not US$30,000) was transferred to the Coutts account.

30 On October 3rd, the Swiss prosecutor executed the search warrant against Dunant's safe deposit box in Geneva. The VTL material in it revealed the existence of Vandry and its use by Ms. Balk for money laundering. The documents were passed to Otkritie's solicitors at the end of October. On November 8th, Otkritie's adjourned application for a *Norwich Pharmcal* order came before Dudley, C.J. The Urumovs' English solicitors, Farrer & Co., were informed of the hearing. Dudley, C.J. ordered Jyske Bank to give disclosure in relation to Vandry. Farrer & Co. asked on November 14th if an order had been made and were told it had, although the order was not sent to them until November 27th.

31 On November 12th, Mr. Kotton emailed Ms. Duran of TTMS asking her to prepare a loan agreement between himself and Vandry for the US$5m. transferred in May. The agreement as drafted provided for repayment (without interest) on one month's notice. Mr. Kotton purportedly signed it on November 15th, he sent it to Ms. Duran on November 21st, and Mr. Lundin (the sole director of Vandry) signed it for Vandry on December 6th. This was also the likely date of a purported meeting of the directors of Vandry (one supposedly held on November 15th) as it was the only day when Mr. Lundin was in Gibraltar. The minutes said that Vandry "had requested [Mr. Kotton] on the 30th May 2012 for a loan for the sum of US$5,000,000 for the purposes of investing into a Portfolio."

32 On December 10th, Mr. Kotton asked Ms. Duran to give a copy of the agreement to Jyske Bank and requested repayment of the US$5m. On January 18th, 2013, he asked Ms. Duran to have the money paid to Ivory. Ms. Duran replied that James Ramagge had suggested "that it might be more appropriate if the funds were transfer[red] from Vandry to your personal account and then to [Ivory] as this would clarify the transaction." On January 28th, Jyske Bank transferred the GDMP, valued at US$4,998,547.62, and a balancing payment of US$12,962.80 to Ivory's account at Jyske Bank. There was no transfer through Mr. Kotton's personal account. That represented an overpayment of US$11,510.42.

33 The assets in Ivory's accounts were subsequently the subject of a freezing order made by Dudley, C.J. on May 13th, 2013, as varied on May 17th, 2013.

Ivory's failure to call witnesses

34 Otkritie's case at the trial, repeated on the appeal, was in part based on a criticism of Ivory's failure to call witnesses in support of Mr. Kotton's account. The judge said Ivory could not be faulted for not calling Ms. Balk: to have presented her as a witness of truth would have been preposterous. Mr. Balk could have given useful information but it was

unlikely he would have co-operated as it would have required him to give evidence damning of his daughter and his own involvement in money laundering would have come under the spotlight. In addition, Mr. Kotton explained that the freezing of the US$5m. had poisoned their relationship. As to Ms. Duran, the judge said that—

> "in my judgment of 15th September 2015, I concluded that she had been 'deliberately attempting to mislead the Court.' It is hardly surprising that [Ivory] did not want to call her as a witness of truth. Further, if Ms. Duran did give evidence, she would inevitably be asked about Mr. Balk, to whom she owed duties of confidentiality. Likewise questions as to other trusts and other clients (such as Mr. Rubiner) might well be posed. If she voluntarily gave evidence about other clients, that would potentially affect the business of TTMS, which is built on confidentiality. It is likely that, even if she is still employed at TTMS, Ms. Duran would be an unwilling witness."

35 The judge explained why, as regards Mr. Lundin and Mr. Lundberg, they would also likely be faced with conflicts of interest if called as witnesses, and why Mr. Lundin was likely anyway to have been a reluctant witness. His conclusion was that no inferences adverse to Ivory should be drawn by reason of its failure to call these individuals as witnesses. Mr. Pillow had submitted in closing that Ivory might also have called Ms. Wright of Jyske Bank to give evidence but the judge did not deal with that submission.

The Profsoyuznaya land

36 Mr. Kotton said the land was to be developed by a Russian company, OOO Mechta ("Mechta"). Mr. Balk had offered him a 20% interest in the project in return for a US$5m. investment. Mr. Balk wanted the money urgently in order to get the project going. The terms of Mr. Kotton's investment in Mechta had not been agreed by May 30th, 2012 (when the money was transferred to Vandry) but were to be agreed later: Mr. Kotton might have taken shares in Mechta or might have taken physical possession of 20% of the flats. They agreed that Mr. Kotton would have the option of treating the US$5m. as a loan if they did not agree investment terms.

37 Mr. Kotton's evidence was that he only learned of claims in respect of the garages on the site in September 2012—before then he was engrossed in enjoying his "holy" months of holiday with his children, having in May 2012 made "a lot of money" (meaning millions). He started to be "very, very, very suspicious about this thing because I know what litigation in Russia means, okay." Jack, J. said of this:

> "129. That there was a genuine problem with the garages is shown by a letter of 28th April 2015 from a Moscow lawyer called

> Stepanenko (admitted without objection . . .). Some of the judgments of the Moscow court dealing with the individual possession actions against the squatters in the garages were also adduced in evidence. The litigation commenced in August 2012 and was only resolved the following year. As a result of the problem with squatters, Mr. Kotton says he decided to have nothing further to do with the Profsoyuznaya project and wanted to convert the US$5 million advanced to Vandry into a formalised loan."

38 Otkritie challenged various aspects of Mr. Kotton's case about the project. It questioned why Mr. Balk, a wealthy man, would want a loan from Mr. Kotton but the judge said Mr. Balk might reasonably wish to share his risk with others. Nor was it incredible that Mr. Kotton did not know the identities of the other parties to the project: the terms of the project were to be agreed later. Mr. Pillow questioned how Mr. Kotton could have been satisfied by his Google search of the site that it was empty when the illegally constructed garages would have been visible to him.

Misleading the court

39 Mr. Pillow's attack on Mr. Kotton's credibility was in part based on his assertions in affidavits of December 12th, 2013 and June 3rd, 2013 that he was not a beneficiary of the IK Trust, whereas he had been a beneficiary since 2009. He had also caused Ms. Duran to make a like assertion.

Assessment of Mr. Kotton's evidence

40 The judge saw Mr. Kotton give oral evidence over 2½ days and was plainly impressed by him. When, for example, Mr. Pillow taxed Mr. Kotton with questions about his failure to comply properly with the court's specific disclosure order, the judge said that whilst his answers as shown in the transcript might appear "slippery"—

> "143. . . . that was not the impression I got. His demeanour suggested that he was learning that he had made a mistake in not revealing the memory stick and failing to state what searches he had made on it. His final answer 'obviously' in my judgment was really an expression of contrition.
>
> 144. Mr. Kotton in my judgment gave his evidence in an honest and credible manner. That is not conclusive as to whether he was a truthful witness and it [is] to that question that I next turn."

41 Since the soundness of the judge's decision on this issue is the subject of challenge in the appeal, I shall set out his conclusions:

"145. Mr. Calver's central criticism of Otkritie's case was that it all depended on suspicion. The actual hard facts on which Otkritie could rely as against his client were, he submitted, very few.

146. There are in my judgment indeed many suspicious features in this case. Vandry was used in the period 2006 to 2009 for money-laundering activities by Ms. Balk. Mr. Kotton's transfer of US$5 million to Vandry was made at a time when the Urumovs were subject to draconian freezing orders. [Mr. Balk] seems to have assisted his daughter by laundering the proceeds of the frauds against Otkritie (albeit not through Vandry). The absence of proper documentation as of May 2012 for such a large advance could potentially also be treated as suspicious.

147. The hard facts on which Otkritie can rely to prove its case against Mr. Kotton are much more limited. Firstly, there is the fact that the loan agreement dated 15th November 2012 came into existence at the precise moment the Urumovs realised the English Court was going to learn of Vandry and of its use by Ms. Balk to launder money. Secondly, there is then the making of formal demands for repayment of the US$5 million, which seems scarcely necessary. Thirdly, there is the absence of documentation passing between Mr. Balk and Mr. Kotton showing any of the initial discussions about the Profsoyuznaya land project or Mr. Kotton's subsequent withdrawal from it. Fourthly there is the destruction of the wilsonsweden.com server and the other deficiencies in the disclosure.

