Neutral Citation Number: [2024] EWHC 3317 (Ch)

Case No: BL 2020 000485

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

Royal Courts of Justice, The Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 19 December 2024

Before :

HHJ JOHNS KC
Sitting as a Judge of the High Court

- -

Between :

ANDREY ROGACHEV

Claimant

- and -

MIKHAIL GORYAINOV

Defendant

- -

MR JAMES SHIRLEY and MS MAYA CHILAEVA (instructed by **Michelmores LLP**) for the **Claimant**

MR TIM AKKOUH KC and MR SEBASTIAN MELLAB (instructed by **Candey Limited**) for the **Defendant**

- -

Hearing dates: 3-5 December 2024

This judgment is handed down by email to the parties' representatives and release to The National Archives at 10.30am on 19 December 2024

APPROVED JUDGMENT

HHJ JOHNS KC:

Introduction

1. This is my judgment on consequential matters in this case. I adopt the definitions employed in my main judgment handed down following trial (neutral citation number [2024] EWHC (Ch) 2436) and will refer to the paragraphs in that judgment as J[:]. Decisions are required on the following: (1) The conversion of RUB investments and drawings, as well as the values of the markets, into US$. (2) Cash capital expenditure on Mr Rogachev's markets. (3) The making of declarations and orders in relation to the termination of the joint venture. (4) Arrangements for payment of the balancing sum. (5) Costs of the proceedings as well as a payment on account and interest on costs.

2. I shall deal with each in turn.

Currency conversion

3. The effect of the decisions in my main judgment is that a substantial balancing payment is due from Mr Rogachev to Mr Goryainov.

4. Expert calculations addressing the amount of the balancing sum in the light of the decisions in my main judgment were exchanged on 25 October 2024. FRG for Mr Goryainov arrived at a sum of US$12,688,011. Mr Knyazev's calculations for Mr Rogachev, subject to the dispute as to currency conversion, produced a like figure, being US$12,696,497.

5. Both sides adopted the US$ figures in the Register. The currency dispute at the consequential hearing related to the other elements in the account. The approach which results in a figure of US$12m-odd is to convert RUB investments and

drawings by the two sides using the US$/RUB exchange rate for the period in which the investment or drawing was made. And to give a US$ value for the markets at the agreed valuation date of 30 June 2023.

6. The different approach now put forward by Mr Knyazev, and urged on me by Mr Shirley for Mr Rogachev, is to convert such investments and drawings, as well as the value of the assets, from RUB to US$ at the date of the consequential order or payment. That way of doing things would result in a very much lower balancing sum, to the tune of several million US$, owing to the substantial decrease in the value of the RUB against the US$. Mr Shirley's argument is that this result flows from the decision of the House of Lords in *Miliangos v George Frank* [1976] AC 443; that case establishing a rule that where judgment is expressed in a foreign currency (as it may be), it will also provide for payment in the GBP equivalent sum on the date of payment.

7. The correct approach, in my judgment, is that adopted by FRG, with investments and drawings being converted to US$ using the rate for the period in which the investment or drawing was made. My reasons are these.

8. The *Miliangos* case does not, in my judgment, provide the answer. It is concerned with a different question. The *Miliangos* decision marked a departure from the old practice of expressing money judgments only in GBP. It was held that judgments could be given in the foreign currency of the relevant obligation, the claim being made for that foreign currency sum or its GBP equivalent, and with the conversion to GBP taking place at the time of enforcement. But the relevant conversion in the present case is not to GBP for enforcement, it is to US$; being the foreign currency in which the judgment was always to be given. That

conversion is from the local currency of the underlying business (the business of the Moscow markets being conducted in RUB) to the currency of the joint venture, namely US$.

9. The question here is really of the relevant foreign currency for the obligation to account as between Mr Rogachev and Mr Goryainov as joint venturers. The answer to that question was not, until this consequential matters exercise, in any doubt. Indeed, it was never a question. In that regard, the case was conducted on the clear and express basis that the joint venture operated in US$. Mr McGrath KC for Mr Rogachev said this in closing:

"… *of course the exercise here at the end of the day is one of accounting between two parties in the joint venture and that joint venture relationship has always accounted between itself in US dollars*."

10. And that reflected the evidence, both expert and factual. In analysing both investments and drawings, Mr Knyazev as Mr Rogachev's expert, as well as FRG for Mr Goryainov, used annual average exchange rates in arriving at US$ figures. There was also plenty of factual evidence of the parties operating in US$. The Register was in US$. Mr Akkouh KC was even able to take me to clear examples of US$ entries in the Register where it was plain from the figure that the conversion from RUB had been done as at the date of the investment, not the date of the Register. The shareholder agreement was expressed in dollars. I referred in my judgment, for example, to clause 5.4 which set out the intention on the part of the two sides to each invest up to US$100m. The Buzdalin agreement was also expressed in dollars. Again, Mr Akkouh was even able to point to a US$ figure

in that agreement for profits which showed that the conversion from RUB had been done as at the date of receipt, not the date of the agreement.

11. It is far too late to contend now that the true currency of the joint venture was RUB so that any judgment should really be a RUB judgment. I have no doubt that, as Mr Akkouh submitted, there would have been further factual evidence dealing with any such contention, different cross-examination, and different expert evidence. On the material which was available at trial, I cannot possibly conclude that the true currency was RUB rather than US$. Everything pointed in the other direction.

