Between: NATIONAL BANK TRUST
(a company incorporated in Russia)
Claimant
- and –
(1) ILYA YUROV
(2) SERGEY BELYAEV
(3) NIKOLAY FETISOV
(4) NATALIYA YUROVA
(5) IRINA BELYAEVA
(6) ELENA PISCHULINA

CASE SUMMARY

Bryan J ruled in favour of National Bank Trust in Russian law damages claims brought against three of its former majority shareholders, finding that they had orchestrated an extensive fraud on the bank by (inter alia) causing the Bank to loan USD 1 billion to their own companies, and then transferring away much of that monies in artificial transactions; in this context, a number of issues of Russian law were considered.

Summary of the Facts and Parties' Contentions

1. The First to Third Defendants ("Mr. Yurov", "Mr. Belyaev" and "Mr. Fetisov", collectively "the Shareholders") were National Bank Trust's ("the Bank's") majority shareholders and members of its supervisory board. The remaining defendants were their wives.
2. The Bank contended that the Shareholders orchestrated a fraud on the Bank over many years which it said involved deliberately falsifying the bank's accounts, concealing bad debts and related-party lending, and deceiving (amongst others) the Central Bank of Russia ("CBR"). The Bank described the fraud as follows: the Shareholders procured the Bank to lend USD 1 billion over several years to their own companies; those companies then transferred away the loan monies in fake or artificial transactions to other companies also beneficially owned by the Shareholders. That money would then be used to make interest payments / repay the principal on other loans in the fraudulent scheme, and for the Shareholders' personal benefit: it was not returned to the Bank. This meant that more and more loans needed to be taken out to serve the existing loans. This allegedly led to the Bank's collapse and bailout by the CBR. The Bank contended that had the CBR known about the Bank's lending and financial position, it would have revoked the Bank's licence. Therefore, the Bank claimed for damages in excess of USD 850 million under Russian law. A central issue was whether the Shareholders were in breach of Article 53(3) Russian Civil Code ("RCC") and Article 71 Joint-Stock Companies Law ("JSC").
3. Mr. Yurov and Mr. Fetisov essentially accepted that Bank funds were transferred through a network of companies, but contended that this was done in the Bank's best interests: they described the practice as "balance sheet management": which they reasonably assumed was legal and legitimate. By contrast, Mr. Belyaev denied knowledge of matters pleaded by the Bank and denied being party to any dishonest scheme.
4. Judgment was given in favour of the Bank. Bryan J found that the Bank was entitled to bring the claims under Russian law: (1) the Shareholders were the ultimate beneficial owners of companies receiving loans from the bank, as they had controlled and used companies for their personal benefit, and had lied in hiding those facts; (2) their lending practices had not been legitimate, reasonable or in the Bank's best interests, which had increased the Bank's indebtedness and caused it immediate loss leading to its collapse; (3) the Bank, as the claimant under Russian law, was entitled to recover outstanding sums due under the loans, less any recoveries made.
5. The following is a summary of the general legal principles which can be drawn from this decision.

Pleading and Proof of Fraud

6. The Defendants raised a series of issues with the Bank's pleadings. Bryan J considered the applicable legal principles. The purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to properly prepare to answer it, to the end of giving each party a fair hearing. In relation to fraud specifically, Bryan J endorsed *JSC BM Bank v Kekhman* [2018] EWHC 791 as setting out the

relevant principles in pleading and proving fraud, at [50] of his judgment. The following points are particularly notable:

7. Firstly, fraud or dishonesty must be distinctly alleged (e.g.: by using unequivocal language such as "dishonestly" or "recklessly") and sufficiently particularised. An ambiguous pleading should be construed as making only a less serious allegation (e.g.: of negligence). The primary facts which will be relied on at trial to show that the defendant was dishonest must also be pleaded. In this regard, the Bank sought to advance a case in oral submissions that certain fiduciary lending arrangements involving EWUB and Donau were "inherently dishonest": they were not entitled to advance this plea, because this contention had not been positively pleaded and particularised. This was not on the critical path of Bryan J's conclusions on the facts - the inherent dishonesty of those lending arrangements was not a necessary requirement of any breaches of duty alleged.
8. Secondly, to establish fraud, the claimant must prove it on the balance of probabilities: this takes into account the fact that that more serious an allegation, the less likely it is to have occurred. Therefore, more cogent evidence is normally required to prove fraud to counterweigh the inherent improbability. The Bank's evidence in this case was held to provide such cogent evidence.
9. Thirdly, Bryan J commented on the inherent tension between two contentions made by some of the Defendants: that the evidence against them disclosed no fraud or wrongdoing, and that knowledge of harm as a result of the alleged wrongdoing should have been obvious to anyone coming into the Bank at the end of 2014. He endorsed the following conclusions in *Kazakhstan Kagazy Plc v. Arip* [2014] 1 CLC 451: (1) the court can take into account the fact that the Defendants are asserting that the obvious inference from the facts would have been entirely mistaken and (2) allegations of fraud should not be made without cogent evidence: the court should not readily conclude that fraud ought to have been apparent unless the evidence plainly justifies this. Bryan J therefore concluded that, for the purposes of Russian limitation law, the harm caused by the fraud had not yet been revealed to the bank for the purposes of Article 392 of the Labour Code more than a year before any relevant commencement date.
10. Fourthly, the court should rely upon documentary evidence and objectively provable fact, given the fallibility of a human witness's recollection. Bryan J relied on documentary evidence to (amongst other things) establish that Mr. Belyaev knew about the structure, ownership and use of the companies for balance sheet management, as he had received emails and signed documents setting this position out ([694]-[710]).

Witnesses not called

11. Bryan J set out the circumstances in which adverse inferences maybe drawn from the absence of a witness who might have been expected to have material evidence on an issue in dispute, as set out in *Wisniewski v Central Manchester HA* [1998] PIQR 324, at [208] - [211] of his judgment. Inter alia: as long as there is a case to answer on that issue, and there is no satisfactory reason given for the witness' absence, the court may draw inferences which weaken any evidence adduced on that issue by the party who was supposed to call the witness, or strengthen the evidence of the other party on that issue. If an explanation can be given which is credible (but not wholly satisfactory), this may reduce or nullify the detrimental effect of the absence.
12. In relation to this case, the Bank refused to call a Mr. Worsley, who was an alleged insider to the fraud and manager of the companies in the network, and initially provided an affidavit and a large amount of documentary evidence to the Bank. He reached an agreement to settle Part 20 claims brought against him by Mr. Yurov and Fetisov, which required him to cooperate in providing a witness statement and appearing in court: neither Mr. Yurov nor Mr. Fetisov called him. The Bank asked the court to draw the inference that, after the settlement was concluded, Mr. Worsley told Mr. Yurov and Fetisov matters which undermined their case. Mr. Belyaev asked that in the absence of Mr. Worsley's evidence, the court should accept Mr. Belyaev's case on what matters were discussed, and should treat with caution the documents that he provided.
13. Bryan J concluded that, whilst Mr. Worsley could be expected to have material evidence on the issues in the case, both the Bank and the relevant Defendants had good reason not to call him. He was not employed by the Bank and was on their case heavily involved in the fraud, and had also given statements to Mr. Yurov and Fetisov. Equally, the fact that he was obliged to give evidence on behalf of Mr. Yurov and Fetisov does not mean that those parties accepted those statements as being true or are expected to call him, especially given the Bank's reliance on documentary evidence. Further, each item of documentation is to be considered on its own merits, particularly where much of it does not relate to Mr. Worsley directly.

Evidence of Foreign Law

14. Bryan J set out a number of propositions about how foreign law is treated before the English courts, at [929] - [938] of his judgment. Foreign law is a matter of fact and must be pleaded and proved, generally by expert evidence: without expert assistance, the court cannot interpret evaluate or interpret foreign books or decisions. When faced with conflicting expert testimony on foreign law, it is appropriate to look at the relevant sources. Further, the task of the court was to apply the law in the same way that a court of the foreign country would do so: foreign judgments are to be given due weight in that regard, even if they are not formal sources of law. Finally, foreign law issues should be addressed from the perspective of the highest appeal court of that jurisdiction, not whichever first instance court would be seized of the dispute. Taking into account these principles, Bryan J determined several issues of Russian law by reference to the experts' evidence.