148. Against this, there is no evidence that Mr. Kotton ever met Mr. Urumov, or that he had had any contact with Ms. Balk since 2008. Nor is there any evidence that Mr. Kotton received any monies from any earlier frauds committed by the Urumovs (assuming there were some). That is a pretty unpromising starting point for Otkritie to show that Mr. Kotton was laundering money for the Urumovs.

149. By contrast, Mr. Kotton gives a coherent narrative as to how he came to advance monies to Vandry. There is nothing inherently unbelievable about two extremely wealthy men, Mr. Balk and Mr. Kotton, who had been friends for many years, dealing with their affairs in an informal manner, as occurred (on Mr. Kotton's case) in May 2012. Nor is there anything inherently unbelievable about Mr. Balk and Mr. Kotton intending to sort out later the precise details of the mechanics of any investment (for example, whether the investment would be taken in shares or physical flats, and who the other investors would be).

150. Mr. Pillow suggested that the Profsoyuznaya land story was concocted later, when Mr. Kotton and Mr. Balk needed a cover to

explain the US$5 million. However, that project did exist. There was a genuine problem of squatters. Mr. Kotton's explanation for wanting to withdraw from the project is a rational one.

151. Admittedly the deficiencies in [Ivory's] disclosure mean that I need to consider whether an inference can be drawn about what transpired in May 2012. However, there is no basis in my judgment for drawing an inference that there would be an email showing Mr. Balk expressly asking Mr. Kotton to launder money for his daughter and her husband. Still less could an inference be drawn that there was correspondence between [Ms. Balk] and Mr. Kotton which has been suppressed.

152. It is a valid point that Mr. Balk put most of the US$5 million into the GDMP rather than transfer it to Moscow for use in the Profsoyuznaya land project. However, if Mr. Balk was bringing Mr. Kotton into the project so that he (Mr. Balk) was not excessively exposed to one single project, then the strength of the point is much reduced. Moreover there is no evidence that Mr. Kotton knew that Mr. Balk was going to make that investment. Indeed he says in his witness statement that he was 'quite annoyed' when he learnt this in December 2012.

153. Another point in favour of Otkritie is that Mr. Balk was said to want the money urgently in May 2012. Again there is in my judgment some validity to this point, but property developers often like to say that they are in a great hurry, even if they are not, and claim that they need to be able to act quickly to take advantage of unmissable opportunities.

154. Mr. Pillow's strongest point by a long way is the astonishing coincidence (if it be coincidence) in the date of the 15th November 2012 loan agreement. However, coincidences do happen.

155. Balancing these considerations, in my judgment Otkritie have not proved their case on balance of probabilities. The absence of evidence to show Mr. Kotton ever receiving proceeds of earlier frauds or other financial misconduct is important. His good character makes him less likely to involve himself in money laundering. He gives a coherent explanation for what occurred. These points and the others which I have set out above in my judgment outweigh the points made on Otkritie's behalf, outweighing even the 15th November 2012 point.

156. My conclusion is reinforced by the oral evidence of Mr. Kotton himself. In relation to the two misleading affidavits, I cannot exclude Mr. Kotton simply swearing the drafts his lawyers gave him. The appointment of Mr. Kotton as a beneficiary of the [IK Trust] was

> some years prior to his making the affidavits, so he may have forgotten the details. He was entitled to rely on his lawyers (who were after all running the trust) to get the beneficiaries right. In relation to the destruction of the server and the inadequacies of the disclosure, these also tell against him, but not sufficiently for me to reject his evidence. In my judgment Mr. Kotton was a witness of truth."

42 The judge then gave himself a *Lucas* direction (*R.* v. *Lucas* (8)) and discussed another matter, but I do not regard it as necessary to refer here to what he said.

The appeal

43 Mr. Pillow, Q.C. and Mr. Dudnikov, who both also appeared before the judge, advanced a forceful challenge to the judge's findings and conclusions. Mr. Pillow claimed that the judge had misdescribed the case for Otkritie that he had advanced to him. He complained of certain of the directions that the judge gave himself. At the heart of his submissions, however, was a sustained complaint that the judge's acceptance of the essence of Mr. Kotton's evidence as to his explanation of the May 2012 US$5m. transaction was in material respects in error. Mr. Kotton could, Mr. Pillow said, be seen to have been deliberately dishonest in his evidence in material respects. His claimed destruction of all contemporaneous documents relating to his proposed entry into the Moscow land project defied rational belief and was incredible. His evidence was in other directly relevant respects said to be inconsistent or incredible. Moreover, such documents as did exist relating to the claimed transaction were said to show that it bore no relation to the transaction that Mr. Kotton asserted (Mr. Pillow relied in particular upon the August 23rd, 2012 memorandum of the Jyske Bank meeting between Mr. Balk, his wife and Ms. Wright). Whilst Mr. Pillow recognizes the steepness of the climb with which an appellant is faced when challenging a judge's findings of fact, he said that a consideration of the evidence before the judge pointed to only one legitimate conclusion, namely that Mr. Kotton's account was in material respects an obvious pack of lies and he says the judge should have so found.

44 Before considering the submissions further, I remind myself of the repeated discouragement at the highest judicial levels of any disposition on the part of an appellate court to overturn a trial judge's findings of fact. In *Cook* v. *Thomas* (3), Lloyd, L.J. said ([2010] EWCA Civ 227, at para. 48):

> "It has been said many times, *Benmax v. Austin Motor Co* [1955] A.C. 370, *Biogen Inc v. Medeva Inc* [1997] RPC 1 and *Assicurazioni Generali SA v. Arab Insurance Group* [2003] 1 WLR 577 being only

three of the examples of high authority, that an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue."

45 In *McGraddie* v. *McGraddie* (5), Lord Reed, JSC, with whom the other Justices of the Supreme Court agreed, said ([2013] 1 W.L.R. 2477, at paras. 2–3):

"2 The principles stated in *Thomas* v. *Thomas*, had, even then, long been settled law: the speech of Lord Shaw of Dunfermline in *Clarke* v. *Edinburgh and District Tramways Co Ltd.* 1919 SC (HL) 35, 36–37, where he said that an appellate court should intervene only [if] it is satisfied that the judge was 'plainly wrong,' is almost equally familiar. Accordingly, as was said by Lord Greene MR in *Yuill* v. *Yuill* [1945] P 15, 19, in a dictum which was cited with approval by Viscount Simon and Lord Du Parcq in *Thomas* v. *Thomas* at pp 486 and 493 respectively, and by Lord Hope of Craighead in *Thomson* v. *Kvaerner Govan Ltd.* [2004] SC (HL) 1, para. 17:

> 'It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.'

3 The reasons justifying that approach are not limited to the fact, emphasised in Clarke's case and *Thomas* v. *Thomas*, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson* v. *City of Bessemer* (1985) 470 US 564, 574–575:

> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road'" . . . For these reasons, review of factual findings under the clearly

> erroneous standard—with its deference to the trier of fact—is the rule, not the exception.'
>
> Similar observations were made by Lord Wilson JSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, para. 53."

46 The law on this topic was recently summarized, to like effect, by Burnett, L.J. in *Watson Farley & Williams* v. *Ostrovizky* (9) ([2015] EWCA Civ 457, at paras. 8–9). Finally, we were reminded of the added caution an appellate court must exercise when faced with a challenge to a judge's finding in relation to allegations of fraud. In *Mutual Holdings (Bermuda) Ltd.* v. *Hendricks* (6), Lord Sumption said ([2013] UKPC 13, at para. 28):

> "An appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness. There are particular reasons for caution in a case like this. The allegation was one of fraud, which fell to be proved to the high standard on which the courts have always insisted, even in civil cases. The critical issues were (i) what was said at an informal and undocumented meeting eight years before the trial, and (ii) what the four personal Defendants believed to be the exposure of the Hendricks and AMPAT to losses that penetrated through the stop loss layer. Any findings about these matters necessarily had to be based on the oral evidence of those Defendants and of Mr Bossard and Mr Agnew. The Judge had to assess their character, the honesty and candour of their evidence, and the quality of their recollection. As Lord Hoffmann observed in *Biogen Inc* v. *Medeva Plc* [1997] RPC 1, 45:
>
> > 'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'"

47 None of this was in issue before us but I must also refer to the judicial guidance upon which Mr. Pillow placed particular reliance. The case that Jack, J. was trying was one in which Mr. Kotton was being accused of participating in a dishonest money laundering exercise, and Mr. Pillow reminded us of the valuable guidance as to the approach a

judge should adopt in trying cases of alleged dishonesty provided by Robert Goff, L.J. in *Armagas Ltd.* v. *Mundogas S.A.* (1):

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

48 Speaking also from my own experience, I would respectfully endorse the good sense of that guidance. Mr. Pillow's criticism of the judge's acceptance of the truth of Mr. Kotton's oral evidence is centrally based on the complaints either that Mr. Kotton (i) had deliberately destroyed all the documentation that might have enabled a testing of what he later asserted to be the nature of the US$5m. transaction, or (ii) had lied in his oral evidence to the judge about such destruction.