12. Mr Shirley said, in support of the argument, that converting the sums at different times would be a mess. But it is exactly the exercise that both sides' experts carried out at trial. He pointed too to a decision in my main judgment that the correct valuation approach to the markets was to value them in RUB. That was indeed the decision. But the reason for it, given at J[94], was that the relevant market for the properties was a RUB market. It did not involve even a suggestion that the currency of the joint venture was other than US$. On the contrary, both sides gave valuation figures in US$ at the valuation date for the purposes of the claim.

13. Overall, this argument at the consequential hearing was an attempt to move the goalposts after both sides had taken their shots at goal. Mr Rogachev's claim as expressed at trial was for around US$28m. His claim was not one in RUB. And did not involve a conversion to US$ as at the date of trial or payment, which would have made it a much reduced claim. The attempt fails. The right approach, for the reasons I have given, is to make the conversion of investments and

drawings from RUB to US$ using the rate for the period of the investments and drawings as FRG has done. And to fix the US$ figure for the value of the markets at the agreed valuation date of 30 June 2023. I anyway had no expert evidence to value them at any later date.

Cash CapEx

14. One of my conclusions at trial was that there had been cash capital expenditure on Mr Rogachev's markets but that his register of fixed assets, by which the sums claimed as capital expenditure were set out, was not a reliable guide as to the true level of such expenditure – see J[55] – [59]. I directed that the experts look at the description of the items in the underlying documents, being account 50 and the cash registers, to assess how much cash capital expenditure there had been. Any disagreement, including where descriptions were ambiguous, would be resolved at the consequential hearing. I attempted to make clear that it would not be open to Mr Rogachev to argue, as part of this further exercise, that the descriptions in the underlying documents which did not point to capital expenditure were wrong and in fact referred to capital expenditure. In that regard, items with the description "payment of dividends" in the source documents had nevertheless appeared in his register of fixed assets as capital expenditure with different descriptions, and it had been suggested for him in closing that there was some yet different explanation for those items; they were not dividends at all.

15. Two points of disagreement now fall to be resolved following that exercise having been carried out by the experts. The result of the exercise as carried out by FRG is that there is US$1.387m of cash capital expenditure to be allowed in relation to Mr Rogachev's markets. It is said for Mr Rogachev, relying on Mr Knyazev's

assessment, that there are two further batches of capital expenditure to be included. First, expenditure of around RUB 24m by M1. That is made up of two entries for US$50,000 described as "construction costs". And 169 other smaller entries for which the descriptions are "Automation costs", "Commissioning costs", and "Fixed assets worth less than RUB 40,000". Second, five items in the cash register for K25 totalling RUB 20.4m with the description "Fixed assets worth less than RUB 40,000".

16. The dispute is of limited value, particularly as it is now accepted for Mr Rogachev that expenditure falling prior to 20 October 2015 is not to be included as there is a risk of double-counting investments included in the Register of that date. Once that is appreciated, I understand the disagreement is worth around US$100,000.

17. As to the first batch, being the expenditure of M1, I have decided that these items are not to be allowed in the account between the parties.

18. One, the two US$ sums and the vast majority of the RUB sums do not appear at all within the register of fixed assets. That is significant in two ways.

19. I intended the further exercise to be by way of limitation on what was being claimed as cash capital expenditure for Mr Rogachev; the sums claimed being set out in the register of fixed assets. An attempt now to include these items therefore travels beyond the exercise directed. I should record that whereas FRG sought in their calculations following judgment to revise the figure from the register of fixed assets for capital expenditure supported by bank documents, Mr Akkouh fairly accepted that likewise went beyond the exercise contemplated by my directions so that there should be no such adjustment.

20. In any event, that the disputed cash items did not appear in the register of fixed assets is a strong indicator that they are not capital expenditure on the markets. The register of fixed assets gave the impression of being created by someone on Mr Rogachev's relevant staff for the purpose of setting out all sums which might be claimed as capital expenditure. There is no explanation in the evidence for why it did not include these sums.

21. Two, M1's work was by no means limited to the joint venture markets. As I noted at J[84], the evidence was that M1 employees were working on business other than K24, K25 and LB30 including Verny supermarket projects. And there was no evidence of construction being carried out for Mr Rogachev's markets. These were farmer's markets which did not undergo any major change. Unlike U26.

22. Three, the descriptions do not look reliable for these items. Why would true "Construction costs" be in round US$ figures? And come, as they do, in the period when other items show dividends being paid in round US$ sums? The description "fixed assets worth less than RUB 40,000" accounts for much of the rest of the disputed expenditure in terms of value. It almost always appears inconsistent with the sum it describes, such sum being greater than RUB 40,000.

23. As to the second batch of disputed items, being five items in the cash register for K25 totalling RUB 20.4m, I have decided that these too are not to be allowed.

24. There is an obvious and unexplained mismatch between the description, "Fixed assets worth less than RUB 40,000", and the items, which range from RUB 0.9m to RUB 9m. I do not ignore the possibility, raised by Mr Shirley, of each item in fact being made up of lots of smaller fixed asset items worth less than RUB 40,000. But that is just speculation and does not fit well with the large figures

being round ones. The items also bear different descriptions in the register of fixed assets, so the maker of that document has decided not ultimately to describe them as sums for fixed assets. Those different descriptions are "Improvement of the object (documents)" or, in one case, simply "Documents". Further, the description "Improvement of object (documents)" was one used elsewhere in the register of fixed assets for round RUB sums of a similar order where the underlying source document called them payments of dividends.

25. While Mr Knyazev has included both batches, insofar as he has made some assessment of whether they really represent capital expenditure, I give little weight to his assessment. That is because of what happened following the exchange of experts' calculations.

