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Case No: BL-2021-000962

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 25/08/2022

Before :

SIR ANTHONY MANN, SITTING AS A JUDGE OF THE HIGH COURT

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Between :

THE DEPOSIT GUARANTEE FUND FOR INDIVIDUALS (as liquidator of National Credit Bank PJSC)	**Claimant**
- and -	
(1) BANK FRICK & CO AG (a company incorporated in Liechtenstein)	
(2) EASTMOND SALES LLP	**Defendants**

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- -

Michael Ryan and Rebecca Jacobs (instructed by **PCB Byrne LLP**) for the claimant)
Andreas Gledhill QC and Luka Krsljanin (instructed by **Greenberg Traurig LLP**) for the first defendant)

Hearing dates: 20th and 21st July 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. This is a strike-out and defendant's summary judgment application made within the context of this action, which is a claim based on section 423 of Insolvency Act 1986. Such a claim permits a challenge to a disposition of a person's assets if the disposition is done for the "purpose" (the key word for the purposes of this application) of defeating the interests of creditors (putting the matter shortly). The application is made on the footing that there is no sufficient pleading of the purpose in that the material which will be relied upon as demonstrating the purpose is insufficient, and the evidence relied on by the claimant in this action does not improve that state of affairs.

2. In this application Mr Andreas Gledhill QC appeared for the challenging defendant, Bank Frick, and Mr Michael Ryan appeared for the claimant.

The parties and a summary of how the claim is put

3. The claimant ("DGF") is the governmental agency responsible for Ukraine's bank deposit guarantee scheme. On 5 June 2015 the National Credit Bank ("NCB") was classed as insolvent and thereafter went into liquidation. DGF has compensated that bank's depositors for some of their losses and at the moment there is a shortfall to unsecured creditors in the liquidation of approximately $US24.4m.

4. On 29 April 2021 DGF was recognised as a "foreign representative" for the purposes of the Cross-Border Insolvency Regulations 2006 and thereby acquired status to bring the claim which is made in this action under section 423. The claim is made primarily against the first defendant, Bank Frick, which is a Liechtenstein bank which received funds from NCB and accepted a pledge over those funds in circumstances which will appear. The second defendant is an English limited liability partnership which participated in what is said to be a fraud, again in circumstances which will appear. The arguments on this application do not directly concern the second defendant, and it will not be necessary to refer to its position as defendant in deciding the issues which arise in this application.

5. It will assist in considering an analysis of the case to provide a short summary of how the claim is said to work. This is merely a summary – a fuller development and analysis is necessary to consider Bank Frick's application, and it appears below.

6. Section 423 provides for remedial steps to be ordered where a transaction is entered into "*for the purpose*" of putting assets beyond the reach of creditors, or of otherwise prejudicing the interests of such a person (the full terms will be considered later). Adopting the phrase used in the application before me, I shall call this the "Avoidance Purpose". The focus of the present application is on whether the allegation of that "purpose" can be maintained on the basis of the pleaded case.

7. The claimant's case can be summarised as follows. The transactions which are impeached in this case are pledges to Bank Frick of moneys placed into an account at that bank by two senior officers of NCB, which pledges were to secure loans to entities which never had any intention of, or ability to, repay in full. The loans were

for the benefit of those officers who extracted the loan moneys for their own purposes, and the whole scheme was dishonest vis-à-vis NCB, from whom it was concealed. The effect of the transaction, as the officers knew or must have known, was that the interests of depositors and other creditors were prejudiced because once the money was pledged it was inevitably lost to NCB, and once it was lost NCB would not have enough assets to be able to repay creditors (principally depositors). Hence those assets were put beyond the reach of those persons, and that was the "purpose" of the officers.

8. That, in outline, is how the claim is said to work. In this application, made before Bank Frick has served its Defence, Bank Frick says that the pleaded material does not justify the averment of the pleaded "purpose" – it does not go beyond averring a purpose on the part of the officers to benefit themselves, and the material is insufficient to justify a further inference, and therefore an averment, of the additional purpose relied on by the claimant. That is where the battleground lies.

9. There were originally two other bases on which a strike-out or summary judgment was claimed – a point about the attribution of the officers' purpose to NCB, and a point about whether this claim had a sufficient connection to this jurisdiction to justify its being brought here. However, those two matters, as striking out/summary judgment matters, were not pursued on this application, though they still remain live in the action should the claim survive this application.

The pleaded claim in more detail

10. Because the application as it now is depends on the manner of the pleading and whether necessary averments can be made on the basis of the pleaded facts, it is necessary to set out the pleaded facts in some detail.

11. The claim arises out of the following particular facts alleged in the Particulars of Claim and to a limited extent in the evidence filed on this application. For the purposes of this application those primary facts are assumed to be true.

12. Mr Andriy Onistrat was the chairman of NCB's advisory board and Mr Igor Klymenko was the chairman of its management board. Mr Onistrat was also a 30% owner of NCB. I can call them both "the directors" together and it will not be necessary to distinguish between them for the purposes of this judgment. In June 2013 the directors visited Bank Frick in Liechtenstein to arrange the opening of a correspondent account. The pleaded purpose of the account was to enable NCB moneys to be deposited there so that they could be pledged to secure borrowing on other accounts. Between then and March 2015 an aggregate of US$40m was deposited in that account.

13. In the months which followed, up to November 2013, the directors, via stooges, introduced three entities to Bank Frick, all of which opened accounts there. They were the second defendant and two Scottish LLPs, namely Universal Trading LP and Europa Trading LP. Similar arrangements were set up in relation to all three of those entities. Each of them opened an account with Bank Frick on which money was lent, and each borrowing was secured by a pledge of moneys deposited in the correspondent account opened by the directors. NCB deposited moneys there for the purposes of their being pledged. In 2014 the loans were rolled over to 2015. There

was some uncertainty as to the aggregate money lent and deposited from time to time but the precise figures do not matter. Either $34m or something like $40m was lent in aggregate, or committed, under loan agreements. At the end of the sequence when the pledges were enforced in order to pay shortfalls on the loan, there was some $25m in the pledged account, which was used to repay the outstanding loans. There was an unsecured shortfall of some $74,000.

14. The pleaded case, assumed to be true and established for these purposes, is that this activity amounted to a fraud perpetrated by the directors for their own benefit. They did it in order to remove bank assets and in effect apply them for their own benefit. They set up the partnerships, which were their own creatures, so they could take the benefit of the loans, not repay them, and leave NCB bearing the burden of the loans via the pledges. The partnerships could be seen to be suspect vehicles. The two Scottish partnerships were incorporated a very short time before the transactions in question and had addresses at Scottish residences. The English LLP had a registered address at a residence in Hertfordshire, and its members were two entities registered in the Seychelles. There was no evidence that it had any, or any intended, commercial activity. The members of the two Scottish companies were Belize registered entities, and again there was no evidence of any intended commercial activity. They were both dissolved in 2015, shortly after the enforcement of the pledges.

15. There were other hallmarks of money-laundering – the loans were not recorded in the public accounts of the second defendant (the other two LPs did not have publicly available financial documents); the loaned moneys were immediately paid out to other accounts across the world in a manner not consistent with any commercial activity; those purporting to act for the companies were NCB employees with no apparent connection to the three entities in question. Furthermore, no records were kept by NCB of the pledge agreements and other than the participants and one other, no members of the various NCB boards or committees knew about the three partnership borrowers or the pledge agreements. In addition, and much emphasised by Mr Ryan, there were express requests to Bank Frick from another employee of NCB, at the behest of the directors, that the existence of the loans be not disclosed by Bank Frick, and it is said that they were not disclosed by Bank Frick, even to NCB's auditors.

16. The pleaded conclusion from this material is that the loans were not genuine commercial transactions because the borrowers had no intention of repaying them, and the pledges conferred no benefit on NCB and were harmful to its interests and the interests of NCB, its shareholders and its customers (Particulars of Claim para 47). The transactions were a transaction at an undervalue so far as NCB was concerned, because it got nothing out of them.

17. Thus what is pleaded thus far in the narrative is a fraudulent scheme under which moneys were extracted from NCB by the two directors for their own benefit and without any benefit to NCB. Paragraphs 58 to 89 of the Particulars of Claim plead that Bank Frick was aware of the above suspicious factors (especially the request for secrecy and non-disclosure) and other factors and that they were indicative of money-laundering and/or an abuse of the power of representation by the directors, and that there were serious grounds for questioning the propriety of the pledges and loan agreements. In the circumstances the bank would have realised that the activities were part of a dishonest scheme to extract valuable assets from NCB or part of a

money laundering operation. The conclusory paragraph 89 of the Particulars of Claim pleads that Bank Frick failed to act in good faith in entering into the pledges, in making payments to the three borrowing companies and in enforcing its security under the pledges.