Otkritie's case at the trial

49 I have said that Mr. Pillow complained that Jack, J. had misdescribed Otkritie's case at the trial. As to the case Otkritie was making, the starting place must be its particulars of claim, served on January 15th, 2015. They followed Dudley, C.J.'s order of December 8th, 2014 directing the issue that came to be tried by Jack, J. Shorn to its essentials, Otkritie's pleaded case was that Vandry was the Urumovs' company; that it had always been used by them exclusively for receiving, transferring and laundering money pursuant to fake or sham agreements; that Mr. Kotton's payment to Vandry was for the Urumovs' benefit and was held by Vandry for them as their trustee or nominee; that, following the payment to Ivory in January 2013, the money was likewise held by Ivory as their trustee or nominee; and thus the original payment to Vandry was in no manner a genuine loan. Otkritie made no express allegation to the effect (reflected in para. 73 of Jack, J.'s judgment) that the US$5m. was the fruit of Urumov frauds that the Urumovs had passed to Mr. Kotton and which he had then returned to them via the "loan" to Vandry. The closest it came to doing so was in para. 15.2, which alleged that the US$5m. was money "*due to* or otherwise paid for the benefit of the Urumovs," the "due to" suggesting either a contractual or perhaps a restitutionary entitlement by the Urumovs to the US$5m., which could, on the face of it, only have arisen following the moving of consideration from them to Mr. Kotton.

50 That imprecise "due to" assertion was then expressly adopted by Mr. Dooley in para. 5 of his witness statement of December 14th, 2015 for the trial. Mr. Dooley had earlier been less inhibited in explaining Otkritie's case: in his fifth affidavit of November 8th, 2013, he had asserted in para. 16 (without any supporting proof) that the Ivory assets frozen in Gibraltar were the "proceeds of other frauds [*i.e.* other than the Otkritie frauds] carried out by" the Urumovs. That put Otkritie's then case on the basis that Mr. Kotton's US$5m. was "dirty" money he was laundering for the Urumovs. By 2015, however, Otkritie had been forced to accept that the US$5m. was clean money and its revised case became (in part) that it was clean money that was "due to" the Urumovs from Mr. Kotton for an unexplained consideration.

51 In para. 7 of its skeleton argument for the trial, Otkritie disclaimed that the US$5m. was the proceeds of any fraud committed on itself; and, beyond asserting that the money was paid to Vandry for the personal benefit of the Urumovs, did not there advance any case as to why it should be regarded as so paid. The essence of the case it made was, as I follow it, that Vandry was exclusively a money laundering vehicle operated for the personal benefit of the Urumovs; that the alleged US$5m. loan by Mr. Kotton to Mr. Balk was a sham; and, if so, the only explanation for the transaction was that it was a money laundering transaction for the benefit of the Urumovs. The skeleton argument described the principal factual issue as being whether the alleged loan was genuine and argued at length why it was said to be a sham.

52 In opening the case to Jack, J., Mr. Pillow made it clear that Otkritie neither needed nor sought to show that the US$5m. was tainted money: he could hardly do otherwise, since Otkritie had already accepted that it was not. He told the judge that all that Otkritie needed to show was that the US$5m. payment was intended to be for the benefit of the Urumovs: the source of the money was, he said, irrelevant. He accepted that the Vandry account was "nominally" controlled by Mr. Balk, its signatory, but said that Otkritie's case was that the account was actually controlled by the Urumovs. Having so made Otkritie's position clear, Mr. Pillow did, however, also modulate to a different stance by saying at two separate points during his opening that—

> "we also know, from the evidence that you've got, that there were frauds perpetrated on Otkritie and others by the Urumovs earlier in the story. Monies moved through the companies including . . . Tarmilona and at least 7 million of that is still missing. Our inference, *and we do invite you to draw the inference*, is that these monies [meaning the US$5m.] were the product of that process, not traceably—we don't need to show traceability—but it seems probable, in our submission, that they were the Urumovs' ill-gotten gains . . .

> All that we have to show is that the money going into Vandry was for the Urumovs' benefit. I set my case higher in some ways, because I do say the flags [meaning suspicious factors] and the evidence suggest it was suspicious in a money laundering sense, and in fact we see that it's likely that it was money laundering and that there was, somewhere behind the scenes, a concomitant debit or promise of debit that the Urumovs were going to have to fund in return for the 5 million, or had funded." [Emphasis supplied.]

53 Given the inference the judge was there being invited to draw, and the "higher" level at which Otkritie's case was there being set, those statements amounted to the proposition, albeit a decorously veiled one, that it was Otkritie's case that the untainted US$5m. was Mr. Kotton's *quid pro quo* for the Urumovs following their prior, or promised, movement to him of money obtained by their frauds. What other suggestion could Mr. Pillow have been making? It was, quite simply, his rationalization of the unparticularized "due to" allegation in Otkritie's particulars of claim. Consistently with that, Mr. Pillow put squarely to Mr. Kotton in cross-examination that he had had an arrangement with the Urumovs "whereby they . . . or someone on their behalf had transferred to you, or agreed to transfer to you or one of your many companies, money or assets worth $5 million," that he agreed in return to transfer the US$5m. to the Vandry account under the pretence that it was a genuine loan, and that he knew the money was in fact for the benefit of the Urumovs. Whilst Mr. Pillow did not suggest that any such actual or promised transfer was of dirty money, the case he was there putting to Mr. Kotton only makes sense if it was. Mr. Kotton firmly denied all such suggestions. I add that there is no doubt that Mr. Calver, Q.C., counsel for Ivory at the trial, also understood this to be part of Otkritie's case. Following Mr. Pillow's opening, Mr. Calver also made some opening submissions, including this early complaint:

> "My Lord, faced with that inconvenient truth [that the US$5m. derived from a legitimate source], the Claimants' last throw of the dice is to assert that the loan was swapping dirty money for clean money. Where is the evidence for that very serious and unfounded assertion, which is not even pleaded, that the Urumovs supplied Mr. Kotton with dirty money? None whatsoever . . ."

54 Mr. Pillow did not rise in response to say that that characterization of Otkritie's case was a misunderstanding and that Otkritie was making no such case. If Mr. Calver had got the wrong end of the stick, there was a risk that so too had the judge. That was, therefore, the point at which Mr. Pillow could and should have risen to put the record straight. He did not. That is because Mr. Calver had correctly understood Otkritie's case.

55 Reverting now to para. 73 of Jack, J.'s judgment, where he summarized Otkritie's primary case (see para. 19 above), in light of how the case

was pleaded, opened to the judge by Mr. Pillow and advanced in cross-examination, I would reject Mr. Pillow's submission that the judge misdescribed Otkritie's case. The essence of the submission was that Otkritie had sought to do no more than make a case that the claimed US$5m. loan was a sham, from which the inference could then be drawn that it was a transaction intended to benefit the Urumovs; and that it had been no part of the case that the US$5m. payment was the consideration for the payment (or promised payment) by the Urumovs to Mr. Kotton of (at least) US$5m. of tainted money. In my view, the judge was entitled to understand that this *was* the case, or at least part of the case, that Otkritie was making. The "due to" allegation in the particulars of claim, at best a slippery piece of pleading which ought to have been particularized, only makes any sense if some such allegation was being tacitly advanced and Otkritie cannot now simply wish that allegation away; and in my view, consistently with that part of the pleaded case, Mr. Pillow made it clear in his opening to the judge that he *was* inviting the judge to draw the inference that Mr. Kotton's US$5m. payment was the *quid pro quo* for an Urumov payment (or promised payment) to him of tainted money. Moreover, Otkritie had to assert this if its case was to make any sense. Why, if there was no such dealing between the Urumovs and Mr. Kotton, should Mr. Kotton decide to make a gift of US$5m. to the Urumovs? Once the judge had found, and correctly found, that there was no evidence of any such Urumov/Kotton dealings, Otkritie's case became a very difficult one. It was not necessarily hopeless because if it could persuade the judge that the claimed loan to Mr. Balk was a sham, it may be that the judge could have drawn the inference adverse to Mr. Kotton and the Urumovs that Otkritie was inviting. But the complete absence of any evidence of a Kotton/Urumov tie up meant that the practical task of proving that, contrary to Mr. Kotton's evidence, the claimed loan transaction was a sham was obviously much more difficult.