26. As I have said, the products of those calculations on 25 October 2024 were, subject to the currency point, very close indeed; around just US$8,000 adrift in a dispute where the competing cases had been over US$40m apart. The difference was certainly well within valuation tolerances. The reasonable expectation can only have been that a figure would be agreed subject to the currency dispute. Instead, on the Friday before the consequential hearing, Mr Knyazev submitted a revised calculation in which, without explanation, he accepted FRG's figures for those elements of the calculation where FRG's figures were favourable to Mr Rogachev while insisting on his own figures for those elements where it was his figures which were to Mr Rogachev's advantage. I considered it unlikely, at least without explanation, that Mr Knyazev was wrong on the elements where FRG's figures were better for Mr Rogachev while being right on the elements where his figures favoured his client. This was not the usual, or at least usually hoped for,

and laudable, narrowing of the issues between experts involving give and take. It was take and take.

27. I nevertheless gave permission so far as necessary for this late evidence. My reasons were these. There had been no agreement as to the figure for the balancing payment, so an assessment would need to be made using the differing expert evidence. There would be no real prejudice to Mr Goryainov's side in this change of stance coming so late as Mr Akkouh made clear he did not wish to argue for Mr Kynazev's other figures where they might be more favourable to Mr Goryainov, he was able to deal with Mr Knyazev's conclusions on capital expenditure, and his criticism about the change of stance was a point he could make as to the weight to be given to Mr Knyazev's evidence.

28. Mr Shirley said that the exercise was, in truth, merely a mechanical one. The description should yield the answer without more. I do not agree. There was nothing in the directions for the exercise which obliges the court to accept sums which it is not satisfied amount to capital expenditure in relation to Mr Rogachev's markets when the description is looked at in context. It would be wrong to suspend critical reasoning altogether when looking at the description.

29. It follows from my conclusions that the balancing payment is US$12,671,497; being the figure put forward by FRG adjusted to take account of the point about capital expenditure supported by bank documents referred to at paragraph 19 above.

Declarations and orders

30. The basis of the account between the two joint venturers at trial was (as recorded at J[8]) that, post-termination, Mr Rogachev would own K24, K25 and LB30, while Mr Goryainov would own V177 and U26. That must be free of technical loans; payments having been made between the parties by means of these apparent, but not real, loans. A key example was Mr Rogachev's "loan" from one of his companies, Gerthing Ltd, to one of Mr Goryainov's, Shannon Finance Limited, in the sum of US$10.953m representing in fact Mr Rogachev's payment towards the cost of V177 – see J[18] & [37].

31. The joint list of issues for trial anticipated, under the heading "Common Ground" that declarations and orders would be made giving effect to the agreed basis of the account.

"*The net balancing payment is to be calculated on the basis that (i) C will obtain ownership of the K24, K25 and LB30 markets and (ii) D will obtain ownership of the V177 and U26 markets (and that declarations and appropriate consequential orders should be granted to this effect).*"

32. A footnote explained that it would be necessary to ensure that Mr Rogachev obtained sole ownership of K25 and that there was termination of the lease of K25 to Gazmarket LLC.

33. The draft order put forward for Mr Goryainov proposed declarations as to ownership and orders which, among other things, sought to tackle the issue of technical loans. Both were opposed.

34. I start with the question of declarations. Mr Shirley submitted that there should be no declarations as to ownership because they served no useful purpose. He also doubted their effectiveness given they concerned foreign property.

35. There should, in my judgment, be declarations as to ownership. That such declarations are resisted and their effectiveness questioned underlines, in my judgment, the reason they should be made. That is to set in stone the clear basis of the account between the parties. And meet the risk which exists in this case of later attempts to move the goalposts.

36. As discussed in argument, I consider however that the form of the declarations should be revised.

37. All the markets save for K25 are already owned by the correct parties or their companies or nominees. Steps do need, however, to be taken to give Mr Rogachev or a company controlled by him or a nominee full ownership of K25; such being held by Avest LLC, a company in which half of the shares are owned by a representative of Mr Goryainov.

38. This means that there should, I consider, be declarations of ownership as to all the markets save for K25. And those declarations need not, and should not, be expressed as referring to such ownership only in the future. As drafted currently, they state that the parties "shall become" the owners. But the declaration is really as to already existing ownership.

39. Further, the declarations should be revised to make plain that such ownership is in the parties or their companies or nominees, again properly to reflect the reality. The current draft refers to the parties becoming owners personally.

40. Finally, the position in relation to K25 means that it is best dealt with not by way of a declaration as to existing ownership, as Mr Rogachev does not yet have full ownership, but by way of a recital of the current position and an order that the parties execute such documents and take such steps as are necessary to give Mr Rogachev, or his companies or nominees, ownership of K25 or its holding company Avest. Indeed, to cater for the possibility that further documents or steps (not as yet appreciated as being needed) are necessary to give effect overall to the agreed basis of termination of the joint venture, I will make a general order that the parties are to execute such documents and take such steps as are necessary.

41. Turning to the orders proposed, there should be an order making clear there are to be no claims under the apparent loans made in respect of the markets; including the 64 identified in a schedule accompanying Mr Goryainov's draft order. A different proposal was made for Mr Rogachev, but only very late indeed. A draft assignment agreement which could be used for each of the technical loans was provided to Mr Goryainov's team only on the first day of the consequential hearing. Mr Shirley rightly described the document as a pro forma. It looked to be in the nature of a standard template. It was suggested that this was a better solution under Russian law.

