

EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2020/0113

BETWEEN:

NOKIAN SHINA LLC

Claimant

and

[1] ANDREI VALEREVICH SMYSHLIAEV

First Defendant

[2] OLGA BORISOVNA SMYSHLIAEVA

Second Defendant

Appearances:

Mr. Iain Tucker, with him Ms. Meena Azmayesh and Ms. Cate Barbour for the Claimant

Mr. John McCarroll, SC, with him Mr. Richard Parchment for the Second Defendant,
the First Defendant not appearing at the trial of this claim

2022: April 4;

September 30.

JUDGMENT

- [1] **WALLBANK, J. (Ag.)** These are the written reasons for the Judgment after trial delivered orally on 30th September 2022. On that occasion, the Court dismissed the claim and made certain consequential orders.

Background

- [2] The Claimant ('Nokian Shina') was incorporated under the laws of the Russian Federation on 25th April 2000 and has its usual place of business in Russia.
- [3] The Claimant is principally engaged in automotive parts trading. The Claimant is a subsidiary company of Nokian Tyres, which is a major European tyre producer listed on Nasdaq Helsinki.

- [4] The First Defendant is an individual. His most recently known usual or known place of business or abode is in Italy.
- [5] The Second Defendant is the ex-wife of the First Defendant.
- [6] The Claimant entered into a sale and purchase agreement dated 28th February 2014 with RusshinaTyumen LLC ('Russhina'), a Russian company of which the First Defendant is the sole shareholder (the 'Agreement'). Pursuant to the Agreement, Russhina agreed to purchase the Claimant's products.
- [7] The Claimant, as the principal, entered into a surety agreement dated 3rd March 2014 with an entity named Track LLC ('Track'). Track, a company within the same group as Russhina and which the Claimant understands is also beneficially owned by the First Defendant, personally guaranteed the obligations of Russhina towards the Claimant (the 'Guarantor').
- [8] On 2nd March 2016, the Commercial Court of the Republic of Bashkortostan held Track to be insolvent and bankruptcy proceedings were initiated before that court ('the Bankruptcy Proceedings').
- [9] In June 2018, the Claimant obtained an *ex parte* freezing injunction in the Territory of the Virgin Islands ('BVI') against Averon Property Limited (the 'Company' or 'Averon'), a company incorporated in the BVI, on the basis that there is good reason to believe that it is ultimately owned by the First Defendant. The Company owns a yacht, named 'Olga', a model MCY86 built by Monte Carlo Yachts in 2015. The freezing injunction was obtained in support of proceedings in Russia in relation to debts said to be owed to the Claimant by the First Defendant.
- [10] On the return date on 17th July 2018, the injunction was continued by the Court.
- [11] On 28th March 2019, the Russian Court held that certain individuals, including the Defendants, bear subsidiary liability and are jointly and severally liable for all creditor claims against Track (which amount to RUB 3,228,393,383.31) (the 'March 2019 Judgment').
- [12] By judgment dated 13th June 2019, the Russian Court assigned to the Claimant Track's right to claim against the Defendants for subsidiary liability (the 'June 2019 Judgment').
- [13] On 24th July 2020, the Claimant filed a Claim Form in this Court claiming:
- (1) the enforcement in this jurisdiction of the June 2019 Judgment against the Defendants;

- (2) the sum of RUB 1,554,102,387.86 as being the total amount of the judgment debt entered against the Defendants in the June 2019 Judgment comprising a total principal of RUB 1,254,529,474.11 plus total interest and total costs of RUB 299,572,913.75;
- (3) interest from the date of the Judgments until the date of payment at judgment rate of 5% per annum; and
- (4) costs.

[14] Also on 24th July 2020, the Claimant filed a Statement of Claim claiming the enforcement in this jurisdiction of both the March 2019 Judgment and the June 2019 Judgment. The proceedings commenced in this Court will, for convenience, be referred to as 'the Proceedings'.

[15] On 24th July 2020, the Claimant filed a Notice of Application seeking permission to serve a sealed copy of the Claim Form and the Statement of Claim in the Proceedings on the Defendants outside of the jurisdiction.

[16] On 16th September 2020, the Court granted permission for service out of the jurisdiction and also required the Defendants to file their Defence within 56 days of the service of the Claim Form.

[17] On 25th November 2020, the Second Defendant was served with the Claim Form and Statement of Claim.

[18] On 10th December 2020, the First Defendant was served with the Claim Form and Statement of Claim.

[19] On 31st December 2020, the Second Defendant filed an Acknowledgement of Service.

[20] On 13th January 2021, the First Defendant filed an Acknowledgment of Service.

[21] The Claimants and the Defendants agreed to an extension of time, by which the First and Second Defendants were to file their defences by 19th February 2021.

[22] The Second Defendant filed a Defence on 18th February 2021

[23] The First Defendant has not filed a Defence.

[24] The Claimant filed a reply to the Second Defendant's Defence on 5th March 2021.

Issues

[25] The parties identified the following issues for the trial of this claim:

- (1) Whether the March 2019 Judgment and June 2019 Judgment (the 'Judgments') are amenable to enforcement against the Second Defendant in the BVI at common law through the mechanism of a common law debt claim.
- (2) This requires the following issues of Russian law to be determined:
 - (i) As a matter of Russian law, are the Judgments a judgment for a money sum? (The Claimant's legal representatives framed this issue as being whether the Judgments, **taken together**, are a judgment for a money sum. The Second Defendant's legal representatives framed this issue as being whether **each of the Judgments separately** are judgments for a money sum.)
 - (ii) Does any right remain under Russian law for the First or Second Defendants to the Judgments to appeal the Judgments?
- (3) What are the requirements under Russian law for a Russian Court Ruling issued pursuant to the Russian Arbitration Procedural Code to be enforceable?
- (4) Are the Judgments final? (Again, the Claimant frames this issue taking the Judgments together, not separately.)
- (5) Are the Judgments enforceable? (Again, the Claimant frames this issue taking the Judgments together, not separately.)
- (6) Whether enforcement of the Judgments in the BVI would be contrary to public policy.

[26] Both sides adduced expert evidence of Russian law. The Claimant relied upon the evidence of Mr. Rustem Timurovich Miftakhutdinov ('Mr. Miftakhutdinov'), whereas the Second Defendant relied upon the evidence of Mr. Alexander Vaneev ('Mr. Vaneev').

Claimant's submissions

[27] The Claimant submitted as follows. In this segment are set forth the Claimant's contentions, without any comments or findings of the Court.

[28] On 28th March 2019, by way of the First Judgment, the Russian Court in the Russian Proceedings held that pursuant to the applicable Russian legislation, certain individuals, including the Defendants, are jointly and severally liable for all creditor claims against Track, in short on the basis that they exercised control over Track at the relevant time. The Claimant is a major creditor in Track's insolvency.

- [29] On 13th June 2019, by way of the Second Judgment, the Russian Court assigned, pursuant to the applicable Russian legislation, an appropriate proportion of Track's claims to the Claimant by way of substituting the Claimant for Track as an enforcement.
- [30] This is an available remedy within Russian insolvency law as an alternative to Track enforcing all of its claims directly on behalf of creditors. Consequently, the Claimant is the judgment creditor of the Defendants in the amount of the Russian Judgments and the Claimant seeks to enforce the Russian Judgments against the Defendants' assets in the BVI.
- [31] Under the terms of the Russian Judgments, the Claimant is entitled to the following:
- (1) the amount of 1,169,116,226.17 rubles in respect of the principal debt and 5,766,839.25 rubles in respect of financial sanctions with the priority of satisfaction being that of third-priority creditors registered in the register of creditors' claims; and
 - (2) the amount of 85,413,247.94 rubles in respect of the principal debt, and 293,806,074.50 rubles in respect of financial sanctions as against the Defendants' property which remains after satisfaction of claims of the creditors included in the register of the debtor's creditors' claim (the 'Judgment Debt').
- [32] The Claimant has received only a fraction of the Judgment Debt through Russian insolvency proceedings – approximately 8.5% of the total due.
- [33] The Russian Court had exclusive jurisdiction over the Defendants to resolve any dispute relating to subsidiary liability. The Defendants were duly notified about the Russian Proceedings. Their representatives appeared in the Russian Proceedings and defended the claims made against the Defendants. No point on original jurisdiction is taken by the Defendants in the Defence to the Proceedings.