56 I would, on this topic, add finally that in para. 73 (see para. 19 above) the judge can perhaps be read as having understood Otkritie's case as being that the US$5m. paid to Vandry was "dirty" money that had been earlier paid to Mr. Kotton. There is, however, no doubt in my view that the judge had *not* understood that, nor was he intending to convey it. He knew perfectly well that the US$5m. was agreed to have been "clean" money (see his para. 10), and his wording in para. 73 can only be interpreted as meaning that Otkritie's case was that the "clean" US$5m. was paid in exchange for "dirty" money paid to Mr. Kotton.

Mr. Kotton's alleged dishonesty

57 The appeal is founded centrally on the assertion that the judge ought to have held Mr. Kotton to have been too dishonest a witness for his evidence on the loan/sham issue to be accepted. A related part of the

argument was also that Ivory's disclosure was so inadequate that Mr. Kotton's oral evidence could not be tested against any contemporary documents (see again the quotation from *Armagas Ltd.* v. *Mundogas S.A.* (1)), nor did Ivory call any of the witnesses who, it is said, might have confirmed his claim that the US$5m. was a loan to Mr. Balk. I shall first identify the main features of Mr. Kotton's conduct upon which Otkritie relies for its assertion of dishonesty against him. In doing so, I shall refer to various material documents to which we were referred at the hearing. At the hearing, we were of course also referred to parts of the transcript of Mr. Kotton's oral evidence, and the judge referred to parts of it in his judgment. As the appeal is based on the making of a wholesale challenge to a key witness's integrity and honesty, I have considered it necessary to read the whole of the transcript of his evidence; and, having done so, I regard it appropriate also to include in this and the following four sections of this judgment, admittedly in fairly general terms, a summary of the material parts of that evidence relevant to the charges of dishonesty levelled against Mr. Kotton.

The evidence about Ivory's disclosure

58 The starting point is Ivory's disclosure statement, which Mr. Kotton made on May 6th, 2015 "as Settlor, Beneficiary and Consultant of the Ivory Key Trust . . . on behalf of [Ivory], as authorized by the Directors . . ." He said in it that he had carried out a reasonable and proportionate search to locate documents he was required to disclose under the order of December 8th, 2014. He said he had not searched for documents pre-dating 2000, that he searched for documents in his own personal records and that the listed documents comprised "a complete list of all documents which are or have been in my control and which I am obliged under the order to disclose." In the section requiring him to list the documents he had formerly had, but were no longer in his control, he made no reference to any (if any) relevant documentation that had been on the servers that, as he was later to explain in his oral evidence, he caused to be destroyed every two years. At one point in his cross-examination (although not specifically in relation to this document), he was asked whether he was aware that Ivory's disclosure obligations extended to relevant documents that it had once had but did not have any more. His answer was that he was not aware of that. The judge made no finding that that answer was untrue.

59 On September 16th, 2015, Jack, J. made an order on an application by Otkritie for specific disclosure. Paragraphs 3 and 5 were as follows:

> "3 [Ivory] shall by 4 pm on October 5, 2015 disclose by making and filing a list verified by a statement of truth all documents from 1st January 2010 onwards held on all relevant computers, servers and internet and email providers used by Mr. Kotton and [Ivory] relevant

to the pleadings herein and required to be disclosed as part of standard disclosure (insofar as they have not already been disclosed by [Ivory] in these proceedings) . . .

5 Mr. Kotton shall by 4 pm on October 5, 2015 swear an affidavit stating with precision all the locations where he keeps his private records and when they were searched."

60 Mr. Kotton answered para. 5 by a witness statement (not an affidavit) made on October 5th, 2015, of which the material parts are as follows:

"2 I make this statement pursuant to paragraph 5 of the [said order] . . . to confirm 'with precision all the locations where [I] keep [my] private records and when they were searched' for the purposes of compliance with the order of disclosure under paragraph 3 of the same order.

3 Under paragraph 3 of the Order I am required to search 'all relevant computers . . . pleadings herein.'

4 I confirm that the vast majority of my email correspondence is conducted through the email address . . . and the server is located in Switzerland. I have one other email address . . . an icloud address provided by Apple, but which I very rarely use.

5 Although I have personal computers, I access my email account through an internet browser, and do not have any of my personal computers operating my email aforesaid address on a separate inbox, nor memory disc. Thus it is the . . . server that contains the records of the majority of correspondence, as well as copies of any documents attached to specific emails, the latter of which I do not save onto my personal computers.

6 On . . . 30 September 2015 I undertook a search of the . . . server that houses my email address, and the Apple address, utilising [eight keywords identified in para. 4 of Jack, J.'s order] plus their Cyrillic script equivalents. Such search raised no emails, correspondence or other documents relevant to the pleadings filed in the action herein from 2010 onwards."

61 Early in his cross-examination (Day 2), Mr. Kotton explained that David Wilson was someone he had known for many years who had set up the domain name on which he allowed Mr. Kotton to use an email address. Mr. Kotton also said that he saved personal records from his computer directly on to the memory stick. He had, for example, kept records of the Morenco deals on it. He said he also kept hard copies of what had become "irrelevant" contracts in his safe. He denied that he kept records of his personal wealth, or any spreadsheets, on the memory stick; or any records of what he owed or was owed at any one time. He was referred to the

order of September 16th, 2015. To the question whether he had complied with para. 5 of Jack, J.'s, order, he said he had. He was taxed with the fact that he had answered that paragraph by a witness statement rather than an affidavit, a point that had not been raised before. He explained that he went to a firm of lawyers in Sweden to make the statement and that particular head of criticism was not pursued. To further questions, Mr. Kotton said that he *had* checked the memory stick and had complied with Jack, J.'s order but he was driven to accept that he had not referred to the memory stick in his statement and that in that respect it was misleading, as was the impression in it that the only places where his private records were stored were email servers. He admitted that he did not say in the statement that he kept some private records in his safe. He had not at this point in his oral evidence yet explained about the destruction of the servers.

62 Mr. Kotton was asked about an affidavit he made on June 3rd, 2013 in support of Ivory's application to discharge the freezing order in relation to Ivory's assets made by Dudley, C.J. on May 13th, 2013. He said in it that his three children were the beneficiaries of the IK Trust. He had, however, been well aware that he had also become a named beneficiary in 2009 but the implication of his affidavit was that he was not a beneficiary. He squarely accepted that it was a mistake, he said that when he signed it he had forgotten he had been named a beneficiary, and he blamed Ms. Duran of TTMS for the mistake (she also swore a supporting affidavit, including the same error, on June 3rd, 2013). Mr. Kotton made a further affidavit on December 12th, 2013, which repeated the same mistake. He said that he "did read all the bits but the question of who the beneficiaries are, I admit that I looked at it, I didn't reflect because I was assuming this was the correct thing." He said the mistake was one that was later realized by his own team, following which the position was correctly re-stated.