42. However, I prefer the making of the order as a solution. There was not the proper opportunity to scrutinise and consider Mr Rogachev's proposal, coming as late as it did. The limited assessment which was possible revealed some potential problems. The template required the value of the rights being assigned to be set out, and for payment to be made in that value. That these are not real loans presents obvious challenges for dealing with them on this proposed basis. Another

problem is that this approach runs the risk of some of the very many technical loans having been overlooked and, no assignment agreement therefore having been entered into in relation to them, a party trying to enforce them as loans. Further, while it was suggested this was the best solution as a matter of Russian law, I had no evidence about Russian law.

43. The draft order proposed by Mr Goryainov, in restraining future claims, went well beyond claims under the loans. It sought to restrain any claim connected to the joint venture partnership or relating to the markets.

44. I understand the desire for such an order preventing any further litigation given how hotly contested and lengthy these proceedings have been. They started in 2018. And Mr Goryainov appears to have spent £8m in costs fighting them. But I have decided that the right exercise of discretion is not to make such a wide-ranging order. The order sought is in the nature of, or akin to, an anti-suit injunction. The grant of such injunctions needs to be considered carefully and that is best done on the basis of full information as to the foreign proceedings. A blanket ban of the sort proposed here allows no detailed consideration of any proposed or actual foreign proceedings. Despite their undoubted industry, Mr Akkouh and Mr Mellab were unable to show me any example of such a wide-ranging order being made on the determination of a commercial dispute.

45. I will, however, make an order preventing pursuit of one existing set of arbitral proceedings referred to in the draft order. That is a UNCITRAL arbitration commenced on 25 October 2018 before the freezing order was obtained in these proceedings. No steps have, it seems, been taken in the arbitration since. Mr

Shirley was unable to identify for me any proper basis for proceeding with the arbitration given the determination of the issues in these proceedings.

46. Returning to the issue of loans, Mr Goryainov's draft order also included an order for the execution of a debt forgiveness deed by Gerthing and Shannon putting an end to all obligations under that loan. While Mr Shirley objected to this, he had no alternative proposal to make for dealing with this major technical loan, saying only that he would have to take instructions. There should be such a consequential order. Such is desirable in preventing any further recourse to what the judgment made clear was a technical loan. Any recourse to it now as a loan would undermine very significantly the basis of the balancing payment.

47. Mr Goryainov's draft order also included an order for the execution of specific Russian documents to give Mr Rogachev sole ownership of K25 through Avest and effect a termination of the Gazmarket lease.

48. There was, as I understood it, no objection to the termination agreement. Or a related corporate consent and a power of attorney enabling someone on Mr Rogachev's side to execute the termination agreement for Avest; someone from Mr Goryainov's side doing so for Gazmarket. But the mechanism for passing ownership of Avest was the subject of dispute. And Mr Shirley also took issue, at least for a while, with an offer of a further power of attorney.

49. The proposed mechanism for passing ownership of Avest and therefore K25 to Mr Rogachev was a share withdrawal. That is a procedure which appears to be available under Russian law by which a share is given up, leaving the holder of the remaining share as the sole owner of the company. It was proposed for Mr Goryainov three weeks or so before the consequential hearing.

50. The different proposal for Mr Rogachev again came very late. The day before the hearing. Too late for considered agreement to be reached on it or arguments about it to be developed fully. It was a share purchase agreement. As well as being late, there was, again, an obvious potential problem. The intention was that the price for the share be stated as RUB 2m and that the agreement record such figure as being real value of the share. But the effect of my decisions in the main judgment is that K25, being Avest's asset, is worth US$10.2m, so that RUB 2m is almost certainly not the value of the share. A further problem is that the agreement also records that the seller has provided the buyer with all information about the financial and economic condition of the company. But that is not possible as Mr Rogachev, rather than anyone on Mr Goryainov's side, has been in control of K25.

51. At least without any Russian law evidence, Mr Shirley could not demonstrate any problem with the withdrawal document.

52. Given all that, I will order the making of the share withdrawal. If there is later any issue with the effectiveness of that, then Mr Rogachev can apply back to court relying on my general order that Mr Goryainov is to take any further steps necessary to give Mr Rogachev, or his companies or nominees, ownership of Avest or K25.

53. Mr Shirley suggested instead that I make an order for a transfer on terms to be agreed and that, absent agreement, there be a further hearing to resolve the differences. But that would be to add delay and cost and is unjustified in circumstances where there has already been plenty of time to make this proposal and reach agreement on it and no problem has been demonstrated with the

withdrawal which was proposed in good time. Further, Mr Rogachev is not shut out from asking for further or different documents if some problem with the withdrawal does surface. He can instead come back under the permission to apply as I have said.

54. The further power of attorney offered by Mr Goryainov was one under which someone on Mr Rogachev's side could later execute again documents on behalf of Gazmarket in case such became necessary. It was hard to see that being objectionable. But it was, at least for a while. As I understood it though, on reflection Mr Shirley's final position was that such power of attorney should be granted, at least if payment to Mr Goryainov of the balancing payment might come before the K25 transactions had been registered. I will therefore include the further power of attorney in the documents which are to be given or made under my order.

55. I will also order, as asked by Mr Goryainov, the making of a document terminating the shareholder agreement relating to the joint venture company, Agro Market Ltd. And the related corporate consents. There was no reasoned objection to this and no alternative proposal.

Payment of the balancing sum

56. As to the payment to Mr Goryainov of the balancing sum, there seemed, in the end, to be three issues to resolve. One, the time for payment into court of the balancing sum. Two, whether payment out of court to Mr Goryainov should await registration of the K25 transaction documents. Three, whether payment out should depend upon a further application by Mr Goryainov to the court.

57. I will take those issues in turn.

58. Mr Rogachev asks for an extension of time to pay the balancing sum into court until 31 January 2025. He relies on a witness statement of his solicitor which sets out at [21] his instructions as to some apparent obstacles to making payment.