18. The basis for claiming under section 423 comes from an additional key fact. The financial state of NCB at the time of the lending and pledging activities referred to above was such that the bulk of the bank's creditors were customers who had deposited funds at the bank, and the bulk of the bank's available assets would be required to back or repay those deposits. The bank's surplus of assets over the funds which were necessary to match customer deposits was not very great. It is pleaded and in evidence, and therefore assumed to be true for the purposes of this application, that it is the case that the amounts deposited and pledged were an amount significantly in excess of any balance sheet surplus of NCB, so the inevitable enforcement of the pledges would mean there would not be enough assets in the bank to pay depositors (or other creditors, but Mr Ryan focused on depositors). Default on the loans, and therefore the loss of NCB's funds, was inevitable, as the directors knew, because they were going to help themselves to the loan moneys which were secured by the pledges.

19. From that the claimant pursues the following line of reasoning and averment:

    i) In those circumstances the directors must have known that the pledges prejudiced the interests of such customers.

    ii) Their conduct of procuring the loans and execution of the pledges was intentional and dishonest. The directors acted to conceal the existence of the pledges "and the wider scheme to extract assets from NCB".

    iii) In order to achieve their aims of profiting from the scheme, NCB assets had to be removed, and those assets were assets that ought to have been available to satisfy the claims of creditors, in particular depositing customers. It is specifically pleaded (with my emphasis):

    > "In executing the Pledges, they therefore <u>intended</u> to put such assets beyond the reach of NCB's customers (and other creditors) and prejudice their interests in relation to their claims." (Voluntary Further Information para 10.6).

    iv) The consequence of the pledges has been to prejudice NCB's creditors and there remains a significant shortfall for creditors. It is pleaded:

    > "The main group victims of this shortfall were the individual depositor customers of NCB. Messrs Onistrat and Klymenko knew this would be the consequence of their actions in executing the Pledges, and they intended this result." (Voluntary Further Information para 10.7)

    v) From this material it is said that the directors had the "purpose" required by section 423.

20. The full pleading of this aspect of the case appears in two documents. First there is the Particulars of Claim, in which the matters are set out in paragraphs 51 to 57.

Because detail matters, I set out those paragraphs in Appendix 1 to this judgment. On 7th July 2022, in the run up to the hearing of this application, the claimant served some Voluntary Particulars which sought to amplify its case. It may be true to say, as Mr Gledhill did say, that this amounts to a covert attempt to amend, but I do not need to decide that. I approach this application on the basis that these are pleaded facts which are assumed to be true. Furthermore, I apply that approach to an amended version of that document produced on the second day of the hearing before me.

21. The amendments seem mainly to have been intended to correct a curious formulation of the relationship between NCB's assets and its creditors. It was originally pleaded there that the bank's funds were "owed to its customers", a formulation which appeared in the Particulars of Claim (para 52.1), the evidence and Mr Ryan's skeleton argument. It seemed to be an important part of the formulation of the bank's case, but Mr Ryan accepted that it was wrong as a matter of analysis and accepted that the proper analysis was that the depositors were bank creditors and the assets of the bank were merely its assets, which had to be applied, as appropriate, in the discharge of its debts. The assets were not "owed" to anyone. The amendments seem mainly to reflect that change of stance.

22. Again because detail matters, the Amended Voluntary Particulars are annexed to this judgment, as Appendix 2.

23. I return to the Particulars of Claim in order to deal with the detail of the material pleaded there. Paragraph 9 pleads:

> "During 2013 and 2014, Mr Onistrat and Mr Klymenko implemented a scheme utilising Eastmond and other UK corporate entities in order dishonestly to extract valuable assets from NCB to the prejudice of NCB's customers and creditors. The particulars of this scheme are set out below."

24. Paragraphs 10 – 14 describe the setting up of the account at Bank Frick to allow NCB's funds to be deposited as collateral for loans. Paragraphs 15 – 37 describe the loans, their drawdown, the fact that they were rolled over to 2015 and that the loan moneys were dissipated otherwise than in the course of legitimate commercial activity. Paragraphs 38 – 40 describe the enforcement of the pledges. Paragraph 40 itself complains that at the time of enforcement NCB was in temporary administration and subject to a moratorium, but nothing particularly turns on that for the purposes of the present application.

25. Paragraphs 41 to 47 appear under the heading "Extraction of valuable assets from NCB". Paragraph 41 pleads that the directors procured the execution of the pledges "in order to extract valuable assets from NCB to the prejudice of NCB's customers and creditors". The following paragraphs go on to show how it was that the three borrowing entities were shells with no prospect of being able to repay a substantial loan within a short period of one or two years. The scheme had hallmarks of money-laundering (paragraph 46) and particulars of the scheme were concealed by the directors from NCB (paragraph 46.7). Paragraph 47 pleads that in the premises set out in the preceding paragraph the loans were not genuine or bona fide commercial transactions, and the pledges conferred no benefit on NCB "and were harmful to the interests of NCB, its shareholders and customers".

26. Paragraphs 48 – 50 plead that the transactions were at an undervalue because they conferred no valuable rights on NCB, which received no consideration for the pledges.

27. Paragraphs 51 and following appear in Appendix 1. Paragraph 52.1 contains allegations of knowledge that are crucial to Mr Ryan's case – knowledge that the pledges would "necessarily be prejudicial to the interests of NCB's creditors", the shell nature of the borrowing entities and the absence of benefit to NCB. Paragraph 54 is important because it pleads the benefit to the directors of the transaction. It is an unsurprising conclusion from what has gone before.

28. Paragraph 56 is the key paragraph because it is this paragraph that pleads how the pleading gets to the "purpose" required by section 423. Because of its centrality I will set it out here:

> "56. In the premises set out above at paragraphs 51 to 55 above and each of them, it is inferred that in procuring NCB to enter the Pledges, [the directors] acted for the sole or substantial purpose of putting assets beyond the reach of NCB's customers and creditors or future creditors or otherwise prejudicing the interests of NCB's customers and creditors or future creditors in relation to claims which they had or may have against NCB. This purpose falls to be attributed to NCB."

29. The allegation of "sole" purpose was not really pursued by Mr Ryan at the hearing and realistically could not be – Mr Ryan, like his pleading, constantly emphasised the illegitimate purpose of the directors to benefit themselves, which is of itself a purpose. What is of more significance is the allegation of "substantial" purpose, which would suffice for Mr Ryan's purposes if it is sufficiently arguable on the facts.

30. Paragraph 57 can be seen to do no more than allege dishonesty in the light of the preceding matters.

31. The remaining paragraphs of the Particulars of Claim deal with the knowledge and conduct of Bank Frick as outlined above and do not bear on the issues on this application. I need say no more about them because they do not go to the question of purpose, and it was not suggested before me that they did.

32. The Amended Voluntary Further Information does not really add any significant new body of fact to that which is already pleaded. What it really does is to order the pleaded facts so as to argue the claimant's case, but it is perhaps important because it contains a particularisation of the matters relied on as establishing the purpose. That appears from paragraph 10 and its sub-paragraphs. The sub-paragraphs seem to contain the facts from which the inference of purpose will be sought to be drawn (though against the background of the preceding facts). The route to the conclusion is pleaded as follows:

    i) The directors knew that customer interests were prejudiced by "extracting assets" via the pledges because in removing those assets they removed funds which were required to be available to meet the claims of creditors; without them there was not going to be enough money to satisfy creditors.

ii) The amount of "assets extracted" was significant.

iii) The directors knew the pledges prejudiced the interests of customers (a repetition, appearing in paragraph 10.3).

iv) The execution of the pledges and procuring the loan agreements was intentionally dishonest.

v) The concealment which the directors deliberately sought to achieve was because the directors knew the pledges prejudiced the interests of customers, which they intended (para 10.5).

vi) In order to achieve their aim of profiting from the scheme, assets had to be removed from NCB that ought to have been available for creditors. "In executing the Pledges, they *therefore* intended to put such assets beyond the reach of NCB's customers (and other creditors) and prejudice their interests in relation to their claims." (para 10.6 with my emphasis)

vii) The consequence of enforcement of the pledges has been to prejudice the interests of NCB's creditors because there is a shortfall in the liquidation estate as a result of the enforcement. "[The directors] knew this would be consequence of their actions in executing the Pledges, and they intended this result." (para 10.7)

33. That is how the pleading seems to work, and I think it can be distilled further as follows:

i) The directors devised a scheme for misappropriating assets of NCB for their own benefit.

ii) Once the assets were deployed they would no longer be assets available the bank.

iii) That brought about balance-sheet insolvency – there would not be enough money to pay creditors.

iv) Creditors were thereby prejudiced; that was an inevitable consequence of the scheme.

v) The directors knew about (ii) , (iii) and (iv) when they embarked on (i).

vi) Concealment was necessary to their scheme because things would collapse when it became apparent that the bank no longer had enough money.

vii) Therefore they intended to achieve (ii), (iii) and (iv) and had as a "purpose" the prejudicing of creditors within section 423.