63 It was following Mr. Kotton's cross-examination on these matters that he came to explain the position in relation to the servers. He was asked about what computers he used in 2012/2013. He said he used a laptop, would buy a new one every year and throw the old one away. He said he would first save any important data on his server, but did not ordinarily keep such data on his computers. When it was pointed out to him that he had not disclosed a single email between him and Mr. and/or Mrs. Balk or anyone else relating to any matter in the case, he said he could explain that easily. As regards the transfer of the US$5m. and the Moscow land project, he said he and Mr. Balk had no written communication, nor had there been any written communication about that transfer with any of his associates such as Mr. Lundberg, Mr. Lundin or Ms. Duran. He explained that he had exchanged emails on *other* matters in the period 2011/2013 but that, for security reasons, he arranged for Mr. Wilson to throw away each server after two years and replace it with a

new one. Such emails were therefore no longer available. He had not, however, instructed any servers to be thrown away since the summer of 2013, since he did not want it to be said that he had destroyed evidence. On being asked further questions on his disclosure statement (October 5th, 2015), he confirmed that he had searched his personal computer; as for the memory stick, to which he had not referred in his statement, he said it was "a mirror image of my . . . server . . . small." He also said he replaced it every second or third month. It was pointed out to him that he did not explain in that statement that, having earlier destroyed the relevant server, he would never find any relevant documents in the server he claimed to have searched. He said that he simply performed what the order required him to do. He said that such search could have revealed communications with Mr. Balk or anybody else. As for the pre-summer 2013 documents that he had produced (relating to the Morenco sales, for example), he had kept copies of those on his memory stick because he had been told that it was important to have records of the source of the US$5m. loan. It was not suggested to Mr. Kotton in cross-examination that his evidence about the destruction of earlier servers was untrue.

The evidence about Vandry

64 Mr. Kotton said that his gift to Mr. Balk of Vandry (under the Birch Key structure) had been in about August 2004 and that he had no clue what business Vandry did between then and May 2012, when he transferred the US$5m. He accepted it was possible he had earlier paid money to Vandry in connection with projects he was doing with Mr. Balk—he could not remember. He accepted that it appeared that Mr. Lundin was the sole director of Vandry during this period. On being shown documents showing that Mr. Lundin apparently signed Vandry documents on the instructions of Ms. Balk, Mr. Kotton said he was unaware that Mr. Lundin was helping the Urumovs in this way, and Mr. Balk had also never spoken to him about the Urumovs. He said he only found out about the Urumovs' involvement in the Otkritie fraud in May 2013, when the Ivory assets were frozen: neither Mr. Lundin nor Mr. Balk had mentioned it to him before. Mr. Kotton said he knew nothing about the Urumovs' involvement in the Otkritie frauds until the Ivory assets were frozen in May 2013. He said that if he had been involved in any way with any money laundering for the Urumovs—

> "I wouldn't have sent the 5 million to Ivory Key, I would have sent them so far away so nobody would have found them, if I was that bad person. No. Instead I sent them to my own trust where I kept them until they froze. Well, I must be pathetic do so."

The evidence about the Profsoyuznaya land project

65 Mr. Kotton rejected the suggestion that his US$5m. payment was other than for the Profsoyuznaya land project. He said Mr. Balk first contacted him about it in about April/May 2012. They spoke perhaps four to six times about it by Skype or on the telephone. He had earlier said in some particulars that they had also discussed it at a meeting in Spain, but in his oral evidence he said he could not remember if they did. His oral evidence was that he remembered Mr. Balk giving him the precise figure of 18,050 sq. m. as the size of the development but he was then referred to particulars he had earlier given where he had instead referred to it as being a 10,000 sq. m. development. He did not know why he had given that latter figure.

66 He understood that Mr. Balk and his partners had already obtained their interests in Mechta and that Mechta had a lease of the site. He said Mr. Balk told him he had not yet got secured funding for the construction work and needed US$5m., and that as soon as he had it he would start the construction work, which Mr. Balk said would be within three to four months. Mr. Balk did not detail when the project would be finished but Mr. Kotton said his own experience was that it would take about 1½ years. He said he checked for himself that the site was empty by a Google Earth search. He did not know, and Mr. Balk did not tell him, that it was covered in illegal garages. He said he agreed nothing specific with Mr. Balk, but that he could ask for his money back any time he thought the deal was not going through. If it did go through, he was going to get a 20% share in Mechta but they did not negotiate the terms of any final deal. It was put to him that, in his witness statement, he had based his return on the units in the development that would be allocated to him. Mr. Balk told Mr. Kotton that others were involved in the project, but not who they were.

67 Mr. Kotton said the US$5m. was an interest-free loan for a period until the deal was decided. He paid the money to Vandry on Mr. Balk's instruction. He did not query that instruction because he was convinced "that Mr. Balk was the same entity as Vandry . . . he did not need to tell me that he controlled Vandry, that is something I have not been hesitant upon until a couple of days ago when you [Mr. Pillow] told me." He did not speak to Mr. Lundin (Vandry's sole director) or Ms. Duran (its secretary) about the payment. He said that, before making the loan, he received "a couple of pictures" and very limited documentation giving the address and size of the development. He said it was "a brochure of future development." His evidence appeared to come down to the acceptance that he had received no more than a photograph in the nature of an artist's impression of the development, one attached to an email from Mr. Balk. He said the email would have been in the subsequently destroyed server. Mr. Kotton's evidence about what he had received was unsure and imprecise. He did not save the picture to his memory stick and he had not previously

disclosed that the picture or email had existed. His first statement about the project, in a June 2013 affidavit, gave no details about it—it made no mention of Mechta or of the location of the site. Nor did he give any more details in his December 2013 affidavit. Nor in Ivory's defence was any reference made to Mechta or the location of the site. Information about the claimed project only emerged when in May 2015 Ivory disclosed documents relating to it that Mr. Balk had provided to Mr. Kotton. Mr. Kotton's response to this was that he understood that Otkritie's claim to the Ivory funds was a *proprietary* one and so he had concentrated primarily on proving the clean origin of the US$5m.

68 It was put to Mr. Kotton that, although Mechta had its building permit for the project in November 2011, it was the existence of the garages that prevented the construction work from starting. Mr. Kotton said the first he learnt about the garages was in August/September 2012, when he came back from his holiday. Having learnt about the garage problem, he withdrew from the project. He accepted that Mr. Balk could have been lying to him in saying that he needed the US$5m. for construction works, but he did not know; he said it might have been the case that they hoped to evict the garage occupiers immediately. Mr. Kotton asked rhetorically why, if Mr. Balk had been misleading him, was he prepared to return the money to Mr. Kotton after he had asked for its return.

The evidence about the 2012 transactions

69 Mr. Kotton's explanation of the US$100,000 payment to Mr. Balk on May 29th, 2012 was that it was by way of payment for roubles that Mr. Balk had arranged to have delivered to Mr. Kotton's office in Moscow. Mr. Kotton explained that in Moscow he did not use a credit card save for hotels and that otherwise he used cash. It was not cash he needed for any particular transaction but which he would need for various expenses over a period. He said: "I can guarantee you one thing, Mr. Pillow: many, many people in Russia use cash."

70 Mr. Kotton explained another, slightly earlier, payment of US$200,000 made on May 25th, 2012 as being a loan to Mr. Balk to enable him to repair his house in Nice, which he expected Mr. Balk to repay either in cash or by the rendering of services. On June 29th, 2012, Mr. Kotton transferred another US$100,000 to Vandry. He could not remember what that was for but said it was either another loan or for services rendered; and he then became sure that it was for services.

71 On September 24th, 2012, Mr. Kotton transferred another US$150,000 to Mr. Balk's account. This too, he said, was a personal loan, again in connection with the repairs to Mr. Balk's house in Nice. The request for it was made either by phone or by Skype. Mr. Balk promptly

paid US$90,000 of that money to the Urumovs. Mr. Kotton said he did not know of that at the time and that it followed that Mr. Balk had lied to him about the purpose of the loan. To the question why Mr. Balk needed such a loan when Mr. Kotton had advanced him US$5m. in May 2012, Mr. Kotton said the earlier loan was for the Moscow project. He had by then asked for the return of the US$5m. after Mr. Balk had told him that the project had stalled.

72 It was pointed out to Mr. Kotton that it was on November 8th, 2012 that Dudley, C.J. ordered the production by Vandry of its bank statements; and that it was on November 12th, 2012 that Mr. Kotton asked Ms. Duran to draw up a Kotton/Vandry loan agreement. Mr. Kotton denied that shortly before the latter date any of Mr. Balk, Ms. Balk or Mr. Lundin had contacted him to ask him to take back the Vandry money and keep it safe in one of his accounts: "No such thing happened," he said. He added that had any such thing in fact happened, he would not have transferred the money "into my main company, I would have transferred it so far away so it would have been never . . ." Mr. Kotton was cross-examined at length as to the claimed need for the loan agreement, as to its signing and as to other payments he claimed to have made to Mr. Balk. This cross-examination was very detailed but we were not referred to any of it during the hearing of the appeal. Mr. Kotton, via Ivory, in fact received back some US$11,000 more than he had lent, but he explained that he repaid the excess by paying Mr. Balk's membership fees of the Los Ramblos golf club.