"*I am instructed that his assets are held in the form of various instruments which will need to be liquidated and transferred between different financial institutions in order to reach a cash account, from which a payment into Court can be made. Such operations will give rise to KYC enquiries which, as the Claimant is a Russian citizen, are now invariably protracted. In addition, documents may need to be obtained from sources in the UK, Switzerland and/or Russia in response to such enquiries which, due to the consecutive holiday periods in these countries, may give rise to delays.*"

59. The solicitor does not state that payment cannot be made in the usual 14 days, there is a striking lack of detail in - and no supporting evidence at all for - these instructions, and Mr Rogachev's own evidence at trial was that he was a billionaire. Further, it has been known since the main judgment that a substantial sum would be required and, from the end of October, that that sum was, subject to the currency argument, in the region of US$12m. I consider there is therefore insufficient justification for extending time for payment to the end of January 2025. Making some allowance for the holiday period however, I will order payment into court of the balancing sum by 10 January 2025.

60. Payment of the sum out of court to Mr Goryainov should not, in my judgment, await registration of the K25 transaction documents. Rather, such payment should come once the ordered documents have been passed to Mr Rogachev's side. To

do otherwise would be to make payment conditional on steps which depend, or may depend, on Mr Rogachev. And which may involve significant delay. I was told registration with the Russian authorities may take weeks. It would not be right to put it in Mr Rogachev's power to delay the money going to Mr Goryainov, or for such to depend on state registration in relation to which no problem is currently foreseen and which Mr Rogachev may also be able to delay. Certainly on the simple sale of property here, money passes on delivery of the documents and does not await registration of the transaction at HM Land Registry. That may be an appropriate analogy as Mr Shirley told me the same may be true in Russia. Mr Rogachev will have the protection of the obligation on Mr Goryainov in my order to do what is necessary to give ownership of Avest or K25 to Mr Rogachev. And will have no incentive to do other than complete the registration and any other steps required of him. Further, his control of K25 has not so far been dependent on registration or anything else. He has continued, and will continue, to enjoy the fruits of K25 in the meantime.

61. I do not consider that a further application should be required of Mr Goryainov in order to take the balancing payment out of court. His solicitors' confirmation that he has delivered the documents should be enough, with a short window before the payment out of the funds following such confirmation to give time for Mr Rogachev to make any application seeking to challenge payment out. In this regard, the steps to be taken by Mr Goryainov under the order before payment is received are simple ones suitable for certification and into which no inquiry is likely to be necessary. An application would lead to some delay and give the opportunity to Mr Rogachev to create significant delay in Mr Goryainov actually receiving the payment.

Costs

62. In his oral submissions, Mr Shirley said this was a case in which, for a very significant proportion of the costs, the right order was no order as to costs. He relied on the decision of Park J in *Sahota v Singh* [2006] EWHC 344 (Ch). *Sahota* was a partnership dissolution case in which "*not much of real financial magnitude turned on the contentious issues upon which large costs have been incurred*" [1]. Park J applied the principle from the Victorian case of *Hamer v Giles* (1879) 11 Ch D 942 that where the assistance of the court is required for the winding up of a partnership's affairs, the costs are ordinarily borne out of the partnership's assets before the final division of them between the partners. He determined that as to 40 percent of the costs of the proceedings there should be no order as to costs. Mr Shirley submitted that a similar percentage, being 30 to 40 percent, of the costs of these proceedings should be regarded as within the same principle so that no order for costs should be made as to that proportion.

63. This submission came as something of a surprise. The skeleton argument for Mr Rogachev for the consequential hearing did not treat this as a *Sahota* case. And I do not see it as one. It is true that the dispute has involved unwinding a joint venture partnership, but it has been major commercial litigation with very significant sums at stake and which has been won very clearly by Mr Goryainov and lost by Mr Rogachev. The overall level of difference between the two sides at trial was over US$40m. Mr Rogachev was seeking a balancing payment of US$28m, with Mr Goryainov saying that payment should be in the other direction in a sum of around US$16m. The result is a payment to Mr Goryainov of US$12m. Everything, or almost everything, this court was asked to do was

contentious. The case started with a worldwide freezing order which was subsequently discharged with indemnity costs. While the overall questions at trial were ones which would need some resolution for an unwinding of the partnership (what had each party put in, and got out, and what were the values of the assets), unlike in *Sahota* all those questions were highly contentious and represented very valuable disputes. By way of examples, one, the level of Mr Goryainov's investments was said by Mr Rogachev to be over US$25m less than claimed. That included an allegation that the cost of V177 had been overstated by around US$10m. Two, as to income, Mr Rogachev suggested drawings from his own markets were in the region of US$3m when the true figure was in excess of US$20m. And, three, as to valuation, Mr Rogachev contended for a combined value of U26 and V177 of more than US$25m in excess of their actual value.

64. Unlike in many partnership dissolutions, it can easily be seen in this case which party is the winner and which is the loser, and the arguments were ones of very significant financial magnitude. It would not be just, in my judgment, Mr Rogachev having lost this valuable contest fought on many fronts, for the costs of the exercise to be treated as costs which should lie where they fall because some such exercise was required in any event, rather than the destination of costs being governed by the contrasting levels of success and failure. That is particularly so where there has been significant unreasonable conduct on Mr Rogachev's side as I will explain later.

65. All those circumstances of this case mean, in my judgment and as a matter of discretion, either that the approach in *Hamer v Giles* is not the right starting point

in this case, or that it is right to depart from that starting point and head instead towards an order based on the relative success of the parties.