Section 423

34. Section 423, so far as relevant, reads as follows. The most relevant provision for relevant purposes is sub-section (3):

"423 **Transactions defrauding creditors**.

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

a) restoring the position to what it would have been if the transaction had not been entered into, and

b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

35. In this application there was no dispute about the potential application of the requirements other than purpose. The dispute is about whether it can be said, on the basis of the pleaded case, that the directors had the purpose specified in subsection (3) (the Avoidance Purpose). The essence of what is said by Bank Frick is that the Avoidance Purpose is said to be an inference from the pleaded facts, but the pleaded facts do not allow that inference.

The proper approach to this application

36. In order to succeed in this application to strike out Bank Frick must establish that the pleaded facts do not disclose any "reasonable ground for bringing … the claim" (CPR 3.4(2)(a). Alternatively it can succeed in getting summary judgment against the claimant if it establishes that "the claimant has no real prospect of succeeding on the claim …" (CPR 24.2(a)). So far as the latter test is concerned, Lewison J formulated the following approach in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* :[2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

37. To that one should add the following, added by the Court of Appeal in *The LCD Appeals* case [2018] EWCA Civ 220, and derived from *Swain v Hillman* [2001] 1 All ER 91 at 94:

> "It is important to note that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position."

38. In the present case there will need to be a particular focus on whether anything would be added to the Avoidance Purpose point at a trial, and whether the claim carries a sufficient degree of conviction to be allowed to progress. For reasons that will appear Bank Frick says that the answer to both those questions is No.

39. When considering how the claim is advanced it is important to bear in mind the nature of the allegations made The directors are accused of serious dishonesty in misappropriating assets, and whether or not one views the present claim as actually founded in dishonesty (as opposed to being made in the context of a dishonest transaction) it is nonetheless an accusation of serious wrongdoing – deliberately prejudicing creditors. That requires a clear pleading of a sufficiently cogent case. In *Lakatamia Shipping Co Ltd v Nobu Su and others* [2021] EWHC 1907 (Comm) Bryan J said:

> > "42. In the present case, Lakatamia alleges two unlawful means conspiracies (the Monaco Conspiracy and Aeroplane Conspiracy). Neither of these requires, or involves, any specific plea of dishonesty as such (nor are fraud claims such as in deceit or the like pleaded) as part of any element of the causes of action. They involve, however, allegations of serious

> wrongdoing, and as such they must be clearly pleaded (not least so the Defendants know the case they have to face, on the applicable principles), and convincingly proved by cogent evidence (as the passages identified above rightly emphasise). Allegations of participation in an unlawful means conspiracy, whilst not necessarily requiring dishonesty or a fraud to be committed, undoubtably involve what can properly be characterised as "discreditable" conduct. In this regard, and as stated by Moore-Bick LJ in *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [73] (in a passage cited with approval by Andrew Smith J in *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm) at [1438] and by me in *Bank of Moscow v Kekhman*, supra, at [52]), *"It is well established that "cogent evidence" is required to justify a finding of fraud or other discreditable conduct".*"

40. Bryan J referred there to evidence and proof. The present application is not concerned with that level of finding, but I agree with Mr Gledhill that the seriousness of the allegation requires the clear pleading of an apparently sustainable case. The present case is one of inference, and what is required is a clear pleading of the facts which give rise to the inference. As Lord Millett said in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1:

> "186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

This is a case of inference, and inference from disreputable conduct. The primary facts relied on must be alleged. That means in the present case the claimant will be confined to its pleading, and it is legitimate to scrutinise its pleaded case with care. Mr Ryan never suggested that he might seek to add to his pleaded case, other than to put in his Voluntary Further Information, and he in effect disclaimed such an intention in his submissions. Furthermore, if the claimant were going to rely on additional evidence at trial then, so far as the summary judgment application is concerned, it behoves the claimant to indicate that evidence at this stage – see Henshaw J in *Lex*

Foundation v Citibank [2022] EWHC 1649 (Comm) at para 35, citing *Korea National Insurance Corp v Allianz* [2007] 2 CLC 748 (CA).

The case law on the meaning of "purpose" in section 423

41. The dispute on this application centred largely on the extent of the subjective element imported in the use of the word "purpose" and what inference should be drawn in that respect from the primary facts pleaded. It is therefore necessary to consider the case law on the subject.

42. It was common ground in this case that the word "purpose" connotes a subjective state of mind, and is to be judged accordingly. As will appear, that is borne out by recent Court of Appeal authorities on the section. It is to be contrasted with the objectivity which is associated with intention. The difference was helpfully elaborated by Millett J in *Re M C Bacon* [1990] BCC 78. In that case the judge had to consider the then new voidable preference provisions in section 239 of the 1986 Act. The relevant word in that section is "desire", not "purpose", but for the moment that does not matter – for there to be a voidable preference the person giving the preference must be "influenced in deciding to give it by a *desire* to produce … the effect …". In contrasting the new section with its predecessor which used the word "intention" Millett J said (at pp 77-78):

> "A man is taken to intend the necessary consequences of his actions, so that an intention to grant a security to a creditor necessarily involves an intention to prefer that creditor in the event of insolvency. The need to establish that such intention was dominant was essential under the old law to prevent perfectly proper transactions from being struck down. With the abolition of that requirement intention could not remain the relevant test. Desire has been substituted. That is a very different matter. Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either.
> It is not, however, sufficient to establish a desire to make the payment or grant the security which it is sought to avoid. There must have been a desire to produce the effect mentioned in the subsection, that is to say, to improve the creditor's position in the event of an insolvent liquidation. A man is not to be taken as desiring all the necessary consequences of his actions. Some consequences may be of advantage to him and be desired by him; others may not affect him and be matters of indifference to him; while still others may be positively disadvantageous to him and not be desired by him, but be regarded by him as the unavoidable price of obtaining the desired advantages. It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations. Under the new regime a transaction will not be set aside as a voidable preference unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation.
> There is, of course, no need for there to be direct evidence of the requisite desire. Its existence may be inferred from the circumstances of the case just as the dominant intention could be inferred under the old law."

43. That is an important distinction in this case because when analysed much of Mr Ryan's case seemed to depend on the effect on creditors being an inevitable consequence of the directors' planned transactions and *therefore* their purpose. That

smacks more of intention than of purpose. I will come back to that. True it is that Millett J was contrasting intention with desire, and the relevant word in this case is "purpose", but as will become apparent "purpose" has very similar subjective connotations to "desire". I do, of course, note what Millett J said about the possibility of inferring desire from natural consequences; the same possibility applies in the present case, and one of the questions for me is whether that inference could actually be drawn on the pleaded facts of this case.

44. In *IRC v Hashmi* [2002] BCC 943 the Court of Appeal had to consider whether the Avoidance Purpose in section 423 had to be the dominant purpose. It was held that it did not, and in the course of her judgment Arden LJ made useful observations contrasting purpose and consequences:

> "19. I take first the question of law as to the requirement of the statutory purpose in s. 423(3) . It is clear that the purpose need not be the sole purpose: see *Royscot Spa Leasing Ltd v Lovett* at p. 507D…
>
> 23. The question arising on this appeal is whether on the true construction of s. 423 the purpose shown must be a dominant purpose. In my judgment the answer to that question must be arrived at taking into account the role, as explained above, of s. 423 in insolvency legislation. Accordingly it is not necessarily helpful to apply the construction placed on similar words in different provisions and none was suggested. In my judgment there is no warrant for excluding the situation where purposes of equal potency are concerned. That was pointed out by HHJ Moseley QC in the *Starelm Properties* case and is in my judgment correct. Thus one purpose can co-exist with another. Moreover, as Jonathan Parker J said in *Re Brabon* , there is no epithet in the section and thus no warrant for reading one in. Accordingly, in my judgment, the section does not require the inquiry to be made whether the purpose was a dominant purpose. It is sufficient if the statutory purpose can properly be described as a purpose *and not merely as a consequence*, rather than something which was indeed positively intended. Moreover, I agree with the observation of the judge that it will often be the case that the motive to defeat creditors and the motive to secure family protection will co-exist in such a way that even the transferor himself may be unable to say what was uppermost in his mind." (my emphasis)

45. After considering some domestic examples to make her point, she went on:

> "25. I cite these examples to emphasise that for something to be a purpose it must be a real substantial purpose; it is not sufficient to quote something which is a by-product of the transaction under consideration, or to show that it was simply a result of it, as in the *Royscot Spa Leasing Ltd v Lovett* case itself, or an element which made no contribution of importance to the debtor's purpose of carrying out the transaction under

> consideration. I agree with the point made by Laws LJ in argument, that trivial purposes must be excluded."