The Defendants' assets in the BVI

- [34] Recognition (*sic*) of the Russian Judgments is sought in the BVI in order to enforce the Judgment Debt against the Defendants' assets in the BVI and specifically against shares in Averon, through which the Defendants are believed to own a valuable yacht, Olga.

[35] The Claimant says the legal basis for these Proceedings is acknowledged by both parties as the Common Law recognition (*sic*) of the Russian Judgments as a BVI debt claim. In determining whether the Russian Judgments can be recognized (*sic*), the issues that the BVI Court has to consider are narrow, specifically:

- (1) The foreign judgment must be final and conclusive and for a fixed judgment sum;
- (2) The judgment debtor must not be appealing the judgment or have the right to appeal it;
- (3) The original Court must have had jurisdiction, i.e. the judgment debtor must have been:
 - (i) properly served with process in the foreign territory;
 - (ii) ordinarily resident or carrying on business within the jurisdiction of the foreign court; or
 - (iii) otherwise voluntarily submitted to the jurisdiction of the foreign Court; and
- (4) Enforcement of the judgment must not be contrary to the public policy of the BVI.

[36] The Second Defendant does not dispute the Russian Court's jurisdiction over her in the proceedings that led to the Judgments.

[37] Rather, her position and that taken in the expert evidence filed on her behalf, is that the Russian Judgments are not judgments for a definite money sum that are final and conclusive. Further, it is said that because the Judgments arose out of Russian bankruptcy proceedings in relation to Track, they do not amount to either:

- (1) a judgment against the Second Defendant (because it is said that the Claimant only has the right to claim against the Second Defendant to satisfy Track's debts); and/or
- (2) a judgment for a definite money sum (because the Claimant is only entitled to any available assets on a *pari passu* basis alongside other creditors of Track).

[38] The Second Defendant further argues that, because it is said that enforcement of the Russian Judgments outside of bankruptcy proceedings would be contrary to the regime set out in Russian bankruptcy law, it would be contrary to BVI public policy to permit its enforcement here.

[39] Given that all of these are ultimately matters of Russian law, at the case management conference on 20th September 2021, the Court directed that expert evidence be filed by both sides. On 28th October 2021 the Claimant filed expert evidence addressing the following questions:

- (1) Whether the Russian Judgments do in themselves provide sufficient context to enable an expert to determine:
 - (i) whether or not they are for a debt or definite sum of money as against the Defendants;
 - (ii) whether the Judgments are final and conclusive as against the Defendants; and
- (2) If the answer to question (1) is positive, whether the Judgments are final and conclusive for a debt or definite sum of money as against the Defendants.

[40] The expert instructed by the Claimant, Mr. Rustem Timurovich Miftakhutdinov, is a former judge of the Russian Supreme Commercial Court, one of the most senior judicial positions in Russia. He worked in the Russian Court system from 2001 to 2014, including as a Judge of the Commercial Court of Tatarstan Republic prior to his appointment to the Supreme Court. He is now an associate professor at the department of Commercial Law and Commercial Procedure at the Private Law Research Centre. As a Judge, he dealt with insolvency cases and took part in the drafting of many Russian laws relating to insolvency. Accordingly, his expertise in addressing these types of questions is undoubtedly significant. The expert instructed by the Second Defendant, Mr. Vaneev, is a lawyer in private practice, having begun practicing in 2006. His experience appears to be in commercial practice.

[41] At the Case Management hearing on 20th September 2021, the Second Defendant sought directions for full standard disclosure and witness statements of fact, claiming (without identifying the scope of disclosure or the detail of what further evidence was said to be required) that this was necessary to enable the Court to understand the 'context' of the case. This was rejected by the Court, which for the time being directed only that experts be required to address whether they had sufficient context to answer the questions of Russian law and, if so, to answer them.

[42] At a further hearing on 13th December 2021, the Court reconvened to consider the experts' conclusions. The Second Defendant continued to argue that full standard disclosure and witness evidence was necessary. The Court rejected this and concluded (subject to one point that follows immediately below) that all that the expert evidence of Russian law on the above questions was alone sufficient.

[43] Finally at the 13th December 2021 CMC, the Second Defendant sought and obtained permission of the Court to amend her Defence to address the matter of a report (the 'Report') arising out of Russian criminal proceedings to which the First Defendant is a defendant. It is said at paragraphs 24 and 25 of the Amended Defence that the Report may have an impact upon the Russian Judgments. At the 13th December hearing, the Court further directed that this question also be addressed by the experts instructed by the parties.

[44] Despite the Court having declined to direct further witness statements of fact, the Second Defendant has very shortly before trial (on 11th March 2022) served further evidence, in her own name, in relation to a challenge she has filed in the Russian Courts in respect of the Russian Judgments. This evidence purports to suggest once again that there may be a basis to appeal the Russian Judgments, notwithstanding that the original deadline to appeal the Russian Judgments has passed. The Claimant strongly disagrees that there is any basis to appeal the Russian Judgments. The reasons why were addressed in detail in the expert report filed by Mr. Miftakhutdinov on 11th February 2022 and by Mr. Alexander Losev, Russian in-house legal counsel for the Claimant, on 24th March 2022. It also remains indisputably the case that the Russian Judgments have not in fact been re-opened, still less set aside.

Final and conclusive and for a fixed sum

[45] It is the Claimant's position that the Russian Judgments together plainly constitute a judgment for a definite sum of money:

- (1) The First Judgment provides that certain individuals, including the Defendants, are jointly and severally liable for all creditor claims against Track. The First Judgment arises from a 'claim to compel', that is recognition by the Court that the claimant has a certain right and then orders that the defendant do something in order to compensate the claimant. A specific amount of money is identified and ordered by the Russian Court within the First Judgment.
- (2) The Second Judgment assigns to the Claimant the right independently to recover the Claimant's portion of damages specified in clause 1 of the operative part of the Second Judgment. Again, specific sums of money are identified.

[46] The Second Defendant's expert makes two simple points in opposition on this issue. Although simply stated, both are, submitted the Claimant, manifestly flawed. In short:

- (1) Mr. Vaneev opines that, because the Second Defendant is herself in an insolvency process in Russia, any judgment against her is not for a definite sum, but only for the maximum sum that could be received, assuming she has sufficient funds to pay all creditors.
- (2) Mr. Vaneev opines that, because Track's debtors are liable jointly and severally, the Second Defendant's liability is not for a definite sum because another defendant may satisfy some or all of the obligations due to Track.

[47] In relation to (1) above, Mr. Vaneev argues, at paragraph 42 of his Expert Report, that 'the sums confirmed by the June Ruling are just the maximum amount that the Claimant can receive if the controlling persons of Track have sufficient funds to satisfy the claims of all creditors having a higher priority than the Claimant or the same priority as the Claimant.'

[48] Approaching the matter from a Common Law perspective, this is a surprising proposition indeed. If Mr. Vaneev's proposition were correct, no judgment would be final and for a fixed sum. An amount received on enforcement of a judgment will always depend on the unknown of the Defendant's financial position and the claims of other creditors.