66. This is therefore a case where the whole of the costs should be approached as dictated by CPR 44.2, that is by identifying the winner and giving weight to the general rule that the winner should receive their costs, but then asking whether the court should make a different order. Overall, the discretion as to costs should be exercised by doing what justice requires. Where the winner has nevertheless lost on some issues, the summary of principles given by Mann J in *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583(Ch) provides valuable assistance. That summary includes the following points at [12]:

"(i) The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs.

'There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at paragraph 35: the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues'. (Gloster J in Kidsons v Lloyds Underwriters [2007] EWHC 2699 (Comm)).

(ii) The reasonableness of taking a failed point can be taken into account (Antonelli v Allen The Times 8th December 2000 per Neuberger J).

(iii) The extra costs associated with the failed points should be considered (Antonelli).

(iv) One still has to stand back and look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs. (Antonelli).

(v) The conduct of the parties, both before and during the proceedings, is capable of being relevant (CPR 44.3(5))."

67. Here, there is no difficulty identifying the winner, as I have said. It is Mr Goryainov. A payment in the region of US$12m is coming to him. He won on virtually all the valuable issues; reflected in that bottom line result in litigation where the competing cases were Mr Rogachev being entitled to around US$28m at one end and, at the other, being indebted to Mr Goryainov to the tune of around US$16m.

68. The general rule would therefore see Mr Rogachev being ordered to pay Mr Goryainov's costs of the proceedings. The question becomes whether the circumstances justify a different order.

69. Mr Shirley highlighted issues on which Mr Rogachev succeeded in asking for an order that only a proportion of Mr Goryainov's costs be paid by Mr Rogachev. Mr Rogachev's successes were, however, modest; reflected in Mr Shirley's submission that the relevant proportion was 70 or 80 percent. He won on the following issues: (1) Whether the Aminievskoye payment of US$2.995m was returned. (2) Establishing some cash capital expenditure on his markets. (3) Some taking into account of his expenses described as "settlement of issues and claims". (4) The control of V177 and U26 up to November 2015.

70. Mr Shirley was also able to point to some issues which were conceded by Mr Goryainov in the run up to or at the start of trial. Those included a dispute about an investment referred to as the Kolomna payment which was in the sum of US$500,000.

71. But that a party has not succeeded on every point is not of itself, a reason for depriving that party of part of its costs. It is just a reality of complex commercial litigation that does not, without more, justify a different order.

72. It cannot be said that these few points on which Mr Goryainov failed were unreasonably taken. The points no doubt accounted for some time and cost, but only something of a bucket in the sizeable pool of evidence and submissions that this trial represented. And they had a limited financial impact in that the overall end result was one very much at Mr Goryainov's end of the scale of possible results.

73. Mr Rogachev's success on the expenses issues was partial only. Around half the claimed cash capital expenditure was not allowed. And only a small fraction of the sums sought under the description "settlement of issues and claims" was brought into the account. As appears from the main judgment at J[82]-[83], whereas some US$3.1m was sought on that basis, only a few hundred thousand US$ were allowed. The control issue was of very little financial moment. At the time of the main judgment, it was not clear to me there was any value in it for Mr Goryainov (J[88]). As it turned out, his apparent failure on the issue slightly increased the balancing payment to be made to him.

74. Standing back, it would be unjust, given those considerations, to deprive Mr Goryainov of part of his costs. That is certainly the case once the conduct on Mr

Rogachev's side, which I will come to next in connection with the basis of assessment, is put into the equation. There will be a simple order that Mr Rogachev pay Mr Goryainov's costs of the proceedings.

75. Mr Akkouh asked that those costs be assessed on the indemnity basis. The importance of the basis of assessment in this case may be in where the burden on the question of unreasonableness lies; the submissions on the level of costs before me focussing on reasonableness rather than proportionality.

76. Though such orders are asked for frequently, the court should be somewhat slow to make orders for indemnity costs. The indemnity basis is not the normal basis of assessment. Such orders are, however, appropriate where the paying party has gone beyond the ordinary and reasonable conduct of proceedings so as to take the case out of the norm in a way which justifies this exceptional basis of assessment.

77. A resounding defeat does not normally justify an order for indemnity costs. But, as appears from the helpful list of factors in *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm), the unsuccessful pursuit of serious allegations and the courting of publicity may do so.

78. I consider that the conduct on Mr Rogachev's side in this case does justify an order that costs be assessed on the indemnity basis. The following factors seem to me the most significant.

79. First, the allegation that Mr Goryainov had in truth expended only around US$11m on V177, not the stated US$21m, was, in substance, an accusation of fraud. It is unrealistic to suggest that the inclusion of expenses in the Register back in 2015 could be down to mistaken recollection. That it was really an

allegation of fraud was reflected in my recording that Mr Goryainov had told me the truth on this key issue (J[48]). It was a question on which a great deal of time was spent at trial and it accounted for a lot of evidence, hence its treatment in the main judgment. It failed. The allegation was made despite one of Mr Rogachev's own witnesses (Mr Romanov) saying the stated cost of US$21m was the true cost. It was also made in circumstances where, as I found, the price had been checked for Mr Rogachev with the vendor. Mr Rogachev was even prepared to allege in his oral evidence that Mr Goryainov had paid for the vendor's statement as to the true price forming part of the evidence. And an explanation offered for Mr Romanov's evidence in closing was that Mr Goryainov had hoodwinked him as to the true cost.