46. Simon Brown LJ considered "two purpose" cases and said:

> "If in fact the judge were to find in any given case that the transaction is one which the debtor might well have entered into in any event, he should not then too readily infer that the debtor also had the substantial purpose of escaping his liabilities."

That is an aspect which I shall have to consider in the context of this case.

47. The contrast between consequences and by-products, or something which made no contribution of importance to the debtor's purpose, on the one hand, and a real purpose on the other, is significant to the analysis in the present case. That contrast was affirmed and indeed emphasised in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176. In that case the disponor transferred £1m into his son's name for the professed reason of providing the son with assets so that he could obtain a UK visa. The first instance court found that even if it would have had the effect of putting that sum beyond the reach of his creditors, that was not a purpose of the transaction for the purposes of section 423 on the facts of the case. In his judgment Leggatt LJ considered *Hashmi* and considered that the word "substantial" was not an entirely appropriate word to use to describe the relevant purpose, but endorsed the distinction between purpose and consequences:

> "14. The description of the requisite purpose as a "substantial" purpose was not necessary to the decision of the Court of Appeal in the *Hashmi* case and to my mind it risks causing confusion. The word "substantial" is not used in section 423 and I can see no necessity or warrant for reading this (or any other) adjective into the wording of the section. At best it introduces unnecessary complication and at worst introduces an additional requirement which makes the test stricter than Parliament intended. I agree with the point made in McPherson's *Law of Company Liquidation* (4th Edn, 2017), para 11-116, that there is no need to put a potentially confusing gloss on the statutory language. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that.
>
> 15. Arden LJ made this very point in the *Hashmi* case when she said (at para 23) that "there is no epithet in the section and thus no warrant for reading one in". When later in her judgment she referred (at para 25) to a "real substantial" purpose, it is apparent from the context that the reason for using those adjectives at that point was to underline the distinction between a purpose and a consequence of the relevant transaction. *As Arden LJ emphasised, it is not enough to bring a transaction at*

> *an undervalue within section 423 that the transaction had the consequence of putting assets of the debtor beyond the reach of creditors. That is so even if the consequence was foreseeable or was actually foreseen by the debtor at the time of entering into the transaction.* Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same. To illustrate the distinction using a less homely example than that given by Arden LJ, a commander may order a missile strike on a military target knowing that it will almost certainly cause some civilian casualties. But this does not mean that the missile strike is being carried out for the purpose of causing such casualties."

48. I have emphasised words which are particularly significant to the present matter. Leggatt LJ elaborated in his next paragraph:

> "16. When judging a person's intentions, we are generally more inclined to accept that an action was not done for the purpose of bringing about a particular consequence, even if the consequence was foreseen, if there is reason to believe that the consequence was something which the actor wished to avoid or at least had no wish to bring about. Hence, in the example just given, where the missile strike had a clear strategic purpose, we may readily accept that it was not ordered for the purpose of causing civilian casualties – particularly if, for example, there is evidence that the commander gave anxious consideration to how many civilians were likely to be in the target area and planned the strike for a time when the number was expected to be low. By contrast, a consequence is more likely to be perceived as positively intended if there is reason to think that it is something which the actor desired. Thus, evidence that a person who has entered into a transaction at an undervalue foresaw that the result would be to put assets out of reach of creditors and desired that result might lead the court to infer that the transaction was entered into for that purpose. But such a conclusion is not a logical or legal necessity. It is a judgment which has to be based on an evaluation of all the relevant facts of the particular case."

49. When he turned to the judge's findings he again returned to the difference between outcome and purpose:

> "17. Subject to the bank's arguments which I will come to shortly, it is common ground in the present case that the judge identified the correct legal test. After pointing out that it was "at least an outcome" of the transfer of funds made by Mr Ablyazov to Madiyar that the funds were put beyond the reach of the bank as a person who was making or might make a claim against Mr Ablyazov, the judge said (at para 130):

> 'What I therefore have to determine is whether this was also a purpose of Mr Ablyazov in making the Transfer. That depends … on whether Mr Ablyazov positively intended that outcome.'
>
> As discussed above, this was the correct question to ask."

50. The trial judge's finding is summarised at paragraph 21:

> "21. Having regard to these and all the other matters set out in his judgment, the judge concluded that, "whilst Mr Ablyazov may perhaps have been conscious that a by-product of the Transfer would be (as it was) that the Fund would be placed out of the hands of potential creditors including [the bank], this was not a substantial purpose of his making the transfer." He accordingly held that the bank's claim under section 423 failed."

51. Having then considered the evidence and findings in the case Leggatt LJ made the following significant point about evidence and the burden of proof:

> "28. … It is clear that there is no rule of law to the effect that, if the debtor knew at the time of entering into the transaction that he was facing claims, the judge must find that the transaction was entered into for the prohibited purpose unless the debtor adduces evidence to show otherwise. Had it wished to do so, Parliament could readily have created a rule of this kind – either generally or applicable in cases where the transaction is entered into with a person associated with the debtor. Section 423 can be contrasted in this respect with sections 239(6) and 340(5) of the Insolvency Act 1986, which deal with preferences. Section 340(5), for example, provides that an individual who has given a preference to a person who was an "associate" is presumed, unless the contrary is shown, to have been influenced in deciding to give it by a desire to put that person into a better position in the event of the individual's bankruptcy. The definition of an "associate" includes a relative: see section 435. No such presumption has been incorporated in section 423."

52. The important point that consequence is not enough was made shortly by Arden LJ in another case, namely *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404, in which she said:

> "130. There can be no doubt but that section 423(3) requires the person entering into the transaction to have a particular purpose. It is not enough that the transaction has a particular result."

53. What is therefore apparent from those cases is the following, so far as the present application is concerned:

i) The Avoidance Purpose, if it is to be found, has to be actually found, and is not presumed.

ii) Its existence is a matter to be determined from the evidence. Inference is obviously possible, but the inference still has to be drawn out from the evidence.

iii) The fact that a transaction has, as a consequence or by-product, the statutory effect of prejudicing creditors is not, by itself sufficient. It may be part of the material for drawing an inference, and is capable of supporting an inference, but is not enough by itself.

iv) (iii) remains the case even if the disponor knew of the effect.

v) The purpose must be a positive purpose, but it does not have to be substantial.

vi) The fact that the disponor would have done the transaction anyway, ie irrespective of its effect on creditors, is a relevant factor.

54. Mr Ryan relied on a series of cases which he said showed how the courts treated the interaction between consequence and purpose and demonstrated that he could win in this case. They were not relied on as demonstrating any particular principle. Rather, they were cited as examples which are said to be analogous to the facts of this case. I shall therefore not consider them at this stage of this judgment but will return to them when I consider his submissions.