[49] Perhaps unsurprisingly, it is also incorrect as a matter of Russian law. As the Claimant's expert Mr. Miftakhutdinov opines, the concept of a judgment for 'the maximum amount that the [creditor] can receive' is not a concept of Russian law. Rather, the Russian Judgments provide the Claimant with 'the right to independently recover the Claimant's portion of damages specified in clause 1 of the operative part of the [Second] judgment...'. Mr. Miftakhutdinov goes on to conclude as follows:

"In conclusion I can say with certainty that the Judgments taken together are against the defendants for definite sums of money, which sums are equal to the harm (damages) caused to each particular creditor included in the list of creditors specified as judgment creditors in the operative part of the [Second] Judgment. These Judgments are final and conclusive, and they do not require any additional court acts for their enforcement, including when applying to government enforcement bodies".

[50] The error that the Second Defendant and her expert make is to elide the issue of a judgment with its enforcement. A judgment for a specified sum of money is, of course, a judgment for that entire amount. What may or may not be recovered on enforcement, depending upon the defendant's financial position, is a separate issue, not required to be considered by this Court in these proceedings at this stage.

- [51] In relation to (2) above, Mr. Vaneev opines at paragraph 52 of his Report that the 'Russian Judgments do not provide sufficient context to determine even the maximum sum that the Claimant will be entitled to receive'. This question of 'context' was raised in the light of the Second Defendant's argument at the Case Management Conference that full standard disclosure was needed to enable the Court to consider whether the Russian Judgments were enforceable. At the CMC, the Court rejected the argument that any further documentary context was required and held that all that was necessary was the experts' views on the relevant Russian law issues.
- [52] Insofar as relevant to this issue, the 'context' alleged to have been required here relates to the joint and several liability of more than one party for the underlying amount of the Russian Judgments and potential recovery from other sources.
- [53] First, as set out above, the Claimant has in fact only recovered approximately 8.5% of the total amount due from other sources.
- [54] Second, Mr. Miftakhutdinov is clear that although the Judgments arise out of Track's liabilities, the Claimant is entitled under their terms to recover the amounts specified from the Defendants.
- [55] Third, again, if Mr. Vaneev's proposition were correct, this issue would arise in respect of any judgment made against debtors on a joint and several basis. Again, from a Common Law perspective, that would be a surprising conclusion. Again, unsurprisingly, it is incorrect as a matter of Russian law. As Mr. Miftakhutdinov opines, the principle of joint and several liability is recognised under Russian law and operates broadly in the same way that would be understood by a common lawyer. It means that a creditor may claim the entire amount due from any defendant, from some of the defendants or from all of them. Any issue of contribution among the defendants *inter se* is a matter between them and does not concern the Claimant.
- [56] Once again, Mr. Vaneev appears to confuse the issue of the fact of a judgment, and its enforcement. Upon enforcement, the fact that some or all of the amount due may have been recovered from another party would be a defence to further enforcement, in order to avoid double-recovery. That does not however affect the amount of the judgment itself.

[57] Mr. Miftakhutdinov acknowledges that a claim brought in the interests of a group of persons is a relatively new concept in Russian procedural law but notes that the Supreme Court has issued judgments emphasising that:

“creditors’ claims must be satisfied on a pro rata basis – this means in accordance with the position adopted by the Supreme Court in the case in question, that creditors must have equal procedural opportunities for enforcing the judgment. The SC further explains in the same case that any disputes between creditors may be resolved by one creditor bringing a claim for damages against another creditor”.

Effect of the report filed in the Russian Criminal Proceedings

[58] Mr. Miftakhutdinov addresses the effect of the expert report filed in the Russian criminal proceedings against the First Defendant (the ‘Report’) in his Supplemental Expert Report filed on 25th November 2021.

[59] His view is simply put: the Report has no direct procedural effect on the Russian Judgments, because it does not constitute a ‘newly discovered fact’ and cannot therefore be relied upon to try to set aside the Russian Judgments. Mr. Vaneev does not dispute this but seems to suggest in his report that the forensic handwriting analysis may assist in the civil challenges brought by the Defendants and L.M. Salmanova. However, Mr. Miftakhutdinov refutes this, on the basis that only facts established by a criminal court judgment must be taken as fact in civil proceedings. The Report is not a finding in a judgment but formed part of preliminary investigations which does not make it ‘proper evidence of whether or not certain actions took place...’.

Right to appeal

[60] The time by which the Defendants were allowed to appeal the Russian Judgments has long since expired with all appeals having been rejected.

[61] However, the Russian Court has the ability to re-open an ability to file an appeal. As the evidence served by the Second Defendant on 11th March 2022 describes, it appears to have done this, to allow the Second Defendant to issue an appeal notice. The appeal is not in relation to the Judgments themselves, but in relation to an earlier ruling of the Commercial

Court of Bashkortostan Republic on 25th October 2016 to uphold the Claimant's claim against Track (the 'Ruling').

[62] The appeal apparently relates to the same issue raised in the Amended Defence and in the Report, i.e., that the signature on the guarantee given by Track that led to its liability was not in fact signed by the person who it purported to be. This is described in the evidence as the signature having been 'forged'. However, there is no suggestion that any of this took place anywhere otherwise than within Track itself. It is not disputed that Track's company seal was affixed to the guarantee. There would appear to be no suggestion that the person who signed the guarantee (whoever that may be) was not a person acting on behalf of Track and put forward by Track to the Claimant as so acting. It is not alleged that the Claimant had anything to do with any defect in the guarantee. It would appear to be a matter purely internal to Track's own processes.

[63] Furthermore, this argument has already been examined by the Russian courts. It was found to be irrelevant to the Ruling to uphold the Claimant's claim against Track. Accordingly, it is hard to see how the appeal of the Ruling could have any prospect of success.

Submission to the jurisdiction

[64] The Russian Court had exclusive jurisdiction over the Defendants to resolve any dispute relating to subsidiary liability. The Defendants were duly notified about the Russian proceedings. Their representatives appeared in the Russian proceedings and defended the claims made against them. No point on original jurisdiction is taken in the Amended Defence.

Recognition of Judgments for Subsidiary Liability

[65] Subsidiary liability is a relatively new concept in Russian law and so examples where such judgments have been recognised in other jurisdictions will naturally be limited. However, the Claimant understands that the English Court in the Pugachev litigation has recognised a Russian judgment for subsidiary liability to enable its enforcement over assets in that

jurisdiction. This is evident from **JSC Mezhdunarodniy Promyshlenniy Bank, State Corporation 'Deposit Insurance Agency' v Sergei Viktorovich Pugachev & ors.**¹

[66] The Claimant says it is not aware of a reasoned judgment dealing specifically with the recognition issue. This is because in the Pugachev case, the claimants applied for default judgment on that issue. However, another judgment in the Pugachev litigation confirms that the English Court accepted that a Russian judgment for subsidiary liability was amenable to enforcement in England and Wales. This is apparent from the judgment against Mr. Pugachev by which the English Court issued a freezing injunction in support of the underlying Russian proceedings. Those Russian proceedings are summarised at paragraph 26 of the judgment, which sets out the provisions of Article 14 of the Russian Federal Law on Insolvency of Credit Institutions, which 'imposes a liability called "subsidiary liability"'.

[67] The willingness of the English Court to freeze Mr. Pugachev's assets in support of the Russian subsidiary liability proceedings and later recognition in that litigation of the Russian Article 14 judgment confirms that the English Court considered that a judgment in the subsidiary liability proceedings was amenable to enforcement in England and Wales.

Public Policy

[68] Both Defendants are subject to bankruptcy proceedings in Russia. Under Russian bankruptcy law, any claims brought against the Defendants must be enforced through the bankruptcy proceedings. It is said by the Second Defendant that this is a bar to enforcing this claim against her outside of Russia.