80. This was, then, a serious and central allegation which failed and which was pursued despite evidence against it on Mr Rogachev's own side. I would add that it was not the only serious allegation made. In relation to the money stuck in Rontek, Mr Rogachev told me "*we have all basis to assume that this amount was stolen*". Mr Rogachev's legal team wisely did not pursue that in closing. Yet another serious allegation was dropped in opening the trial. That was that Mr Goryainov's father had taken up to US$1m in cash; that account coming in Mr Vidyayev's statement at [25].

81. Second, as I found, Mr Rogachev concealed undeclared cash income including by not disclosing rent rolls which existed. Rent rolls are documents key to running a market which show the expected income unit-by-unit and month-by-month. To be useful, they track actual income closely. Rent rolls were disclosed for Mr Rogachev's markets for 2016 and 2017 only. Yet he told me they existed, as one

would expect, for the entire period to 2023. Given that, and the fact that the rent rolls which had been disclosed pointed to an income far in excess of that shown in the accounting records, I found that much of the income had been undeclared cash and that that was the explanation for the failure to disclose later rent rolls. Mr Shirley said that he had read my judgment at J[74] in a different way which did not involve such findings, but I was unable to follow that different suggested reading.

82. This was seriously unreasonable conduct and one which had a very significant effect on costs. It led to FRG carrying out the expert exercise of using market rates, arrived at by adjusting comparables, as a proxy for actual revenue. As appears from J[75], that was not an easy exercise. It was an exercise which would otherwise have been unnecessary. There should, instead, have been the simple process of totting up the sums received in the accounting records supported by rent rolls.

83. Third, a worldwide freezing order was wrongly obtained. And then waved around Russia in an attempt to damage Mr Goryainov. The freezing order application relied on a proposed sale of V177 to Lenta. On discharging the order with indemnity costs for a failure to make full and frank disclosure, Morris J said at [92] and [93], "*in my judgment the statements in the affidavit and skeleton argument that the Defendant had been negotiating "clandestinely", that the sale to Lenta had been discovered "by chance" and that the Claimant was "unaware of a potentially legitimate explanation" were misleading and did not represent a fair presentation of the facts as they were, or ought to have been known, to the Claimant. … even if the non-disclosures and misrepresentations could not be*

characterised as "deliberate", they showed at the least a high degree of lack of care, and in some aspects, recklessness." Mr Rogachev was ordered to provide a list of persons and organisations to whom the freezing order had been sent for Mr Rogachev. It appeared to include most major Russian banks as well as the Russian financial press. Unsurprisingly, Mr Goryainov's evidence was that it did serious damage to his reputation. I recognise that at least the wrongful obtaining of the order has already resulted in a costs consequence in that it was discharged with indemnity costs. But that does not mean I am required to ignore it when considering the appropriate order following trial. It is part of an overall picture. This case began with this seriously unreasonable conduct. And further unreasonable conduct followed, as I have said. Indemnity costs are justified as a result.

84. Mr Shirley tried to meet these conduct factors by pointing to failures on Mr Goryainov's side. But those are in no way comparable. Perhaps the most promising of them was incomplete disclosure which led to an order of Master Pester of 9 November 2023, on application being made by Mr Rogachev, and resulted in thousands of further documents being made available. But any power in that point was rather neutralised by the fact that Master Pester also required further disclosure from Mr Rogachev on a cross-application made for Mr Goryainov. That, similarly, resulted in thousands more documents appearing.

85. I would add that the appropriateness of an order for indemnity costs was underlined by the approach taken to consequential matters. That at least bordered on unreasonable conduct. In that regard, one, the currency argument was a piece of opportunism. Two, the finding that there had been concealment of undeclared

cash including by a failure to disclose the rent rolls gave rise to a very strange brand of evidence. It sought to challenge that finding. And did so in an unusual way. There was a witness statement by a solicitor stating that another solicitor (referred to in the witness statement as "the Unidentified Solicitor") had told her that Mr Rogachev had subsequently explained he was not referring in his oral evidence to rent rolls at all but to a spreadsheet forming part of an expert report. That explanation was not one suggested at trial and anyway looks most unlikely having reread the transcript of the oral evidence. Three, instead of agreeing the balancing payment subject to the currency point following the exchange of expert evidence which showed the parties to be just a few thousand dollars apart, a further expert appendix was put forward on the Friday before the consequential hearing in which Mr Rogachev's expert accepted FRG's figures for those parts of the calculation where such figures favoured Mr Rogachev but relied on his own figures for those elements where it was his figures which were more favourable to his client. A situation was therefore engineered in which only points on which Mr Rogachev may gain an advantage would be scrutinised. Four, the documents which Mr Rogachev said should be used to effect the winding up of the partnership were not proffered until very late indeed. Only just before or during the consequential hearing. It meant there was inadequate time for considered agreement of them to be explored or arguments about them to be fully developed. There was absolutely no reason for them to come so late. It was known by the time of trial at the latest that K25 was one of the markets to be owned by Mr Rogachev and that all the markets would need to be held free of technical loans. Further, the proffered documents seemed to have no regard at all to the drafts suggested for Mr Goryainov weeks before. Some were so similar to those

drafts that, in the end and on examining them during the hearing, neither Mr Akkouh nor Mr Shirley could discern any significant difference. Mr Shirley said he had no explanation as to why Mr Rogachev proffered his own versions of these documents at all.

86. I turn to the question of interest on costs. It was common ground that there should be interest on costs pursuant to CPR 44.2(6)(g) for the period between those costs being paid and when any Judgments Act interest begins to run. The disagreement was as to the rate.

87. Mr Akkouh's submission was that the rate should be 8.79 percent per annum, being the average rate for 1-3 year loans from November 2018 to March 2022 (since when no published rate is available) according to the Central Bank of the Russian Federation. That is put forward as the rate at which someone in Mr Goryainov's position could have borrowed money in US$.