55. However, Mr Ryan also relied on one authority which was closer to principle, albeit derived from a different area of law. *OBG Ltd v Allan* [2008] 1 AC 1 was concerned with economic torts, but the torts in question involved intention, and (so far as relevant to the present matter) an intention to cause loss. It is the approach to that question which was relied on by Mr Ryan. He drew attention to Lord Hoffman's speech in which he said:

> "62. Finally, there is the question of intention. In the *Lumley v Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

56. That, and especially the last sentence, seems to me to be consistent with the approach in the section 423 cases which distinguishes between purpose and consequences,

albeit that that case concerned intention. The same is true of the next part relied on by Mr Ryan:

> "134. Thus the position of Senor Sanchez Junco was that he wished to defend his publication against the damage it might suffer on account of having lost the exclusive. But that, it seems to me, is precisely the position of every competitor who steps over the line and uses unlawful means. The injury which he inflicted on *OK!* in order to achieve the end of keeping up his sales was simply the other side of the same coin. His position was no different from Mr Gye saying that he had no wish to injure Mr Lumley and had the greatest respect for Her Majesty's Theatre but his intention was to improve attendance at his own theatre, or the master of the *Othello* saying that his intention was to buy more palm oil. Lord Sumner made this point pungently in *Sorrell v Smith* [1925] AC 700, 742:
>
> > "How any definite line is to be drawn between acts, whose real purpose is to advance the defendants' interests, and acts, whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power. When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears."
>
> The injury to *OK!* was the means of attaining Senor Sanchez Junor's desired end and not merely a foreseeable consequence of having done so.
>
> 135. The analysis of intention by the Court of Appeal in my opinion illustrates the danger of giving a wide meaning to the concept of unlawful means and then attempting to restrict the ambit of the tort by giving a narrow meaning to the concept of intention. The effect is to enable virtually anyone who really has used unlawful means against a third party in order to injure the plaintiff to say that he intended only to enrich himself, or protect himself from loss. The way to keep the tort within reasonable bounds is not to extend the concept of unlawful means beyond what was contemplated in *Allen v Flood*, rather than to give an artificially narrow meaning to the concept of intention."

57. Mr Ryan emphasised the "coin" metaphor and submitted that it was applicable to the present case. I will deal with that submission below. Lord Nicholls also dealt with this point with a similar metaphor:

> "164. I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.
>
> 165. Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does

> not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.
> 166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must *intend* to injure *the claimant*. This intent must be a cause of the defendant's conduct, in the words of Cooke J in *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354, 360. The majority of the Court of Appeal fell into error on this point in the interlocutory case of *Miller v Bassey* [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.
> 167. I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in *Sorrell v Smith* [1925] AC 700, 742:
>
> > 'When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendant's success is the plaintiff's extinction, and they cannot seek the one without ensuing the other.'

58. Mr Ryan relied on this as demonstrating the "coin" analogy again. He also pointed out that it meant that the defendant could not avoid liability simply by saying that the directors were acting solely for their own gain. I agree with that proposition, but that is not Bank Frick's case, as will appear.

The evidence

59. The claimant put in evidence on this application in order to indicate and (presumably) bolster its case. The evidence is contained in a witness statement of its solicitor, Mr Trevor Mascarenhas, which is specifically targeted at this application. It has sections dealing with the forum and attribution points, not pursued for the time being, and a section dealing with "The purpose requirement" which "contains the evidence relevant to [this ground]". It is important to consider this evidence to see what if anything it adds to the pleaded case. It is a significant indicator of the sort of evidence that would be adduced at a trial. If it indicates an evidential case will be run

which would support the case on the Avoidance Purpose then I must take that into account on this application even if it is not specifically pleaded.

60. The relevant section of Mr Mascarenhas's witness statement can be summarised as follows:

i) At paragraph 53 he sets out his intentions:

> "I now set out the evidence which amply demonstrates that [the directors] were acting for the relevant section 423 purpose."

ii) In the following paragraphs he sets out the position of the directors and others within the bank, and that the directors "must have been aware of the nature of NCB's business as a retail bank and that the funds it held were in large part owed to its depositing customers. [The directors] were under a duty to protect the interests of NCB and its customers and to act diligently and manage the risk and exposure of NCB… By procuring or assisting NCB to enter into the pledges they acted in breach of such duties."

iii) The result of the execution of the pledges was to tie up funds with Bank Frick. "This had the effect of prejudicing the claims of NCB's creditors because these funds were no longer at the disposal of NCB… The sums held in NCB's Frick account subject to the pledges will inevitably be paid away to Frick…" The scheme also had the effect of concealing the removal of assets.

iv) Due to their senior positions the directors must have known that removing funds from NCB via the pledges would seriously prejudice NCB's customers' ability to recover their deposits.

v) The prejudice to NCB's customers must have been particularly obvious to the directors because of the amounts involved.

vi) Paragraph 63 is an important paragraph in terms of setting out the evidence which is relied on:

> "63. Moreover, [the directors] must have intended this prejudice to occur to NCB's customers and must have intended to put assets beyond their reach because the evidence demonstrates that they acted deliberately and dishonestly in executing the scheme."

I shall treat the reference to "intention" as being a reference to "purpose" for the purposes of section 423.

vii) Paragraph 64 then avers:

> "Such intention is clear from attempt to conceal the scheme. This is powerful evidence that [the directors] knew that executing the pledges was harmful to the interests of NCB's creditors (and that they intended this), hence the need for concealment."

There then follow comprehensive allegations as to the concealment and the absence of any relevant records in the books and records of the bank. What is evidenced is a clear pattern of concealment.

viii) Paragraph 70 says that the directors could not offer any explanation at police interviews which is said to lead to "further inferences that there was not and could not have been any legitimate explanation for the relevant transactions."

ix) Paragraph 71 then seeks to draw a conclusion:

> "71. In all the circumstances the purpose (or at least a substantial purpose) of [the directors] in executing the pledges was to prejudice NCB's creditors by removing assets against which NCB's customers' deposits could be redeemed or other claims of creditors enforced."

x) Finally, paragraph 72 refers to the defendant's affirmative evidence that the directors were acting for their own gain, which Mr Mascarenhas infers is to support an argument that the statutory purpose was not made out. He goes on:

> "DGF does not dispute that [the directors] were acting for their own gain. However, acting with such a purpose is not incompatible with the purpose of prejudicing the position of creditors by putting assets beyond their reach. This is because the scheme necessarily involved taking assets from NCB which were owed to the depositing customers and placing them into the hands of [the directors] personally, beyond the reach of NCB's customers and other creditors."

61. What emerges from that evidence is the following points:

i) No form of evidence is relied on other than the primary facts as to the carrying out of the scheme and the knowledge of the directors, as pleaded. That is, of itself, not unusual in cases under section 423. The perpetrator seldom gives evidence against himself/herself, or volunteers helpful admissions. And very often the wrongful purpose is not disclosed clearly in contemporaneous documents either. That is apparently the case here. Despite the fact that DGF has had all the documents, and access to all the perpetrators, concealers and other NCB employees, for many years, it has not got anything approaching direct evidence of what the purpose of the directors was. The claimant is, like most section 423 applicants, thrown back on what is to be inferred from the primary facts of what actually happened.

ii) The primary facts of what happened are the following:

a) The dishonest acts of the directors in applying bank moneys for their own purposes via the pledges and the loans.

b) Concealment of those facts.

c) Dishonest concealment of the whole transaction from the bank itself by the directors.

d) Inevitable prejudice to the creditors of the bank, because the pledge inevitably reduced the bank's available funds to a level below that necessary to repay creditors.

e) Knowledge of (d) on the part of the directors.

iii) Those are "all the circumstances" referred to in paragraph 71. There are no others. In particular, there is no reference to any form of further evidence that might be forthcoming.

62. That reasoning shows that the claimant will seek to establish the infererence of the Avoidance Purpose from the pleaded facts to which the witness statement evidence adds nothing material. There is no suggestion that anything new and material will be produced at, or on the way to, trial, so, as Mr Gledhill put it, the pleaded case (and evidenced case) is as good as it gets when it comes to material from which the purpose is to be inferred. He invites me to find that it is not good enough.

The application of those matters to this case

63. Mr Gledhill's case is that even if everything that is pleaded (and proposed in the evidence, if different or better) is proved at the trial, that material will not be sufficient to justify an inference of the Avoidance Purpose, that that can be seen now, and there is no point going all the way to a trial to achieve the same result. I agree with Mr Gledhill for the reasons appearing below.

64. If the claimant is right about the nature of the activity in this case, this is a case in which the directors clearly intended to benefit themselves from the transactions they undertook. They pledged the money to back loans which they then appropriated, at the expense of their bank via the pledges. That was clearly their first purpose. If it matters (which it does not, save for the purposes of analysis) it can probably be said that it was also their purpose, within section 423, to damage NCB itself (by misappropriating the bank's money). That was the other side of the coin, in *OBG* terms. Their gain was the bank's loss and vice versa; the money they misappropriated was the bank's money. Those two elements were clearly two aspects of the same thing.

65. However, going one step further, as a matter of inference of a further purpose, is a step too far on the pleaded case. The claimant says that because, on the facts relating to the financial state of NCB it was rendered insolvent and it was inevitable that creditors would suffer, to the knowledge of the directors, then the prejudice to creditors was therefore a purpose of the directors. The claimant relies on the directors' foresight of the inevitable consequence of the transaction as justifying the inference of purpose. That logic does not follow in this case. It might have been an appropriate conclusion (not inference) if the question was one of intention on the footing that a person is taken to intend the consequences of his acts, but the question is not one of intention in that sense, but of purpose, which the authorities clearly show to be a subjective consideration.