[69] The Second Defendant pleads that the Claim is contrary to the regime set out in the Russian bankruptcy law, on the basis that it is said that the law requires that any recoveries made as a result of the Russian Judgments have to be paid into Track's bankruptcy estate to satisfy the claims of all creditors on a *pari passu* basis and that no creditor is entitled to full recovery unless there are sufficient assets available to satisfy all of the creditors' claims.

¹ [2017] EWHC 2426 (Ch)22.

[70] The Claimant denies that any public policy issue arises here. On the contrary, what would be inappropriate would be to deny a creditor the right to enforce in the BVI a judgment against a debtor purely because the debtor is in insolvency process in Russia:

- (1) the powers exercised by a bankruptcy manager in Russian bankruptcy proceedings are not recognized in the BVI and so the bankruptcy manager is not able to enforce over assets held in the BVI through the Russian bankruptcy proceedings;
- (2) the Claimant notified the Defendants' bankruptcy manager of its intention to file these proceedings in the BVI Court and throughout the process the Defendants' Bankruptcy Manager has fully supported these proceedings;
- (3) the logical effect of the Second Defendant's position is that, if the Claimant is prevented from seeking recognition of the Russian Judgments in the BVI, none of the Defendants' creditors (or Track's creditors), or the Defendants' (or Track's) Russian trustees in bankruptcy, would be able to enforce against the Defendants' BVI assets. If this were to be the case, it would mean that all assets overseas in jurisdictions that have not enacted legislation to enable the assistance of Russian insolvency practitioners would be wholly immune from enforcement. This would be to the detriment of all creditors and to the benefit of the delinquent debtors, unjust, and lacking in common sense;
- (4) as a matter of Common Law, judgments given in insolvency proceedings do not form a separate category of judgment outside the common law rules of enforcement;
- (5) the Claimant has expressly stated that it will ensure that any recoveries made in these Proceedings will be notified to the Defendants' Bankruptcy Manager to ensure that it is not subject to double recovery; and
- (6) where other creditors who have not joined an enforcement proceeding believe that the recovery was made contrary to the established priority of creditors' claims, there is a mechanism under Russian law for this to be dealt with in the Russian insolvency.

Conduct of the Defendants

[71] In essence, this is a straightforward claim to recognise (*sic*) a Russian judgment where the facts have already been considered and ruled upon by another Court, so that it can be enforced against an asset in the jurisdiction. The Second Defendant has sought to obscure this at every stage and to complicate and delay the issues. Had the Court not rightly rejected the Second Defendant's position that a full trial timetable should be imposed, even greater delay would have arisen, with no trial until 2023.

- [72] It is telling that this approach to the litigation has been employed despite the Second Defendant's continued denial that she has any legal or beneficial interest in Averon or the yacht, 'Olga' (apparently named in her honour), or any other assets in the BVI.

Application for Default Judgment

- [73] On 28th April 2021, the Claimant filed a request for entry of judgment in default against the First Defendant in default for failing to file a Defence to these proceedings.
- [74] The Court indicated that this application could not be dealt with on the papers, on the basis that as the Second Defendant is defending the claim, the Court would need to consider whether judgment could properly be entered against the First Defendant prior to the issues raised by the Second Defendant being resolved.
- [75] Accordingly, it is the Claimant's position that, should judgment be entered against the Second Defendant, judgment should also be entered against the First Defendant.

Claimant's Conclusion

- [76] For the reasons set out above, the Claimant invites the Court to grant the relief sought in the Claim, recognise (*sic*) the Russian Judgments and enter judgment against both the First and Second Defendant.

The Second Defendant's submissions

- [77] The following is a summary of the Second Defendant's submissions. In this segment are set forth the Second Defendant's contentions, without any comments or findings of the Court.

Second Defendant's summary of the factual background

- [78] In 2014 the First Defendant (who has not put in a defence) acquired the entire shareholding of a tyre distribution company in Russia, Russhina. Russhina entered into a sale and supply agreement with the Claimant on 28th February 2014. Russhina's obligations were guaranteed by the First Defendant personally. In the events that happened, Russhina's business failed and Russhina was declared bankrupt.
- [79] The Claimant relied upon a guarantee apparently dated 3rd March 2014 which it claimed had been executed by Track, also guaranteeing Russhina's debts to the Claimant. It was claimed, that Track, which was beneficially owned by the Second Defendant's mother Ms. Salmonova ('S'), had executed the guarantee ('the Track Guarantee'). This is now disputed on the basis that S's signature on the document had been forged. Since the June 2019 Judgment, an expert report has come to light in criminal proceedings which concludes that the signature on the Track Guarantee was forged. Two sets of proceedings have been commenced in Russia in which the validity of the Track Guarantee has been challenged. Again, these are referred to further below.
- [80] Leaving aside the question of validity for now, an order for Track's bankruptcy was made on 2nd March 2016 and on 25th October 2016 the Claimant sought and obtained permission to be included as one of Track's creditors on foot of the Track Guarantee.
- [81] The court, being satisfied that Track itself had insufficient funds to pay its creditors in full, made an order on 28th March 2019 (the March 2019 Judgment) by which Track's trustee in bankruptcy was entitled, under the principle of subsidiary liability, to seek to recover the shortfall against certain persons who allegedly (although this was disputed) had control of Track and who had caused Track not to fulfil its obligations. Accordingly, the March 2019 Judgment ordered that certain persons, including the Defendants, were jointly and severally liable for the unsatisfied debts of Track.
- [82] Subsequently, certain creditors, including the Claimant, when asked how they wished to proceed to enforcement opted for a relatively new procedure in Russian bankruptcy law, in which a creditor may take an 'assignment' of the right of enforcement up to the limit of his claim

in the bankruptcy. A writ of execution is then issued to every creditor who has opted for this enforcement option.

- [83] The June 2019 Judgment assigned to the Claimant the right (previously vested in the Trustee in Bankruptcy) to enforce the claim against the subsidiary debtors including the Defendants to the extent set out (being the full extent of the creditor's claim in the bankruptcy). That was calculated at RUB 1,254,529,474.11 principal and RUB 299,572,913.75 interest. It is significant to note that the two elements (principal and interest) attract different priorities under the Russian bankruptcy code. Further, the Claimant was not the only creditor to have opted for the 'assignment' method of enforcement. Three other creditors also sought and obtained 'assignments'. Further, any creditor can seek a writ of enforcement from the Russian court at any time for a period of three years from the date of the election.
- [84] There is a difference of opinion as to the effect of 'assignment' and as to the nature of that enforcement option, in the context of enforcement of foreign judgments. In short, the Second Defendant's expert Mr. Vaneev is of the opinion that the 'assignment' of enforcement rights does not disturb the collective nature of the bankruptcy regime in Russia, and that should recovery be made, such must be distributed in accordance with the rules of bankruptcy *pari passu* amongst the creditors who have taken out writs of execution. It therefore continues to be a collective remedy enforceable only as part of the bankruptcy regime.
- [85] Mr. Miftakhutdinov takes a rather more radical approach. He suggests that 'assignment' allows the assignee to enforce the debt on his own behalf as if it were a simple debt action and to do so both in a foreign jurisdiction and outside the requirements of the Russian insolvency regime. Thus, it is argued, the Claimant would not have to account for what it recovered to other creditors.
- [86] In short, the introduction of a new means of enforcement (i.e., assignment of the right of enforcement from the Trustee to the creditor) substantively changed the very nature of Russian bankruptcy law, which is a collective remedy, so that the mere right to enforce personally became a substantive right to receive and to keep the proceeds irrespective of the rights of other creditors. As Mr. Vaneev points out, there is no support for this fundamental and radical change to Russian law in the statute. All that occurred was the addition of another enforcement option.