88. I consider that risks being rather too specific, at least in the absence of evidence that Mr Goryainov in fact borrowed at that rate. The assessment as to the proper rate of interest is a broad one to arrive at a reasonable rate. The danger of that specificity became apparent during the hearing. It emerged that Mr Goryainov had paid at least the costs incurred up to 2022 in RUB. He had not therefore in fact borrowed US$ in Russia in the period. Further, the rate anyway ended in 2022.

89. In my judgment, a reasonable rate is 2 percent above the US Prime rate. In circumstances where Mr Goryainov was at least invoiced in US$, Mr Shirley put forward the US Prime rate as the relevant commercial rate (not wishing, understandably, to argue for a rate related to the rouble – that would almost

certainly be higher). However, I consider 2 percent should be added to that rate. I would not expect a Russian business individual to be treated by US banks at all in the same way as one of their most creditworthy customers such as a major US company.

90. I find support for such a rate in the very helpful recent discussion by Foxton J in *Lonestar Communications Corporation LLC v Kaye* [2023] EWHC 732 (Comm) of the use of the US Prime rate in awarding interest. Having reviewed some of the previous decisions and set out why US Prime should be used as the default rate where the award is in USD, he went on to say this at [16]:

"*As its name indicates, US Prime is the rate offered by US banks to their most creditworthy business customers. In these circumstances, it would not be appropriate to have a default rule that there will always be an uplift over and above US Prime in an interest award. In some cases, even without evidence, it will be obvious from the general characteristics of the claimant that it would have to pay a higher rate to borrow US$ than a bank's most creditworthy customers. In such cases, the court may well be persuaded to order interest at US Prime plus 1% or US Prime plus 2% for certain types of claimant. Higher uplifts than that are likely to require evidence to justify them*."

91. It may be that, at least with evidence, a higher uplift might have been justified. But without such evidence, my broad brush assessment is that 2 percent above US Prime is a reasonable rate. I gain confidence that is not too high a rate from Mr Rogachev's own demands made of Mr Goryainov before proceedings. Those regarded 15 percent as an appropriate rate of interest to compensate Mr Rogachev for being kept out of US$.

92. The draft orders for both sides included a provision that the Judgments Act rate of interest apply from 4 months after the date of my order. But Mr Shirley sought to distance Mr Rogachev from that in submissions, casting doubt on whether it would be the appropriate rate without an express order. I will make an order in the form which both sides had asked for. It was the common approach, at least according to the draft orders. It will avoid the need to keep an eye on the US Prime rate. And is not an inappropriate rate even judged by reference to the US Prime rate. The evidence was that the current US Prime rate at the time of the hearing was 7.75 percent. Once 2 percent is added, as I have ordered, that is higher than the Judgments Act rate of 8 percent. So such an order may even end up benefiting Mr Rogachev. Further, from 2022 when Mr Goryainov changed lawyers, the costs have been billed and paid in pounds not dollars. For all those reasons, I decline to exercise any power in s.44A of the Administration of Justice Act 1970 to order a rate different than 8 percent, and will, for clarity, make an express order that 8 percent will be the rate.

93. Before moving away from the topic of interest, I should deal with an argument of Mr Shirley for Mr Rogachev to have the benefit of interest, not on costs, but in relation to the elements in the overall calculation featuring in Register A. The argument seemed to be that if regard were had only to those elements, leaving all the others out of account, then a net sum would be due to Mr Rogachev and, as interest on that could be calculated readily, Mr Rogachev should be awarded interest, which would then reduce the overall balancing payment.

94. I do not accept that argument. No basis or power for awarding interest to Mr Rogachev as the paying party was identified. And it would anyway be wrong to

act on any such basis or power as there is no principled basis for leaving all the other elements out of account. Doing so would produce an unjust result, with one net sum said to be due to Mr Rogachev bearing interest but the sums due to Mr Goryainov not doing so. I should record that Mr Goryainov does not seek pre-judgment interest on the sums making up the balancing payment. There should, however, be interest on that sum if it is not paid into court on time. It being a US$ sum and for the same reasons as given in relation to interest on costs, I will order interest in the event of late payment at the US Prime rate plus 2 percent.

95. It remains to consider the question of a payment on account of costs. Again, it was common ground that a payment should be ordered pursuant to CPR 44.2(8). The issue was what is a reasonable sum on account. However, there was not an enormous distance between the parties' submissions on that. Mr Shirley argued that a reasonable payment on account would be £4m. The figure ultimately put forward for Mr Goryainov, it having been appreciated that Mr Rogachev may now be able to argue on assessment that the relevant currency of costs incurred is RUB, was around £4.5m. But that relied on adding interest to costs, and doing so at the rate of 8.79 per cent per annum, which I have not adopted. That has led me to conclude that £4m is a reasonable sum.

96. As to timing of the payment on account, Mr Rogachev sought an extension of time to 31 January 2025 relying on the same evidence as I have already referred to in relation to the timing of the balancing payment. For like reasons as already given on that issue, I will order that payment must be made by 10 January 2025.

Other issues

97. The consequential hearing was to be the occasion for any application for permission to appeal the decisions in my main judgment. But no such application was made. It had also been suggested for Mr Rogachev that £100,000 held as fortification of his undertaking in damages given when obtaining the worldwide freezing order should be released to Mr Rogachev. But that was not pressed at the hearing.

98. My decisions set out above therefore deal with all the consequential matters in issue. I invite counsel to agree a final form of order which reflects those decisions.