66. The foreseeability of the effect on creditors might have been material supporting an inference if there were other reasons to suppose that the directors wished that particular effect, but there are none. If one stops at the pleaded facts said to justify the inference, then in my view one cannot conclude that the directors had, as a subjective purpose, damage to creditors in mind. One can ask rhetorically: Why would they have that purpose? On the pleaded facts they were stealing the bank's money. Their dishonesty in that respect is constantly relied on by the claimant. That is what the directors sought to do. There is no reason for inferring that they had any eye to the creditors at all even if they knew the financial state of the bank. The likelihood is that they would have done the same had the bank remained solvent; there is no suggestion that the solvency or insolvency of the bank played any part in their thinking, and why would it? The suggestion is not plausible. There is no pleading that the transactions took place *because* the directors could see that the bank was going into insolvency. It was actually solvent when they were considering the transaction, and there is no pleading that they deliberately brought about the insolvency (as opposed to foreseeing it). Simon Brown LJ in *Hashmi* observed that if the transaction would have taken place anyway then one should not necessarily infer the Avoidance Purpose. That seems, with respect, an appropriate approach. If one looks at the facts realistically in this case, one simply cannot see why the insolvency of their bank, or the effect on creditors, would have had any effect on or in their plans at all.

67. Thus there is no reason, on the pleaded and evidenced facts, for inferring that the prejudice to creditors was actually a purpose of the directors, as opposed to a consequence of their acts. The effect on creditors could be a starting point for considering whether the purpose was to affect creditors, but the fact that there was that inevitable effect is not necessarily sufficient. But that is all the claimant has got. The whole thrust of Mr Ryan's pleaded case, and then of his submissions, was that *because* prejudice was the effect, and *because* it was foreseen, *therefore* it was the purpose of the directors to produce that effect. So far as the pleadings are concerned, see paragraphs 19 and 32 above. That logic does not follow. The effect was as it was said to be, but that is a consequence. There has to be more - it has to be an effect which was sufficiently intended so as to be a subjective purpose of the directors. The important purpose/consequence distinction appears from the authorities cited above, and in particular the *Ablyazov* case. There is nothing in the pleaded facts to justify the effect as being more than a consequence.

68. Mr Ryan sought to meet this analysis and to establish his purpose by relying on various other points. None of them assist him. They were as follows:

    i) This was a dishonest scheme and concealment was part of the plan of the directors; that is a basis on which to draw the inference. I agree that this was a dishonest scheme, and dishonesty might be material which contributes to an inference, but in this case it does not have any impact in that area. It does not inferentially follow from the dishonesty that they had prejudicing the creditors as part of their subjective purpose and in this case their dishonesty says nothing about whether they did. *Ablyazov* demonstrates that a background of dishonesty does not necessarily lead to an inference of the Avoidance Purpose. The concealment was so that no-one could find out what they had done in taking the bank's assets; it makes little sense that it was so that no-one could

find out the damage to creditors. On the facts it is not realistic or possible to infer that they had the creditors in mind, with or without the concealment.

ii) He sought to meet a case, which he thought was being made against him, that the personal benefit to the directors displaced an intention to prejudice creditors, saying that that was not a proper analysis. However, Mr Gledhill did not advance that case. It would be possible for the two purposes to co-exist – indeed, that is the case in the classic section 423 cases where a person decides to further his own interests and protect himself from creditors by transferring property to a third party (classically, a family member). It was never said against the claimant that the personal benefit purpose somehow displaced a creditor prejudice purpose. What is said is that on the facts one cannot infer the creditor prejudice purpose in the first place, especially in the light of what was obviously the first purpose (theft from the bank).

69. What was probably Mr Ryan's biggest point is what I can call his "two sides of the same coin" point, taking the metaphor from *OBG* on which he relied. I have set out the relevant passages from that authority above. Mr Ryan's point was that in the present case the prejudice to creditors was the natural and inevitable consequence of the directors' acts, of which they were aware, so it was the other side of the coin to the benefit to themselves. It was therefore a purpose of the directors.

70. One must always be careful not stretch analogies too far, or turn them into some sort of principle. They are no substitute for proper analysis. A proper analysis in this case involves deciding whether, on the facts pleaded and evidenced, it is possible to infer the Avoidance Purpose. The "coin" metaphor reflects the extent to which intent B (*OBG* was about intent not purpose) was a necessary part or reflection of intent A, in terms of intent, and not merely in terms of consequence. If they are bound up together so that the one is the necessary counterpart of the other ("in the nature of things", and "The defendant cannot obtain the one without bringing about the other", per Lord Nicholls), then they are two sides of the same coin and both intentions exist for the purposes of the tort.

71. That cannot be applied to the present case, essentially for reasons already given. This was obviously (as pleaded) a fraud perpetrated for the directors' personal gain. That was a purpose. It was obviously at the expense of the bank, whose funds were purloined. If it mattered the directors would not be able to say that they did not have damage to the bank as a purpose, because that damage was a necessary counterpart to the gain to them. Those two elements are two sides of the same coin. However, the damage to the creditors is not necessarily part of that purpose merely because it was a further consequence of damage to the bank. In Lord Hoffmann's words in *OBG*:

> "… it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

One can translate that into the realms of purpose in this case. The prejudice to creditors may be a foreseeable consequence the of directors' actions, but that does not

of itself make it part of their purpose. It was not a means to their end. To return to the point made above, the scheme would have worked in just the same way had the bank been and remained solvent and there is no reason to suppose that the directors would not have carried out their scheme had that been the case. That shows that prejudice to creditors was not an essential ingredient of the scheme itself. Mr Ryan's pleaded case depends on no more than foreseeability and indeed that a consequence was foreseen, and that is not enough.

72. Accordingly nothing in *OBG* helps Mr Ryan; in fact it demonstrates the holes in his arguments. The fact remains that there is no pleaded material which gives rise to the inference of purpose that he requires.

73. In addition to those arguments, Mr Ryan also relied on a number of decided cases which he said usefully demonstrate how "purpose" is addressed in assessing evidence, and which he said demonstrated that Bank Frick's approach in this case was wrong.

74. *Swift v Ahmed* [2018] BPIR 197 was a case where a deed of trust was executed by a husband in favour of his wife before taking a loan. On the facts Norris J found the Avoidance Purpose to be established, and as part of his reasoning he relied on concealment of the deed and a desire to keep control over who knew about it. On his facts Norris J held:

> "37. Such an inference [ie an inference that the husband wished to control knowledge of the deed] might suffice to found an inference that the statutory purpose had been established. Or it might (as here) go to support other evidence tending in the same direction."

In relation to prejudice he said:

> "38. The 2006 Deed (if effective) does in fact prejudice the interests of those who might have a claim against Mr Ahmed. An inference is raised that that obvious result was its purpose to a substantial degree: an obvious result of an action is generally unintended result."

75. Mr Ryan pointed to those passages to show the significance of what he said were parallel events in the present case. Obviously those factors are capable of being significant, depending on the factual context in which they arise. It does not follow that they always have the significance and effect which Mr Ryan would say they have in this case. All cases depend on their own facts. *Swift* does not seem to be a case in which there were other identifiable purposes of the transaction which was impeached and which were capable of providing an explanation short of prejudice to creditors. Nor is it a case in which prejudice to creditors might be described as a consequence rather than an intended effect. I do not consider that that case, with its own particular facts, assists in deciding whether it would or might be appropriate to infer the Avoidance Purpose in the present one.

76. *In New Media Distribution Company v Kagalovsky* [2019] BIPR 170 Marcus Smith J had to consider the application of section 423 to a transaction described as "the Dilution". Mr Ryan relied on paragraph 60(5) of the judgment:

> "(5) What is more, viewed objectively, the Dilution *looks* like an attempt to put assets beyond the reach of New Media and Mr Gusinksi's Nominee. An asset indirectly held by Iota was transferred away from Iota (i) by Kagalovsky (ii) at an undervalue (iii) in circumstances where the expropriation was concealed from Mr Gusinski but where (iv) Mr Kagalovsky himself benefited. Given that, at the time of the Dilution, there was already a sense in Mr Kagalovsky that Mr Gusinski's companies were doing too well out of the partnership, the Dilution looks very much like an attempt to deprive those companies of their entitlements."