- [87] The nature of the 'assignment' is such that the June 2019 Judgment is neither a judgment for a fixed sum nor is it final. These issues, form the kernel of the questions posed to the experts and are addressed further below.
- [88] There are, however, two other issues which, independently of the questions referred to above, are material in the context of enforcement. The first is the issue of the forged signature on the Track Guarantee. If that guarantee is found to be void, the Claimant's basis for proving in Track's bankruptcy simply disappears. In terms of enforcement, the question of the forgery is relevant in two respects. First, it is material because where a right exists to have judgment altered by the court that made it, the judgment cannot be considered as final. Secondly, it would be against public policy in the BVI to enforce a judgment which was itself acquired by use of a forged instrument.
- [89] The second issue also raises a public policy ground. It is undoubtedly the case that the Claimant has sought to pursue the Defendants with some zeal. The evidence of the Second Defendant (in this regard unchallenged) is that they are now seeking to include her children as controlling parties in Track in order to render them also liable under the principle of subsidiary liability. The children, as at the date of Track's bankruptcy, were 13 and 9 years old respectively. On the application of the Claimant the Defendants have both been adjudged bankrupt in Russia. Such has, quite independently of the other issues, a bearing on the question of enforcement. Enforcement of the judgment (if otherwise possible) would prefer the Claimant over other creditors and would be contrary to recovery under Russian bankruptcy laws (as set out in Mr. Vaneev's Third Report). Accordingly, it would be contrary to public policy to allow the June 2019 Judgment to be enforced.

The Questions

- [90] At the Case Management Conference held on 20th September 2021 (the 'CMC') the Court ordered that the following questions be put to the parties' Russian law experts:
- (1) Whether the judgments of the Russian Courts in proceedings A07-1646/2016 dated 28 March 2019 and 13 June 2019, taken together (the 'Judgments') do in themselves provide sufficient context to enable an expert to determine (i) whether or not they are for

a debt of definite sum of money as against the Defendants; and (ii) whether the Judgments are final and conclusive as against the Defendants; and

- (2) If the answer to question (1) is positive, whether the Judgments are final and conclusive for a debt of definite sum of money as against the Defendants (the 'Questions').

[91] Subsequently, at the adjourned CMC held on 13th December 2021, the Court ordered that the parties' Russian law experts were permitted to file further evidence on a further question, that being:

"What effect, if any, does the expert report No. 23784 filed in the Russian criminal proceedings against the First Defendant have on the Russian civil judgments dated 28 March 2019 and 13 June 2019 against, *inter alios*, the First and Second Defendants that are the subject of these proceedings."

The Law

[92] The law with regard to enforcement of claims at common law is well-settled. The Second Defendant sets out the relevant legal issues as follows:

- (1) Is the judgment a judgment for a definite sum of money?
- (2) Is the judgment final and conclusive?
- (3) Are there any public policy or other reasons why the judgment should not be enforced?

A: Definite sum of money

[93] A foreign judgment will only be enforced if it is for a definite sum of money. Accordingly, the judgment to be enforced must order the Defendant in the BVI action to pay to the Claimant, a definite and actually ascertained sum of money (see **Sadler v. Robbins**² and generally Rule 42 in Dicey, Morris & Collins: The Conflict of Laws (15th edn., Sweet & Maxwell 2012) and paragraph 5 14-022. If a mere arithmetical calculation is required for the ascertainment of the sum and such is apparent from the judgment itself, it will be treated as having been ascertained (see **Beatty v. Beatty**³).

² (1808) 1 Camp 253.

³ [1924] 1 KB 807 (CA).

[94] For the reasons which are set out below (and in the reports of Mr. Vareev) it is plain that the June 2019 Judgment is not a judgment in favour of the Claimant for a definitive sum of money but simply part of the enforcement process in Russian bankruptcy law.

B: 'Final and Conclusive'

[95] The test of finality is of considerable vintage. It was held in **Nouvion v. Freeman**⁴ that:

“...in order to establish that [a final and conclusive] judgment has been pronounced, it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence this country, so as to make it res judicata between the parties.”

[96] It is clear that while the prospect of an appeal to a higher court will not render the judgment inconclusive, any judgment which is liable to be abrogated or varied by the court which pronounced it is not, for the purposes of enforcement, a final judgment (see **Re Macartney**;⁵ **Westfal-Larsen AS v. Ikerigi Naviera**⁶ and Rule 42 Dicey, Morris & Collins paragraph 14-023).

[97] The June Judgment is not final and conclusive because:

- (1) the figure which is cited representing the Claimant's debt as claimed in the bankruptcy of Track, is liable to change depending upon recoveries from Track or other debtors including those subsidiarily liable. The changes are not ascertainable by reference to the June 2019 Judgment itself. Further:
- (2) the original court (i.e., that which made the June 2019 Judgment) has the power to alter its own judgment should it be determined that the Track Guarantee is forged. It is well-established that where a judgment may be set aside for fraud the judgment cannot be categorised as conclusive (see Dicey, Morris & Collins paragraph 14.139 and the cases there referred to).

⁴ (1889) 15 App. Cas. 1 at page 9.

⁵ [1921] 1 Ch. 522.

⁶ SA [1983] 1 All E.R. 382.

C: Other reasons against enforcement (Public Policy/Fraud/breach of natural justice)

[98] Where the judgment is impeachable because it was obtained by fraud, the enforcing court will not enforce the judgment (see Rule 50 Dicey, Morris & Collins and paragraph 14.139 to 14-151). The following appears in Dicey, Morris & Collins (citing **Abouloff v. Oppenheimer**⁷) paragraph 14.139:

“A foreign judgment.....can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been, and was, alleged in the foreign proceedings.”

[99] Such a principle has been affirmed in more recent cases in the English Court of Appeal (**Jet Holdings Inc v. Patel**⁸) and the House of Lords (**Owens Bank Limited v. Bracco**⁹). It follows, that where fraud exists, it impacts in two ways in the context of enforcement. First, the judgment cannot be considered as final because it is impeachable. Secondly, the judgment will not be enforced on public policy grounds as no judgment will be registered if it was obtained by fraud.

[100] In the current case, while it was alleged at the hearing that S had not signed the Track Guarantee, the court refused permission to have the guarantee subjected to forensic analysis and the evidence that has now emerged as a result of a criminal investigation (although not into the conduct of the Claimant) was not available and was not before the court. S has subsequently brought proceedings claiming that the Track Guarantee is invalid and in addition, the Defendants have appealed to a higher court. It is worth observing that as at the date upon which the June 2019 Judgment was made, persons liable under the principle of subsidiary liability had no standing to challenge the validity of the Track Guarantee. That position has changed subsequently, following a higher court decision in Russia.

[101] In this latter regard, courts will not enforce judgments which have been made in breach of the rules of natural justice (see Rule 52 Dicey, Morris & Collins). The following appears at paragraph 14-164:

“Adams v. Cape Industries Plc appears to have been the first English case in which the defence of breach of natural justice was established in relation to a judgment in

⁷ (1882) 10 Q.B.D. 295 (CA).

⁸ [1990] 1 Q.B. 335 (CA).

⁹ [1992] 2 A.C. 443.

personam. The Court of Appeal held that the defence of natural justice was not limited to the requirements of due notice of the hearing to a litigant and the opportunity to put a case to the foreign court. It confirmed that the basic question was that stated in *Pemberton v. Hughes*, namely whether there was a procedural defect which constituted a breach of the English court's view of substantial justice, which would depend on the nature of proceedings under consideration. The principle was applied in *Masters v. Leaver*, where the Court of Appeal considered that a substantial failure to follow its own procedure for an assessment of damages meant that proceedings before a Texas court had led to judgment in denial of a substantial justice."

[102] Here, the incapacity of a person who is subject to subsidiary liability to challenge the validity of documents underlying that liability is a significant issue in terms of substantial justice. If that person (as clearly was the case) is prevented from leading evidence which would of itself if accepted, result in no liability then it cannot be said that she has been afforded an opportunity of presenting properly her case before the court.