The argument

73 I should say that, having read the transcript of the whole of Mr. Kotton's oral evidence, he did not—judging him simply by reference to the words on the printed page—emerge as an apparently impressive witness. He was subjected to a searching cross-examination by Mr. Pillow and did not—again, merely by reference to such words—apparently fare well. He may be a brilliant and successful businessman but he revealed himself as by no means a details man. His evidence reflected regular inconsistencies between accounts he had earlier given on paper and those he gave orally, and he showed himself as having a poor memory. Yet he was, however, consistently unbending in his denial of the entirety of Otkritie's case, that is that his assertion that the US$5m. payment was a loan for the purposes of a joint participation with Mr. Balk in a Russian development project was a fabrication and that the reality was that it was a payment to Vandry for the personal benefit of the Urumovs as part of a dishonest money laundering operation. The task for the judge was to find where, on the probabilities, the truth lay. In performing that task, he of course had the inestimable advantage that this court does not have, namely that of seeing and hearing Mr. Kotton give his evidence over some 2½

days. The judge engaged in a careful analysis of all the material before him and came to a reasoned conclusion that Mr. Kotton was a witness of truth (para. 156). He found that he was not a liar. That marked the end of Otkritie's case.

74 By way of a challenge to that, Mr. Pillow and Mr. Dudnikov criticized the judge's approach on various grounds and submitted that collectively his errors fatally undermined his conclusion. I regard the essence of Otkritie's case as falling under three main heads, which I shall deal with separately although they are in reality closely related.

Disclosure deficiencies

75 Central to this part of the argument is that it is said that in finding Mr. Kotton to be a witness of truth, the judge failed to find, or to take proper account of the fact, that Mr. Kotton had deliberately suppressed documentation that would otherwise have enabled a proper testing of his case as to the reason for the US$5m. payment to Vandry. It is said that such were Mr. Kotton's apparently deliberate efforts in this regard that the judge really had no alternative but to find that they tipped the balance firmly against any finding that Mr. Kotton was a witness of truth.

76 I have summarized the story of the disclosure made by Ivory/Mr. Kotton. It is the case that no emails or other communications with Mr. Balk in relation to the US$5m. payment were disclosed. Ivory's original disclosure statement disclosed nothing of this nature, nor did it list any such documents it had once had but no longer had. Mr. Kotton was not in fact cross-examined on this latter omission by reference to Ivory's disclosure statement and his evidence was that he was unaware of such obligation. It may be that he *should* have been aware, and if he had read the disclosure statement itself with any care he might have realized that. Mr. Kotton is not, however, the sort of man who (it appears) tends to read legal documents with care and the judge made no finding that his statement as to his unawareness was dishonestly untrue.

77 When it came to his witness statement of October 5th, 2015, made in answer to the order of September 16th, 2015, the judge found that statement to be "deficient and misleading" (para. 67), as plainly it was: it did not reveal the existence of the memory stick or the safe of which Mr. Kotton spoke in his oral evidence, and it can be said implicitly to have conveyed that a search of all relevant servers had yielded a nil return—without, however, disclosing that it had not been possible to search the key server, one destroyed on Mr. Kotton's instructions in about July 2013. It is obvious that the judge was fully aware of these deficiencies, as he was of Ivory's failure to disclose documents it had formerly had, but no longer had.

78 As for the server that Mr. Kotton said he had caused to be destroyed in about July 2013, his evidence was that it would not in fact have yielded *any* communications about the US$5m. payment because there were none. Otkritie's submission about such destruction is that the judge erroneously failed to consider whether Mr. Kotton's evidence in that regard was true; and, it submits, had the judge done so, he ought to have found that it was in fact a lie. The judge plainly did not, however, regard the "destruction" evidence as a lie. He said nothing to suggest that he considered it might be, and it is to be noted that, whilst Mr. Pillow did not hold back from asserting to Mr. Kotton that he was lying in various aspects of his evidence, he made no such assertion to him in relation to the evidence about the destruction of the server, although he did make a submission to that effect in his closing address to the judge.

79 In my view, the judge was in no manner in error in (i) failing overtly to consider whether the "server destruction" evidence was a lie, or therefore (or anyway) (ii) in failing to find that it was. First, the evidence was volunteered by Mr. Kotton in the course of his cross-examination as, ostensibly, a reasonable explanation to the court, in response to Mr. Pillow's questions, as to why there was no written documentation relating to events during the two-year period prior to the destruction. When given, such evidence was not challenged as untrue whereas I consider that, if Mr. Pillow *was* minded to assert that it was untrue, he ought to have put that specifically to Mr. Kotton. But even if he did not need to do that, I can still identify no error on the part of the judge in accepting the evidence. Mr. Pillow submitted that it was obvious that it was a pack of lies, because (i) the court could infer that Mr. Kotton had not previously told Ivory's lawyers of such destruction, since had he done so the Ivory disclosure statement and Mr. Kotton's witness statement of October 5th, 2015 would have been drafted very differently; and (ii) Ivory *had* disclosed a solitary document of May 24th, 2012, which went to the origins of the US$5m., which affidavit evidence produced during the trial from Ivory's solicitors showed had not been copied on to Mr. Kotton's memory stick. Thus, says Otkritie, the "destruction" evidence was obviously untrue.

80 I regard these as weak points. Any legitimate inference that Mr. Kotton did not inform his solicitors of the destruction would not, without more, justify a finding that the destruction evidence was untrue. As for the document of May 24th, 2012, Mr. Kotton's evidence was that he kept this because he needed to prove the source of the money—as he did—and that, whilst he did save important documents on to his memory stick, his practice was to change his memory stick every two or three months, the contents of which respectively became a mirror image of the then *current* server: thus the memory stick, the subject of the solicitors' evidence, would not be expected to show the May 2012 document.

81 The judge did not expressly consider either of these matters but he produced his judgment with commendable promptness after the conclusion of the submissions and it is improbable that he had overlooked them, for what they were worth—Otkritie itself having described the latter point in its closing submissions as a "tiny" one. In my view, the judge's finding that Mr. Kotton had caused the relevant server to be destroyed was one he was entitled to make and it is not for this court to purport to step into the arena and re-decide this matter. We are in no position to do so.

82 What did exercise the judge about this aspect of the case was not whether the destruction evidence was true but rather whether he could accept Mr. Kotton's reasons for such destruction, namely his obsession with the need for security as to information he assessed to be sensitive. The judge plainly had some concern as to whether he ought to accept this account. His reaction to it was that it seemed improbable, although he also had regard to the point that, in assessing its probability or otherwise, it was dangerous to view evidence of Russian business practices through Western eyes (para. 56).

83 I have had some doubts as to whether the judge's doubts in this respect went simply to the *reason* for the destruction or to the question of whether there had in fact been *any* destruction but I have come to the view that the former is all the judge had in mind. As I read his judgment, he had accepted by para. 54 that the destruction had taken place, and that is also clear from para. 77. When (in para. 56) he also said that the "improbability of his explanation is something which I will need to take into consideration when deciding whether Mr. Kotton is a witness of truth," he was not there still reserving the question of whether the destruction had in fact taken place. And when he finally found (in para. 156) that Mr. Kotton was a witness of truth, he there expressly brought into account the question of whether the destruction of the server and the inadequacy of the disclosure were matters that justified the rejection of his evidence. His view was that they did not.

84 There is no doubt, therefore, that the judge was fully aware of the serious disclosure deficiencies on the part of Ivory/Mr. Kotton and that he accepted the evidence about the destruction of the server. Those deficiencies were obviously matters that could well influence an assessment of Mr. Kotton's reliability and honesty as a witness. In making his ultimate assessment in that regard, the judge took account of them and nevertheless found Mr. Kotton to be a witness of truth. In my judgment, this court is in no position to second guess him in that assessment. I have indicated my own impression of Mr. Kotton as a witness, one that was formed with the benefit of a sight of no more than the written words of his evidence. That, however, is plainly no basis on which to make an assessment of his credibility and honesty as a witness that differs from that which the judge made: the judge saw him give evidence and was plainly impressed by him.