This sub-paragraph is contained within a list of reasons for the judge's arriving at the conclusion that the transaction fell foul of section 423. Mr Ryan said that the facts referred to in that paragraph could be transposed to the present case, leading to an inference of the Avoidance Purpose. I find that this sort of exercise does not assist the court at all in the present case. The sub-paragraph itself has its context in the facts of the rest of the case, and is no more than a finding of one of the indicators in that case. Mr Ryan's case derives no support from it. Having said that, I would add that if one steps back from this case and asks whether this case looks like an attempt to put assets beyond the reach of creditors (which is not a question I would otherwise have asked), I would conclude that it does not. It looks like a theft of bank assets simpliciter.

77. *Re Dormco Sica Ltd (In liquidation)* [2021] EWHC 3209 was a factually complicated case involving a hive-across of group assets for a nominal consideration as part of a scheme for the sale of the holding company. ICC Judge Jones held that the hive-across fell foul of section 423. It was a decision on its particular complex facts and is of no assistance to me, though it is fair to point out that, having considered the facts in detail, the judge concluded that the overall arrangements "were <u>designed</u> to leave SICA's creditors as victims by putting the true value of the Goodwill into SBL and beyond the reach of its creditors." That indicates a positive finding which it would not be possible to reach on the facts of the present case because on any footing it could not realistically be said that the scheme of the directors was "designed" to prejudice creditors.

78. Last, *Pena v Coyne (No 1)* [2004] 2 BCLC 705 was a case where a director put a company's property in the name of another of his companies (he "extracted" it) so that funds could be raised to finance redevelopment in the context of an inevitable insolvent winding up of the first mentioned company. It was, again, very much a case on its own facts. Robert Hildyard QC, then sitting as a deputy High Court judge, said:

> "126. Then question then is whether this reveals a purpose such as to trigger the application of s423. In my view, it plainly does. To achieve their aims Mr and Mrs Ulloa and their company, Sunmoor, had in effect to cut free the property from the claimant's claims, with the inevitable consequence of leaving the claimant with claims against a company with no remaining assets, and thus greatly prejudiced. Even if it is contended that their motivation was their own advantage rather than to put the property (or more accurately its value) beyond

> the reach of the claimant, the first could not be achieved without the second."

79. This would seem to be another "coin" example without the metaphor. The purpose of the scheme, as found by the judge in the preceding paragraph, was described as follows:

> "the urgent extraction of the property from Vintageset before its liquidation to make it available for use as security free of indebtedness (other than to the Bank of East Asia) and to enable Mr and Mrs Ulloa to develop the residential potential of the property became essential."

The reference to the property being "free of indebtedness" demonstrates a finding, on the facts, that the transferring director actually had in mind the removal of this property from assets available for creditors. The judge was prepared to make that finding on the basis of the facts of the case before him. The question which arises in the present case is whether or not such a finding would be open to a court on the basis of the pleaded facts of this case. *Pena* is yet another example of a case decided on its own facts which does not determine how the pleading and evidence should be viewed in this case.

80. Those cases, therefore, do not assist the claimant's case. Nor does Mr Ryan's urging upon me to look at the position "colloquially". This case concerns the application of the technical words of a statute in the real world. It does not require a "colloquial" approach. I therefore do not accede to those urgings, though I confess that if I did I would say that, colloquially speaking, what this case demonstrates is a theft of bank money and no more; or in the words of Marcus Smith J it looks like a theft and does not look like an attempt to do down creditors. Doing down creditors was a by-product.

Conclusions

81. I therefore conclude that the pleaded material does not contain material which justifies an inference of the Avoidance Purpose. If Mr Ryan were to prove his pleaded factual case on the acts of the directors, the generated insolvency of the bank, the misappropriation of the assets via the scheme and the knowledge of the directors of the resulting insolvency, he would have demonstrated only the theft of bank assets. There would not be any basis for inferring the further purpose of prejudice to creditors within section 423. He would only have proved that as a consequence.

82. I appreciate that this is a strong thing to find in the circumstances of this case, and I accept the care that must be taken before stopping a case with potential complexities short of a trial. In many cases which look suspect there will nonetheless be the possibility that further evidence will be forthcoming, or that disclosure will reveal supporting material; or sometimes it will be the case that a proper consideration of the facts or the law requires a trial and not a more summary disposal at a pre-trial stage. That is the point made by Lewison J in *Easyair* at his points (v) and (vi). I have considered whether those, or any other factors, would justify this apparently doomed case going to trial. I have concluded that they do not. Mr Ryan was quite clear that his pleaded case was the totality of his case on the primary facts. He confirmed that

he would be calling evidence to prove that primary fact case and would not be seeking to introduce "new elements". As already observed, the evidence filed did not suggest any new matters, either now or for the future. It was not suggested that a trial would bring any further benefits in terms of analysis or anything else. The law is clear enough and no development of the law needs to be considered.

83. In those circumstances there would seem to be no point, and no merit, in allowing this case to go to an expensive trial, which would involve a lot of points other than those considered in this judgment which would be irrelevant if the claimant falls at this hurdle. On the matter as it was presented to me, at best (from the point of view of the claimant) the trial would end up establishing the points pleaded and assumed to be true, from which the inference of purpose would be sought to be drawn. The result would be the result which I have found now. The point made in *The LCD Appeals* (above) applies to make it right to strike out this claim now (or grant Bank Frick summary judgment).

84. The consequence of my finding is that Bank Frick would not face a trial in this jurisdiction. If the main facts of the case are correct then the directors have been guilty of serious dishonesty, and there might be a case for pinning some liability on Bank Frick through knowledge, wilful blindness or the like. If English law applied one would be likely to be looking at a constructive trust claim. If it be thought, with justification, that the directors and Bank Frick should somehow be held accountable in some way then there ought to be a remedy somewhere. However, that is not a reason for distorting and misapplying the particular remedy afforded by section 423.

85. Mr Ryan's constant urging of the dishonesty of the directors as the core of the matter is not a reason for going to trial. It would be consistent with the Avoidance Purpose, but it does not go a sufficient distance towards establishing it. Dishonest people, and even those with a track record of keeping assets away from creditors, sometimes enter into transactions at an undervalue without infringing the section – see, for example, Mr Ablyazov.

86. I therefore conclude that this claim should be struck out, or dismissed, a distinction which can be debated at the consequentials hearing in this matter if that is a debate which the parties think it necessary to have.

Appendix 1 – extract from Particulars of Claim

The purpose of the Pledges was to put assets beyond the reach of creditors or otherwise prejudice their interests

51. NCB entered into the Pledges under the direction and control of Mr Onistrat and Mr Klymenko, whose acts and state of mind fall to be attributed to NCB for this purpose.
52. At all material times, both Mr Onistrat and Mr Klymenko and their associates Mr Marchenko and Mr Vasylenko knew:
    52.1. That any funds held by NCB were predominately funds owed to its customers and consequently any scheme designed to extract funds from NCB for no or no adequate consideration would necessarily be prejudicial to the interests of NCB's customers.
    52.2. That Eastmond, Universal and Europa were shell entities with no valuable assets and no or no legitimate commercial activity.
    52.3. That neither Eastmond, Universal nor Europa had any means of repaying a loan in the sum of US$ 10 or 15 million or any intention to repay the same.
    52.4. That the Eastmond, Universal and Europa Loan Agreements and Re-Stated Loan Agreements did not bestow any rights on NCB nor confer any benefit on NCB and were not genuine commercial transactions for the reasons aforesaid.
    52.5. That NCB derived no benefit from Pledges.
    52.6. That Mr Marchenko was acting on behalf of Eastmond whilst under a conflict of interest due to his position as advisor to the management board of NCB.
    52.7. That Mr Vasylenko was acting on behalf of Universal and Europa whilst under a conflict of interest due to his position as an employee of NCB.
53. Further, Mr Onistrat and Mr Klymenko took steps to conceal the scheme by:
    53.1. Directing Ms Zhernova to ask Bank Frick not to disclose the Eastmond Pledge Agreement.
    53.2. Procuring that no record was kept within NCB's books of the Pledges.
    53.3. Concealing the existence of the Pledges from the other members of the supervisory and management boards and credit committee of NCB (save for Mr Zorenko).
54. From the foregoing, it is inferred that Mr Onistrat and/or Mr Klymenko, or parties associated with them, held interests in Eastmond, Universal and/or Europa such that they benefitted from the proceeds of the monies advanced under the Eastmond, Universal and Europa Loan Agreements.
55. Further, Mr Onistrat and Mr Klymenko acted in breach of their duties to NCB:
    55.1. Under the Charter of NCB, Mr Onistrat as Chairman of the Supervisory Board was under a duty to protect the rights of NCB's shareholders and customers. By procuring or assisting NCB to enter the Pledges, Mr Onistrat acted in breach of such duty as the Pledges were detrimental to the rights and interests of NCB's shareholders and customers.
    55.2. Under the Charter of NCB, Mr Klymenko as Chairman of the Management Board was under a duty to protect the interests of NCB and its shareholders and to act diligently to manage the risk and exposure of NCB. By procuring or assisting NCB to enter the Pledges, Mr Klymenko acted in breach of such duty.
    55.3. Further, Mr Klymenko in signing the Pledges and each of them acted without authority because the Pledges both separately and cumulatively had a value of more than 10% of NCB's total assets at the material times. Consequently, under paragraph 8.4.10.1 of the Charter of NCB, the approval of the

Supervisory Board was required for the execution of the Pledges. Contrary to this requirement, the approval of the Supervisory Board was not obtained.