[103] Accordingly, on that ground also, the judgment should not be enforced.

[104] Finally, on public policy grounds, it is clear that it is the recognition of the judgment which must be contrary to public policy and not its subject matter (see Rule 51 Dicey, Morris & Collins and paragraph 14-155). In this regard the Defendants have themselves been made bankrupt in Russia. It is undisputed that in Russia bankruptcy is a collective remedy. It follows that the assets of the bankrupt can only be dealt with through the bankruptcy process in which creditors (at least in the same class) are paid out on a *pari passu* basis.

[105] Enforcement of the current judgment outside of this process would be wholly contrary to the principles and policy underpinning bankruptcy law (and indeed Insolvency in this jurisdiction). It would confer upon the Claimant an advantage over the other creditors. Accordingly, it would be contrary to public policy to enforce the June 2019 Judgment in those circumstances.

Application of the Law

[106] It is clear from the expert evidence of Mr. Vaneev that the March 2019 Order and June 2019 Judgment must be viewed in the context of the Russian bankruptcy regime. It is equally clear, from the statutes and judgments referred to in Mr. Vaneev's reports, that Russian bankruptcy is a collective remedy with a 'cumulative enforcement process' and that creditors are paid

according to the order of priority as provided for in the bankruptcy regime. Creditors of the same class are paid on a *pari passu* basis.

- [107] As Mr. Vaneev points out, the trustee in bankruptcy must provide creditors with the choice to elect as to how they wish enforcement to proceed. One of those options is the relatively recent introduction of the 'assignment' of the right to enforce against the creditor. While this gives the creditor the right to bring enforcement proceedings against a debtor (including those who have been found to have subsidiary liability) it does not change in any meaningful way the substantive principles underpinning Russian bankruptcy law. In particular, it does not alter the collective or cumulative nature of the remedy. The 'assignment' is thus an assignment of the right to enforce. It is not an assignment of any debt.
- [108] Accordingly, the effect of the June Judgment is not to provide judgment in favour of the creditor for a particular or definite sum but rather to provide for a maximum amount that may be received in the enforcement process against a debtor. That sum will only be paid provided the persons with a higher or the same priority in the bankruptcy process are paid in full. It is not therefore, a judgment for a definitive sum. It merely provides for a ceiling which might or might not allow for payment depending on the claims of creditors of a higher priority and those in the same class who also have had writs of execution issued in their favour.
- [109] In the current case, the Claimant's debt is divided in terms of priority. The principal amount falls into the third category (meaning that there are two categories above it in the order of priority) and the interest element falls into the lowest priority category. Within the same class there are three creditors who have also issued writs of execution. To that end, insofar as the higher categories are satisfied in full, whatever is recovered would have to be paid on a *pari passu* basis amongst, in the first instance, all four creditors who have issued writs of execution in the bankruptcy process. It is also noteworthy that other creditors who have not already done so may issue writs of execution within a three-year period from the date of election. All of this underlines that the June 2019 Judgment is simply part of the Russian bankruptcy regime but does not amount to a judgment for a definite sum which may be enforced in the BVI.
- [110] Equally, there is insufficient context in the judgment itself to be able to determine any 'definite sum'. Quite apart from what is set out above, the Claimant has proved in the bankruptcy of others including Russhina and the Defendants and the three other persons named as

controlling persons in the June 2019 Judgment. Any recovery from those other estates would clearly impact upon the maximum amount which (even within the context set out above) the Claimant might enforce. Even that sum cannot therefore be determined by reference to the June 2019 Judgment itself.

- [111] For the same reason the June 2019 Judgment cannot be considered to be final as the sum in question is liable to alteration. Further, given that the court has power to alter its judgment in the light of new evidence, including fraud, and given the existence of a report produced by the Russian state (and not by the First Defendant) to the effect that the Track Guarantee contained a forged signature, the June Judgment cannot be regarded as final. Ms. Salmonova has already commenced proceedings on foot of the document in question, which, if successful, will inevitably mean that the court will be asked to rescind or alter both the March 2019 Order and the June 2019 Judgment.
- [112] Accordingly, with regard to the questions posed to the experts, the Second Defendant submitted that the June 2019 Judgment is not a judgment for a definite sum obtained by the claimant against the Defendants nor is it a judgment which is final and conclusive.
- [113] The Claimant has tendered its own expert reports (the 'Nokian Reports') which reach different conclusions. It is not intended here to interrogate each of the conflicting findings. Suffice it to say for present purposes, that the approach of the Nokian Reports is fundamentally flawed. The reports do not adequately explain how an amendment to the procedural provisions of the bankruptcy code in terms of choice of enforcement, has translated into a substantive right which gives an electing creditor the right to pursue a debtor as if there was a free-standing cause of action.
- [114] The conclusion reached by the Nokian Reports is at odds with the general scheme of the bankruptcy code and contrary to the collective nature of the regime and its 'cumulative enforcement process'. Furthermore, if such a substantive change had been envisaged it is inconceivable that the statute itself would not have made the effect contended for by the Claimant expressly clear. There is, however, nothing in the statute nor is there any authority which supports the Nokian Reports in this regard. Indeed, the effect contended for by the Claimant runs contrary to the provisions of the bankruptcy code (see for example Article 61.17 (6) referred to by Mr. Vaneev).

[115] Accordingly, it is submitted by the Second Defendant that the evidence of Mr. Vaneev is to be preferred to the Nokian Reports. It is further submitted by the Second Defendant, that if the Court takes the view that it is unable to resolve the evidential conflict as the burden of proof rests with the Claimant, the Claimant will have failed to establish its case and the June 2019 Judgment ought not to be enforced.

Second Defendant's Conclusion

[116] The June 2019 Judgment is not a judgment in favour of the Claimant for a definite sum nor does the judgment provide sufficient context to enable the court to determine that sum.

[117] The June 2019 Judgment is not a final and binding judgment given both the changeable nature of the sum referred to and the fact that judgment is liable to rescission or variation by the court which handed it down on account of the forged signature on the Track Guarantee.

[118] In any case (irrespective of how the first two issues are determined) the fact that both Defendants are now bankrupt means that any claim against them can only be brought in their bankruptcy proceedings in Russia. Enforcement otherwise would be to permit the Claimant to gain an advantage over other creditors and offend against the principles of the cumulative enforcement process. It would therefore be against public policy to enforce the judgment.

[119] The March 2019 Order and June 2019 Judgment were obtained by reliance on a document upon which a signature was forged according to an independent report. Accordingly, the judgment should not be enforced.

[120] The fact that the Defendants were not, as persons to whom subsidiary liability attached, permitted as a matter of law to challenge the veracity of documents fundamental to their liability, amounted to a breach of natural or substantial justice. The court should therefore not enforce the June Judgement should it otherwise be enforceable.