In para. 40 above, I cited paras. 143 and 144 of the judge's judgment, where he explained the added value he derived from also seeing and hearing Mr. Kotton give evidence, which all fed into his ultimate finding as to Mr. Kotton's honesty as a witness. In my judgment, the proposition that this court is in any position to reverse the judge's finding as to Mr. Kotton's honesty by reason of the various disclosure deficiencies is mistaken. The judge was aware of all these matters, he took account of them and made the finding as to Mr. Kotton's honesty that he did. This court cannot decide that the disclosure deficiencies required the making of a different finding.

Was the US$5m. loan a fiction?

85 The judge's finding as to Mr. Kotton's honesty as a witness was in principle fatal to the success of Otkritie's case: it was inevitably going to lead him to accepting Mr. Kotton's account as to the nature of the US$5m. transaction. Mr. Pillow, however, also mounted an extended challenge to the judge's acceptance of that account. The submission was to the effect that all the circumstances relating to what Mr. Kotton said was a loan to Mr. Balk for the Profsoyuznaya land project, if considered cumulatively, combined to point to the probability that it was not such a loan at all. Mr. Pillow relied on (a) Vandry's prior history as to its participation in money laundering; (b) what he said were the uncommercial terms of the claimed loan to Mr. Balk; (c) the lack of any contemporaneous documentation corroborating the claimed loan; (d) the fact that the one document that did relate to the claimed loan—the Jyske Bank attendance note of August 23rd, 2012—was said to be inconsistent with the making of any such loan; (e) the creation of the Kotton/Vandry loan agreement at the very moment when Mr. Balk and the Urumovs realized that the *Norwich Pharmacal* order would result in Otkritie obtaining a sight of Vandry's Jyske Bank documents; (f) various features of the Kotton/Vandry loan agreement that were said to make it a false instrument contrary to the Gibraltar Crimes Act 2011, namely that (i) it did not reflect Mr. Kotton's evidence as to his May 2012 arrangement with Mr. Balk; (ii) it was stated to have been executed on November 15th, 2012 when, as the judge found, neither party executed it until later; and (iii) it contained a false statement that Mr. Lundberg had witnessed Mr. Kotton's execution of it; (g) the use to which the "loan" money was put despite its claimed purpose, a reference to the fact that none was applied towards the Profsoyuznaya land project and a material part was invested in the GDMP; and (h) that, on Mr. Kotton's case, he was the sole honest and innocent figure in the dealings with Vandry, with the judge having found that Mr. Balk, the Urumovs and Mr. Lundin had all been involved in the use of Vandry for the Urumovs' money laundering. Mr. Pillow developed these points with great skill and submitted that what the judge should have done was not to consider them separately, as it is said he did, but rather to consider them cumulatively;

and Mr. Pillow said that, if that had been done, their proper assessment would have rendered vanishingly small the probability of the US$5m. payment being the loan that Mr. Kotton asserted. In support of that approach to the assessment of the evidence, Mr. Pillow referred us to *JSC BTA Bank* v. *Ablyazov (No. 8)* (4) ([2013] 1 W.L.R. 1331, at para. 52, *per* Rix, L.J.).

86 Mr. Pillow placed heavy reliance on the August 2012 bank memorandum, which he described as a key document in the case and as pointing away from the truth of Mr. Kotton's account. In my view, however, he overstated the strength of that document for the purposes of Otkritie's case. First, the document supported the inference that the Vandry account was under Mr. Balk's control rather than that of his daughter. Secondly, there is nothing in it to disprove Mr. Kotton's explanation of the payment to Vandry. Whilst Mr. Kotton claims to have understood that the US$5m. was urgently needed for the Profsoyuznaya land project, it does not follow that the payment was impressed with a *Quistclose*-type trust requiring the money paid to Vandry to be so applied; it could have been that Mr. Balk used other money of his for the project or, as the judge considered, he may have been misleading Mr. Kotton as to the claimed urgency as to the need for it. The judge also said (para. 152) that there was no evidence that Mr. Kotton knew that Mr. Balk was going to put most of the US$5m. into the GDMP and that Mr. Kotton's evidence was that he was "quite annoyed" when he learnt of this in December 2012.

87 As Mr. Calver submitted, all these submissions by Mr. Pillow really amounted to a re-presentation of his closing submissions at the trial. The judge had the benefit of those submissions and was expressly sensitive to the "many suspicious features in this case" (para. 146). His ultimate assessment was that he *did* accept Mr. Kotton's account, notwithstanding the existence of such features, and he explained his reasons for that conclusion in paras. 145–156. Mr. Pillow's submissions that the various matters he relies upon pointed inevitably to the probability that Mr. Kotton's account was false pays insufficient weight to other features of the case, to which the judge rightly had regard in making his overall assessment. First, the burden of proving that the US$5m. was paid to Vandry for the benefit of the Urumovs was upon Otkritie. Secondly, Otkritie adduced no evidence showing that since 2008 Mr. Kotton had had any contact with Ms. Balk and there was no reason to disbelieve his evidence that he had never met and did not know Mr. Urumov. Thirdly, Otkritie had accepted by the time of the trial that the US$5m. payment derived from "clean" money. Fourthly, that acceptance meant that the only rational basis for the making by Mr. Kotton of a US$5m. payment to the Urumovs was if they had made a counter-payment of "dirty" money to him, or if they had promised to do so. But there was no evidence of that either, and it was firmly denied by Mr. Kotton. There was therefore no

evidence providing any reason why Mr. Kotton should have made a US$5m. payment to Vandry for the benefit of the Urumovs.

88 For the judge, in those circumstances, to find that Mr. Kotton was making such a payment required convincing evidence. There was none. There were at best suspicious circumstances surrounding the payment which *might* have enabled the judge to find that the claimed loan was a sham. But against that there was the evidence of Mr. Kotton, "who gave his evidence in an honest and credible manner" (see para. 144), although it still remained for the judge to assess whether his evidence was truthful. In making that further assessment, the judge had regard to the suspicious circumstances surrounding the US$5m. payment and its subsequent return to Ivory but had regard also to the fact that the claimed loan was one between two very wealthy men who had known each other for years, had done business with each other over those years, had dealt with their business relationships in an informal manner and was one for an investment in a Moscow project which undoubtedly did exist and in respect of which there was a genuine problem with squatters. The judge found that Mr. Kotton's account was believable and he did believe it. He did not overlook the fact that Ivory's disclosure deficiencies meant that there was an absence of corroborating contemporaneous documentation but held that there was no basis inferring that the unavailable material would have included emails supporting Otkritie's case. In weighing up the various factors, the judge did not refer to all the matters upon which Mr. Pillow relied but there is no basis for any inference that he did not have them in mind and his omission to refer to every point upon which Otkritie relied provides no basis for upsetting his conclusion. Despite his express recognition that there were *many* suspicious circumstances, his conclusion was that Otkritie had not proved its case. In addition, at paras. 163–164, the judge found that at the material time Ms. Balk did *not* have control of the Vandry account. He referred to the attendance note of August 23rd, 2012 as showing that Mr. Balk and his wife were in control of Vandry, and also recorded that there was no evidence that Mr. Balk was acting as his daughter's cypher.

89 In my judgment, the judge's conclusion by which, on the facts, he rejected Otkritie's case as unproved on the probabilities is unimpeachable. There is no proper basis upon which this court can re-try the facts and come to a conclusion that the judge's assessment of them was perversely wrong. It was not.

Was Ivory's conduct of the case such that the judge should have drawn adverse inferences against it?