56. In the premises set out above at paragraphs 51 to 55 above and each of them, it is inferred that in procuring NCB to enter the Pledges, Mr Onistrat and Mr Klymenko acted for the sole or substantial purpose of putting assets beyond the reach of NCB's customers and creditors or future creditors or otherwise prejudicing the interests of NCB's customers and creditors or future creditors in relation to claims which they had or may have against NCB. This purpose falls to be attributed to NCB.

57. It is further averred that:

    57.1. By procuring NCB to enter into the Pledges and concealing the same, Mr Onistrat and Mr Klymenko acted dishonestly in light of their knowledge and conduct pleaded above.

    57.2. By executing the Eastmond Loan Agreement and the Eastmond Re-stated Loan Agreement on behalf of Eastmond, and by signing the drawdown notices issued under the Eastmond Loan Agreement, Mr Marchenko acted dishonestly in light of his knowledge pleaded above.

    57.3. By executing the Universal and Europa Loan Agreements and Re-stated Loan Agreements on behalf of Universal and Europa respectively, and by signing the drawdown notices issued under the said loan agreements, Mr Vasylenko acted dishonestly in light of his knowledge pleaded above.

Appendix 2 – Amended Voluntary Further Information

AMENDED VOLUNTARY FURTHER INFORMATION

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1. The definitions used in the Particulars of Claim are used herein.
2. This further voluntary information is served by the Claimant (the DGF) in further support of its case that Messrs Onistrat and Klymenko procured NCB to enter the Pledges for the purpose of putting assets beyond the reach of NCB's customers and creditors or future customers or creditors or otherwise prejudicing the interests of NCB's customers and creditors or future creditors in relation to claims which they had or may have against NCB, as alleged at paragraph 56 of the Particulars of Claim.
3. As pleaded in paragraph 6 of the Particulars of Claim, NCB was a Ukrainian bank.
4. As a bank, the funds held by NCB were predominately funds ~~owed to~~ its customers ~~who~~ had deposited ~~sums~~ with NCB. As such, those customers ~~and who~~ had claims against NCB to redeem the value of those deposits. Therefore, NCB's customers comprised the majority of NCB's creditors. The value of their claims exceeded 75% of NCB's total assets at the material times. This state of affairs was known to Mr Onistrat and Klymenko, as pleaded at paragraph 52.1 of the Particulars of Claim. Mr Onistrat and Mr Klymenko must have known this because (i) it is obvious and (ii) by reason of their senior positions within NCB, namely Chairman of the Supervisory Board and Chairman of the Management Board respectively, as pleaded at paragraph 7 of the Particulars of Claim.
5. Messrs Onistrat and Klymenko procured the execution of the Pledges and the Loan Agreements to extract valuable assets of NCB to the prejudice of NCB's customers and other creditors, as pleaded at paragraph 9 of the Particulars of Claim.
6. The effect of the Pledges was that substantial assets held in NCB's Bank Frick Account were subject to security in favour of Bank Frick in relation to the sums advanced by Bank Frick to Eastmond, Universal and Europa; as pleaded in paragraphs 15 to 37 of the Particulars of Claim. Substantial assets were thereby removed from the free disposal of NCB.
7. In return for the Pledges, NCB received nothing of value, as pleaded at paragraph 49 of the Particulars of Claim. Rather, some US$40 million of its funds were pledged to facilitate loans to shell entities which had neither the intention nor ability to repay such loans, as pleaded in paragraph 50 of the Particulars of Claim. The default of the debtor companies and the loss of NCB's funds was thus inevitable.
8. The Pledges were therefore harmful to NCB and to its customers, as pleaded at paragraph 47.2 of the Particulars of Claim. Assets that should have been available to NCB's customers in order that they might redeem their deposits were removed from NCB.
9. By the Pledges and the loan agreements, Messrs Onistrat and Klymenko benefited from the funds extracted from NCB because it is inferred they held interests in Eastmond, Universal and/or Europa; as pleaded at paragraph 54 of the Particulars of Claim.
10. In procuring the execution of the Pledges, Messrs Onistrat and Klymenko acted intentionally to prejudice and with the purpose of prejudicing the interests of NCB's customers and creditors and to put assets beyond the reach of such customers and creditors in relation to their claims.

10.1. When executing the Pledges and at all times thereafter, Messrs Onistrat and Klymenko knew that, by extracting assets from NCB for no consideration, they were necessarily prejudicing the interests of NCB's customers because the funds subject to the Pledges were funds which were required to be available to NCB to meet customers' claims to redeem the value of their deposits. ~~such funds were predominantly owed to NCB's customers; as pleaded at paragraph 52.1 of the Particulars of Claim.~~ Such conduct necessarily meant that such assets were not available to satisfy the claims of NCB's customers to redeem their deposits, as was obvious and as Messrs Onistrat and Klymenko well knew.

10.2. The amount of assets extracted from NCB via the Pledges was significant. As pleaded at paragraph 55.3 of the Particulars of Claim, it amounted to more than 10% of NCB's total assets at the material times and further exceeded NCB's net asset value at the material times. It was obvious, and Messrs Onistrat and Klymenko well knew, that extraction of such a high amount of NCB's assets would prejudice the claims of NCB's customers to redeem the value of their deposits.

10.3. By virtue of their positions within NCB and the fact that they owed duties to protect the interests of NCB's customers (as pleaded at paragraph 55 of the Particulars of Claim), they must have known that the Pledges prejudiced the interests of such customers.

10.4. Moreover, the conduct of Messrs Onistrat and Klymenko in procuring the execution of the Pledges and the Loan Agreements was intentional and dishonest, as pleaded at paragraph 57 of the Particulars of Claim.

10.5. Messrs Onistrat and Klymenko acted extensively to conceal the existence of the Pledges and the wider scheme to extract assets from NCB. This was because they knew that the Pledges prejudiced the interests of NCB's customers and other creditors, which they intended. In particular, Messrs Onistrat and Klymenko concealed the Pledges and wider scheme from:

(a) NCB's other executives, as pleaded at paragraph 53.3 of the Particulars of Claim.

(b) NCB's auditors, as pleaded at paragraph 53.1 and 75 to 81 of the Particulars of Claim.

(c) Persons generally by procuring that no record was kept within NCB's books of the Pledges, as pleaded in paragraph 53.2 of the Particulars of Claim.

(d) The DGF itself, by agreeing to a Financial Recovery Plan dated 7 May 2015 to address NCB's solvency issues which did not refer to the Pledges, the existence of which were at that time unknown to the DGF.

10.6. In order to profit from the scheme as alleged in paragraph 54 of the Particulars of Claim, Messrs Onistrat and Klymenko had to remove from NCB assets that ought to have been available to satisfy the claims of NCB's creditors, in particular NCB's depositing customers, and transfer those assets to entities in which they held interests. In executing the Pledges, they therefore intended to put such assets beyond the reach of NCB's customers (and other creditors) and prejudice their interests in relation to their claims.

10.7. The consequence of the Pledges and their enforcement by Bank Frick (as pleaded at paragraphs 38 to 40 of the Particulars of Claim) has been to prejudice the interests of NCB's creditors. There remains a significant shortfall in the liquidation estate, caused by the enforcement of the Pledges by Bank Frick. The main group of victims of this shortfall were the individual depositor

customers of NCB. Messrs Onistrat and Klymenko knew this would be the consequence of their actions in executing the Pledges, and they intended this result.