DISCUSSION

- [121] In my respectful judgment the key to this claim is that the June 2019 Judgment is not a judgment for a definite sum of money and is thus not enforceable.
- [122] Since the June 2019 Judgment is not enforceable, the Claimant, Nokian Shina, cannot rely upon it in this jurisdiction to enforce the March 2019 Judgment, which is a judgment for a definite sum of money.
- [123] Nokian Shina would have to rely upon the June 2019 Judgment because, without the June 2019 Judgment, the Claimant has no benefit from the March 2019 Judgment. The two Judgments are separate judgments, upon two different applications, although made in the same legal proceedings. They are not two parts of the same judgment. Nokian Shina would need to have the June 2019 Judgment enforced first, before Nokian Shina can invoke the benefit of the March 2019 Judgment.
- [124] Without the benefit of the June 2019 Judgment, Nokian Shina would have no right to claim enforcement of the March 2019 Judgment, because Track, not Nokian Shina, is the party identified in the March 2019 Judgment that has a monetary judgment against the Defendants.
- [125] Because Nokian Shina has no right to claim enforcement of the March 2019 Judgment upon the terms of that March 2019 Judgment, Nokian Shina cannot simultaneously have enforcement of both the March 2019 and June 2019 Judgments – which is what Nokian Shina seeks to do by this claim. Nokian Shina must first obtain enforcement of the June 2019 Judgment. If it fails to do so, the entire claim must fail, because, without the June 2019 Judgment, Nokian Shina cannot, in this jurisdiction, independently establish a right to enforcement of the March 2019 Judgment.
- [126] Nokian Shina commenced these enforcement proceedings by issuing a Claim Form on 24th July 2020. In the Claim Form, the substantive relief sought by Nokian Shina was for enforcement of the June 2019 Judgment alone, and for a monetary award in the sum of the claim against the Defendants mentioned in the June 2019 Judgment. I emphasise ‘enforcement’, to distinguish it from ‘recognition’. It is enforcement that Nokian Shina seeks in this claim. Nokian Shina does not plead a claim for recognition. This Court is constrained to determine the claim as made, not a different claim. I say this because in Nokian Shina’s outline submissions for trial, its legal representatives mentioned that they seek ‘recognition’ of the two

Judgments. That is not so. They claim enforcement, and the Court must therefore apply the legal test for enforcement.

[127] It would appear that Nokian Shina's lawyers realised that such a claim was doomed to fail (as indeed it would be), because they prepared and filed (also on 24th July 2020) a Statement of Claim in which they prayed that Nokian Shina should receive the same monetary award, but that **both** the June 2019 and March 2019 Judgments should be enforced.

[128] In my respectful opinion, Nokian Shina's lawyers must have realised that Nokina Shina needed more than the June 2019 Judgment in order to succeed with a claim against the Defendants. Indeed, Nokian Shina's Russian law expert, Mr. Miftakhutdinov, was clear that the two judgments, **taken together**, are for a definite sum of money.¹⁰ Mr. Miftakhutdinov explained that the March 2019 Judgment gave Track judgment for a definite sum of money against the Defendants¹¹ and that the effect of the June 2019 Judgment was to assign this judgment debt from Track to Nokian Shina.¹²

[129] Neither Mr. Miftakhutdinov, nor the Defendants' expert, Mr. Vaneev, gave evidence that the June 2019 Judgment was a judgment for a definite sum.

[130] Nokian Shina's legal representatives nonetheless attempted to argue that the June 2019 Judgment was a judgment for a definite sum, on the basis that 'specific sums of money are identified' in the June 2019 Judgment, and, in its Amended Reply, Nokian Shina pleaded that

"The Second Judgment determined the specific amount of the Second Defendant's debt in respect of the Claimant (in the amount of 1,554,102,387.86)."¹³

[131] This submission and this pleaded point, which go further than the Claimant's expert Mr. Miftakhutdinov went, prompts us to look at what exactly the English (and by extension the BVI) requirement is concerning judgments for a definite sum in the context of enforcement by an action at common law.

[132] The applicable principles are summarised in Dicey, Morris and Collins' Rule 42, which is stated thus (without endnotes):

"(1) Subject to the Exceptions hereinafter mentioned and to Rule 62 (international conventions), a foreign judgment in personam given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 47 is enforceable in this country."

¹⁰ At paragraph 54 of Mr. Miftakhutdinov's First Report.

¹¹ At paragraph 45 of Mr. Miftakhutdinov's First Report.

¹² At paragraphs 50 and 51 of Mr. Miftakhutdinov's First Report.

¹³ At paragraph 4(a).

46, and which is not impeachable under any of Rules 49 to 54, may be enforced by a claim or counterclaim for the amount due under it if the judgment is (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and (b) final and conclusive, but not otherwise. Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.

(2) A foreign judgment given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, which is not impeachable under any of Rules 49 to 54 and which is final and conclusive on the merits, is entitled to recognition at common law and may be relied on in proceedings in England.

(3) No proceedings may be brought by a person on a cause of action in respect of a judgment which has been given in his favour in proceedings between the same parties or their privies in a court in another part of the United Kingdom or in a court in an overseas country unless that judgment is not enforceable according to clause (1), or not entitled to recognition according to clause (2), of this Rule. This Rule must be read subject to Rule 59.¹⁴

[133] The learned authors then explain in the ensuing 'Comment' section¹⁵ that:

"For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs, e.g. in a divorce suit. 85 (*Russell v Smyth* (1842) 9 M. & W. 810; cf. *Ruf v Walter* [1990] 6 W.W.R. 661 (Sask).) It must order X, the defendant in the English action, to pay to A, the claimant, a definite and actually ascertained 86 (*Sadler v Robins* (1808) 1 Camp. 253. Compare *Hall v Odber* (1809) 11 East 118.) sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained; 87 (*Beatty v Beatty* [1924] 1 K.B. 807 (CA).) if, however, the judgment orders him to do anything else, e.g. specifically perform a contract, it will not support an action, 88 (cf. *Church of Scientology of California v Miller*, *The Times*, October 15, 1987, affirmed *The Times*, October 23, 1987 (CA); and see n.85, above.) though it may be res judicata as to the issues of substance, with the consequence that there may be summary judgment as to liability on a fresh claim brought on the original cause of action. 89 (Wolff, s.243; see *Duke v Andler* [1932] 4 D.L.R. 529 (Sup Ct Can). But see *White* (1982) 9 Sydney L.Rev. 630.)."

[134] The key phrases here are that '[f]or a claim to be brought to enforce a foreign judgment...it [i.e. the judgment] must order X, the Defendant in the English [(read BVI)] action, to pay to A, the claimant, a definite and actually ascertained sum of money...'.

[135] It is thus not enough, for enforcement, for the judgment simply to specify sums of money. **It must order the defendant to pay such sums to the claimant.**

¹⁴ Dicey, Morris & Collins: The Conflict of Laws (15th edn., Sweet & Maxwell 2012) paragraph 14R-020.

¹⁵ Dicey, Morris & Collins: The Conflict of Laws (15th edn., Sweet & Maxwell 2012) paragraph 14-021.

[136] The June 2019 Judgment does not do this. Moreover, none of the parties to this claim, nor their experts, say that it does. Mr. Miftakhutdinov's silence in this regard is striking. He goes to some lengths to show that the March 2019 Judgment is a judgment for a definite sum of money, but he stops short of analysing to what extent the June 2019 Judgment itself does so. He goes only so far as to contend that **taken together**, the June 2019 and March 2019 require the Defendants to pay a definite sum. He appears to be entirely correct in this regard. But he does not suggest that the June 2019 Judgment, by itself, does so, in any of his three expert reports. I apprehend that he does not do so, because (entirely correctly) he cannot.

[137] The notion that the two Judgments need to be taken together is carried through into the Claimant's framing of the issues for trial. The Claimant was clearly cognisant that it would have insuperable problems seeking enforcement of each of these Judgments individually.

[138] The June 2019 Judgment materially provides (according to its official translation, with which the parties take no issue) as follows:

“...the court

HAS RULED AS FOLLOWS:

1. To substitute ...Track...as the recoverer in accordance with the ruling of the Commercial Court of the Republic of Bashkortostan dated March 28, 2019 by ...Nokian Shina...in respect of the claims in the amount of 1,169,116,226.17 rubles of the principal debt, 5,766,839.25 rubles of financial sanctions with the priority of satisfaction as the claims of third-priority creditors included in the register of creditors' claims;
 - In respect of claims in the amount of 85,413,247.94 rubles of the principal debt, 293,806,074.50 rubles of financial sanctions – at the expense of the debtor's property remaining after the satisfaction of the creditors' claims included in the register of the debtor's creditors' claims;”

[139] In my respectful judgment, I cannot discern any order here that the Defendants are to pay these sums, or part thereof, to Nokian Shina. Upon its face, the effect of the June 2019 Judgment appears only to be to substitute Nokian Shina for Track in respect of the subsidiary liability pronounced in the March 2019 Judgment, in respect of certain stated claimed sums – and no more. As far as I can see, **the June 2019 Judgment does not order the Defendants to pay Nokian Shina (nor indeed Track) those sums.**

[140] Consequently this Court concludes that the June 2019 Judgment does not fulfil that requirement for enforcement in this jurisdiction as summarised in Dicey & Morris's Rule 42.