90 Otkritie also complained that Ivory's conduct in the litigation and its failure to call the evidence of witnesses at the trial who, it is said, might or could have supported its case were such that the judge could and should

have drawn adverse inferences against Ivory on the substantive issues. It is said that such inferences ought to have required him to reject Ivory's case. In Otkritie's grounds of appeal, and briefly in its skeleton argument, it was asserted that Ivory's disclosure deficiencies required the drawing of such inferences, although that argument was not developed orally. The authorities to which we were referred are to the effect that the fact that a party has improperly destroyed documentation will not justify any *presumption as to liability* (although it may justify a presumption in relation to the quantification of damages if liability is established), although it may at least justify the drawing of adverse inferences in relation to the determination of liability but "in every such case the court must take care to be satisfied that the particular inference urged upon it is an appropriate response to the particular instance of destruction or failure to preserve records relied upon" (*British Sky Broadcasting Group plc* v. *Sky Home Servs. Ltd.* (2) ([2007] F.S.R. 14, at para. 211, *per* Briggs, J.)). The judge did consider whether Ivory's disclosure deficiencies justified an adverse inference as to the nature of the May 2012 transaction and concluded that there was no basis for an inference that the documentation then existing would have supported Otkritie's case that the transaction was a money laundering operation (at para. 151). There is in my view no basis upon which this court can properly conclude that he ought to have drawn a different inference. That was an assessment he made in the context of his consideration of all the evidence touching upon the key matters in dispute and it was one he was entitled to make.

91 The main thrust of Otkritie's challenge to the judge's failure to draw adverse inferences against Ivory was in relation to its omission to call any supporting witnesses as to its case in relation to the May 2012 payment in circumstances in which it is said that, if Mr. Kotton's evidence were true, such witnesses could have been called. The principles relied upon were explained as follows by Brooke, L.J. in *Wiszniewski* v. *Central Manchester Health Auth.* (10) ([1998] P.I.Q.R. at P340):

> "(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."

92 That principle was more recently referred to by Lord Sumption, JSC in his judgment in *Prest* v. *Petrodel Resources Ltd.* (7). I regard what Lord Sumption said as having been agreed with by all the other justices. He said ([2013] 2 A.C. 415, at para. 44):

"There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced view expressed by Lord Lowry with the support of the rest of the committee in *R v. Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 A.C. 283, 300:

'In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified.'

Cf *Wisniewski v. Central Manchester Health Authority* [1998] PIQR P324, P340."

93 The judge was well aware of that principle, and cited from *Wiszniewski* at para. 70 of his judgment (he was also referred to *Prest* but did not refer to this passage). Mr. Calver submitted that Otkritie had not established a *prima facie* case on either its primary or its secondary case and so no question arose as to whether adverse inferences could or should be drawn against Ivory. The judge shared this view as regards Otkritie's primary case, although I regard it less clear what his view was as regards its secondary case. For myself, I am disposed to the view that Otkritie probably did raise a case to answer on both issues. The burden was on Otkritie to prove that the money paid to Vandry and thence to Ivory belonged to the Urumovs beneficially. That presented Otkritie with a heavy evidential burden. It seems to me, however, that for Otkritie to prove, as it did (a) that Vandry had in earlier years been used by the Urumovs for money laundering on a major scale, and (b) the payment to Vandry of the US$5m. in May 2012 would probably, *in the absence of any*

answering case from Vandry and/or Ivory, have been sufficient to entitle the court to infer that the US$5m. was yet more dirty money that was also being laundered.

94 However, Otkritie's case against Ivory *was* answered, Mr. Kotton's evidence being directed to providing that answer. In my view, however, Otkritie raised a legitimate question as to whether adverse inferences should have been drawn against Ivory by reason of its omission to call any evidence supporting that answer.

95 As regards the failure to call witnesses who might have supported Ivory's case, Otkritie's skeleton argument for the trial noted the omission to call Mr. Balk, Ms. Balk or Mr. Lundin. Mr. Pillow's opening at the trial added Ms. Duran to the list. His closing also added Mr. Lundberg and Ms. Wright. The judge dealt in paras. 114–116 with the omission to call witnesses, although he there referred only to the first five individuals just referred to, not to Ms. Wright. For its appeal, Otkritie devoted several pages of its skeleton argument to its submissions as to the judge's errors in his assessment of this aspect of Otkritie's case and it also formed a material part of Mr. Pillow's oral argument. The central criticism levelled at the judge is, first, that he failed to address the omission to call Ms. Wright; and, secondly, that he relied on his own reasons as to why it was it should not be held against Ivory that it did not call any of the other witnesses, whereas it is said that the judge could only legitimately rely on explanations for not calling them that had been given by Ivory.

96 I would not accept that the omission of Ivory to explain why any particular witness was not called meant that it was not open to the judge nevertheless to make his own assessment, as he did, of whether there was a credible explanation for not calling that witness. Otkritie's submission logically amounts to the proposition that a party to litigation must, if it is to escape an argument that it could have called a particular witness but did not, list in its witness statements for the trial which witnesses it might be suggested it could or should have called and then explain in relation to each why they are not being called. If it does not do that, the opposite party will be likely to refrain from asking any questions on the topic in cross-examination and then invite the drawing of adverse inferences against the first party.

97 I would not accept that the guidance in the authorities requires the first party to go to such formal lengths. There may be cases in which it can and will do so. But in many cases the decision whether to call particular witnesses will have been the subject of privileged legal advice and the tendering of an explanation as to why particular witnesses are not being called would, if it is to be evidence of the whole truth, require the waiver of that privilege. In my view it must be open to the court to make its own assessment of whether any putative witnesses might reasonably have been

called, and in the present case Jack, J. did precisely that and held that, in respect of all the potential witnesses whom he considered, there was a credible explanation as to why each might not have been called by Ivory. Otkritie's submission that this court should reject his reasoning as worthless speculation is one I would reject. The judge's assessments were reasonable ones and he was entitled to take account of them.

98 There remains the position of Ms. Wright, whom Mr. Pillow added belatedly to his list in his closing submissions at the trial and whom the judge did not refer to when considering this aspect of Otkritie's case. When, however, Mr. Pillow made his points about Ms. Wright in his closing submissions, the judge suggested that, as Ms. Wright had apparently deliberately been closing her eyes to money laundering by the Urumovs, she might be unwilling to give evidence voluntarily (which Mr. Pillow agreed was possible), and the judge also questioned whether she was still resident in Gibraltar, as to which we are told there was no evidence. That exchange took place on April 22nd, 2016, with the judge's judgment following on June 9th, 2016. It is unlikely he had forgotten it. Had he remembered to deal also with Ms. Wright in his judgment on this aspect of the case, it is in my view highly improbable that he would have regarded the omission to call her as justifying the drawing of adverse inferences against Ivory. The plain inference is that he had formed a view at the end of the submissions on this part of Otkritie's argument that there was no sufficient substance in it.

Conclusion

99 I am conscious that I have not dealt with the many points that Mr. Pillow raised in his excellent submissions in the sort of detail that Otkritie may consider that each deserved. That is because to do so would in substance have amounted to approaching this appeal as if it were a re-trial of the factual issues. I have earlier referred to the authorities which are uniform in their discouragement of any temptation by appellate courts to engage in such a re-trial. This is not to say that appeals on fact can never succeed although I do not propose to list the types of circumstances in which they might or can. Otkritie's difficulty, however, is that its case against Ivory was thin. It disclaimed any suggestion that the US$5m. was "dirty" money derived from Urumov frauds. It was, therefore, driven to advancing the suggestion that the Urumovs had done some behind the curtain deal with Mr. Kotton involving the swapping of their dirty money for his clean money. That was evidentially hopeless and Otkritie's difficulties were then materially magnified by the fact that (so the judge found) Mr. Kotton was a reputable person of good character, who had had no known connection with Ms. Balk since 2008, who did not know Mr. Urumov and who had for years done business deals with Mr. Balk. The judge found nothing unusual about the informal way in which Mr.

Kotton's claimed business deal in May 2012 with Mr. Balk was set up. The judge was *expressly* aware of the many suspicious circumstances surrounding the claimed loan transaction but ultimately he found Mr. Kotton to be a witness of truth, accepted his evidence and was not prepared to accept that either the disclosure deficiencies or the omission to call any supporting evidence justified the drawing of inferences adverse to Ivory's case. In my judgment, the judge's approach to his ultimate decision cannot be criticized. What this appeal comes down to is an invitation to this court to substitute a different finding to the effect that Mr. Kotton's evidence was a pack of lies and that, in consequence, Otkritie's evidentially weak case should have succeeded. In my judgment, the judge was entitled to make the findings of fact that he did or, at any rate, this court is in no position to conclude that he was not. I would dismiss Otkritie's appeal.

100 **POTTER, J.A.:** I agree.

101 **KAY, P.:** I also agree.

Appeal dismissed.