The June 2019 Judgment is not 'a judgment for a definite sum of money' as that concept is to be understood in that Rule.

[141] Thus, quite apart from whether any other requirements of Rule 42 are met, the fact that this particular criterion is not satisfied is fatal to Nokian Shina's claim for enforcement of the June 2019 Judgment.

[142] As a direct consequence, this Court cannot give effect to the entitlement Nokian Shina obtained under Russian law, through the June 2019 Judgment, to compel the Defendants to pay to Nokian Shina the sums due under the March 2019 Judgment.

[143] For completeness, I can state that I am satisfied that the March 2019 Judgment is a judgment for a definite sum, within the meaning of Dicey & Morris's Rule 42. That is so, even though upon the face of the official translation of the March 2019 Judgment this is not immediately obvious.

[144] The March 2019 Judgment was a ruling upon an application of the bankruptcy receiver of Track for 'Bringing [the Defendants] to Subsidiary Liability'. That application succeeded, and as a result Track, through its bankruptcy receiver (and not Nokian Shina), became entitled to look to the Defendants to pay a certain sum of money.

[145] The March 2019 Judgment materially provides:

"The Commercial Court of the Republic of Bashkortostan...

HAS RULED AS FOLLOWS:

To satisfy in part the application of insolvency receiver Aleksei Viacheslavovich Emelianov for bringing to subsidiary liability.

To recover 3,228,393,383.31 rubles jointly from [the Defendants and three other names individuals] in the framework of subsidiary liability to the bankruptcy estate of ... Track... ."

[146] On the face of this there is no order requiring the Defendants to pay the stated amounts. However, the words 'To recover' the stated sum, from the Defendants (and/or the other named persons), can imply the requirement that they pay this sum. Fortunately, this Court is not left alone to work this out. In the June 2019 Judgment, the preamble to that judgment stated:

“By the ruling of the Commercial Court of the Republic of Bashkortostan, 3,228, 393,383.31 rubles were recovered jointly and severally from [the Defendants and three other named individuals] to the bankruptcy estate of ... Track.”

In the overall context, in which (certainly at that time) there had not yet been recovery of the full amount stated, this narration cannot sensibly be taken to mean that this sum has already been ‘recovered’ from the Defendants (and/or the other named persons), in the sense of already obtained from those persons. ‘Recovered’ must here mean something else. One thing it could sensibly mean is that the March 2019 Judgment provides for an obligation on the Defendants (and/or the other named persons) to pay the stated amount. Mr. Miftakhutdinov gives evidence that this is the effect of the March 2019 Judgment.¹⁶ I accept this evidence and am persuaded by it.

[147] It bears stating that in considering whether a judgment orders a defendant to pay a definite sum of money, this must mean that the court has to discern the effect of the judgment in question. Simply put, the Court has to ask itself ‘what does the judgment purport to do?’ The Court is not looking for adhesion to a specific verbal formula. There are potentially many different ways of expressing what it is that a judgment purports to do, and these may be coloured by national and cultural modes of expression and the commonly understood norms of a particular legal system.

[148] However, the fact that the March 2019 Judgment is a judgment for a definite sum, in the sense required by Dicey, Morris & Collins’ Rule 42, does not save Nokian Shina’s claim for enforcement. That is because the March 2019 Judgment is in favour of Track, through its insolvency or bankruptcy receiver, and not in favour of Nokian Shina.

[149] These reasons suffice for the determination of this matter. For completeness, I accept that the two judgments otherwise satisfy the requirements of Dicey & Morris’s Rule 42. I accept the evidence and explanations given by Mr. Miftakhutdinov and the submissions of the Claimant’s legal representatives on the other points.

[150] I prefer the expert evidence of Mr. Miftakhutdinov to that of Mr. Vaneev. My reasons for doing so are because:

¹⁶ At paragraphs 35 and 36 of his First Report.

- (1) I found Mr. Miftakhutdinov's explanations easy to follow and they made sense to me. With all due respect to Mr. Vaneev, I found it difficult to follow Mr. Vaneev's reasoning, and I was left asking myself why and how he reached the conclusions he did in several respects. I accept the criticisms of Mr. Vaneev's evidence ventured by Mr. Miftakhutdinov and the Claimant's legal representatives.
- (2) Mr. Miftakhutdinov appears to have considerably greater experience of Russian law than Mr. Vaneev, starting in practice (i.e., after obtaining academic qualifications) around 21 years ago in 2001. Mr. Miftakhutdinov's career includes around four years as a Judge of the Russian Supreme Commercial Court, during which time he claims (and this is not contested) an impressive rate of around 93% of having his first instance decisions upheld upon appeal, also including some six years as an Associate Professor of Commercial Law, and work as a legislative draftsman, including on Russian insolvency law, and claiming authorship of over 30 research works in various areas of law, including insolvency law and commercial procedure. Mr. Vaneev, and this is no criticism, appears to have devoted himself predominantly to private practice, to which he was admitted in 2006, around sixteen years ago.

[151] In relation to the Second Defendant's public policy argument that the BVI courts should not enforce a Russian judgment for subsidiary liability, to the extent that such a judgment gives rise to an *in personam* right of recovery outside the scheme of collective insolvency proceedings, I should say (albeit this is an *obiter dictum*) that I am not persuaded that this is correct. It is rarely the case that there is a single public policy principle that applies in any given case. Usually, a number of public policy considerations are in play, and compete with each other. The Second Defendant's argument would give paramount importance to a need to ensure that insolvency proceedings are conducted on a collective basis. That would, in practice, translate into a principle that if the creditors as a collective body cannot make a collective recovery, none of the creditors should receive anything. That would leave wrongdoers clear to enjoy ill-gotten gains. Such a notion goes against other public policy principles that favour recovery of debts from debtors (as is apparent from Mr. Miftakhutdinov's evidence explaining why the remedy of subsidiary liability was introduced). This jurisdiction clearly shares with the Russian legal system an intention that debts should be reasonably amenable to enforcement. The Russian concept of subsidiary liability appears to be somewhat akin to piercing the corporate veil under English/BVI law, and, like the latter, is a practical solution to mischief that can otherwise all too easily be perpetrated by wrongdoers who seek to hide behind legal structures. Moreover, as

we see, for example, from the various methods used for unwinding Ponzi schemes, whilst no method is capable of making all creditors whole, nor indeed able to eliminate net losers, our legal system does not shrink from allowing one or more of such methods to be used, even though a *pari-passu* apportionment cannot be achieved.¹⁷ The watchword is that some recovery, however imperfect, is better than no recovery.

Disposition

[152] For the reasons stated above, the disposition of the claim is therefore as follows:

- (1) The claim against the Second Defendant is dismissed;
- (2) The second Defendant is awarded her costs of this claim, to be assessed if not agreed within 14 days.

[153] The Court will hear the parties further on the disposition of the claim against the First Defendant.

[154] The Court takes this opportunity to thank the parties' learned Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar

¹⁷ ANUHCv 2009/0149 Velasquez et al. v Stanford International Bank (In Liquidation) (unreported, delivered 28th October 2013) at paragraph [68] (Wallbank J(Ag.)).