Neutral Citation Number: [2023] EWHC 79 (Ch)

Case No: BL-2020-001416

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

Rolls Building
Fetter Lane
London, EC4A 1NL

25 January 2023

Before :

MRS JUSTICE BACON

- -

Between :

WWRT	**Claimant**
- and -	
(1) SERHIY TYSHCHENKO	
(2) OLENA TYSHCHENKO	**Defendants**

- -
- -

Andrew Ayres KC and **James Mitchell** (instructed by **Rosling King LLP**) for the **Claimant**
The **Defendants** appeared in person

Hearing dates: 20–21 December 2022

- -

Approved Judgment

This judgment was handed down remotely at 9 a.m. on 25 January 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mrs Justice Bacon:

Introduction

1. This is the hearing of four applications by the defendants (**Mr and Mrs Tyshchenko**) which seek to strike out or stay the claim, or otherwise revoke the worldwide freezing order imposed on the defendants. The claimant (**WWRT**) contends that the applications are abusive, in that they repeat arguments already rejected by this court at earlier stages of the proceedings; and that the applications should in any event be dismissed as being totally without merit.

2. The applications are brought in the context of a fraud claim brought by WWRT in relation to loans made by the Ukrainian bank JSC Fortuna Bank (**the bank**) on various dates during the years 2010–2014. WWRT's case is that the borrowing companies were all connected with one or both of the defendants; that the defendants directed, caused and/or procured the borrowing companies to take out the loans with the bank; that the borrowers did not engage in any substantial commercial activity and had no intention of repaying the loans; and that the defendants were beneficiaries of the alleged fraudulent scheme. The claim is brought under Article 1166 of the Civil Code of Ukraine, and it is common ground that the substance of that claim is governed by Ukrainian law.

3. A worldwide freezing order was initially granted at a hearing in September 2020 without notice to the defendants: [2020] EWHC 2409 (Ch) (**the September 2020 judgment**). Both defendants were then served in this jurisdiction. The order was continued following a hearing in March 2021, with judgment handed down in April 2021: [2021] EWHC 939 (Ch) (**the April 2021 judgment**).

4. Numerous further applications have been brought since then by one or both of the defendants, as set out in more detail later in this judgment. The present applications are as follows:

    i) Mr Tyshchenko's application dated 19 May 2022 (**the May application**) for a stay of proceedings and strike out of the claim, on the basis of judgments of the Ukrainian courts in related proceedings, and complaints about the authenticity of the evidence relied upon by WWRT.

    ii) Parts of Mr Tyshchenko's application dated 29 June 2022 (**the June application**) for revocation of the worldwide freezing order and an order that the court refuse jurisdiction, on the basis of allegedly false information provided to the court and inconsistency with other judgments.

    iii) Mrs Tyshchenko's application dated 8 July 2022 (**the July application**) for a stay or strike out of the proceedings on a series of grounds, mainly based on Ukrainian law and decisions of the Ukrainian courts.

    iv) An application by both defendants dated 22 October 2022 (**the October application**) for a stay or strike out of the proceedings on the grounds of claims brought by the Deposit Guarantee Fund of Ukraine (**DGF**) in the Kyiv Commercial Court, and criminal proceedings initially opened in Ukraine but then closed in November 2019.

5. On 29 July 2022, pursuant to an order dated 1 July 2022, the May and June applications were listed to be heard together at this hearing. The 1 July order also provided for any application by Mrs Tyshchenko on essentially the same grounds as the May application to be listed for the same hearing, if issued and served by 8 July 2022.

6. The October application was initially listed to be heard in February 2023, but was later directed to be addressed at this hearing in so far as possible, provided that if there was a new argument which WWRT was unable to address, that would be left over for the February hearing. In the event, WWRT has not identified any argument in that application which it is unable to address, and I will therefore consider below the issues in that application alongside the other applications.

7. On 14 December 2022, less than a week before the start of the present hearing, Mr Tyshchenko applied to adjourn this hearing on the grounds of (in particular) a further judgment which had been handed down by the Kyiv Commercial Court on 28 November 2022, which he said provided a further basis to strike out WWRT's claim in these proceedings. That application could not be accepted by the court, since it was filed in breach of a limited Civil Restraint Order imposed on Mr Tyshchenko on 12 December 2022. The following day, therefore, the adjournment application was refiled by Mrs Tyshchenko. On 16 December directions were given that the adjournment application would be heard at the start of the hearing on 20 December, and that if it was refused then the hearing would proceed as listed.

8. On 20 December 2022 I refused the adjournment application and recorded that it was totally without merit, for reasons given in an *ex tempore* ruling on that date. Mrs Tyshchenko then asked that the hearing of the four listed applications should be adjourned to the following day; that request was refused and the hearing of the applications therefore proceeded as per the directions given on 16 December.

9. Mrs Tyshchenko drafted the defendants' skeleton argument for the hearing and made submissions at the hearing on behalf of both defendants. Mr Tyshchenko, who speaks only limited English, was present at the hearing and confirmed that he endorsed Mrs Tyshchenko's submissions and had nothing to add to those. As at previous hearings, WWRT was represented by Mr Ayres QC and Mr Mitchell.

Factual background

10. I have described at §2 above the essence of WWRT's fraud claim against the defendants, relating to loans granted by JSC Fortuna Bank. That claim is summarised in similar terms in the September 2020 and April 2021 judgments granting and continuing the freezing order (respectively).

11. In 2017 the bank was declared insolvent, and came under the control of the DGF. The DGF auctioned tranches of unpaid loans owed to the bank, and as part of that process the loans that are the subject of the present proceedings were assigned to a Ukrainian company now called Star Investment One LLC (**Star**) in February 2019 (**the First Assignment**).

12. There are disputed versions of the translation of that agreement. WWRT's translation of the key clause, clause 1.1, reads:

> "1. Subject matter of the Agreement
>
> 1.1 In accordance with this Agreement in the order and on conditions agreed by this Agreement, Seller transfers into the ownership of the Buyer, and the Buyer takes ownership of the proprietary rights, which have accrued and/or may accrue in future and which include:
>
> – Right of claim to borrowers, property guarantors and financial guarantors … which accrued due to signed agreements … and/or on other grounds provided in annex no 1 to this Agreement (hereinafter – Rights of claim);
>
> …
> – other rights, which are connected to or arise out of the Rights of claim."

13. Mr and Mrs Tyshchenko's translation of clause 1.1 reads:

> "1.1 Hereunder, on terms and conditions specified herein, the Seller transfers into ownership, and the Buyer accepts into ownership the property rights occurred and/or to be occurred in future and which include:
>
> – receivables from debtors, property surety providers and financial surety providers … occurred under the Agreements concluded … and/or other grounds specified in the Annex No 1 hereto (hereinafter referred to as the Legal claim);
>
> …
> – other rights related or arising out of the Legal claims."

14. For present purposes I do not consider that anything turns on the specific version of the translation of this clause.

15. On 23 March 2020 Star sold its rights under the First Assignment to WWRT (**the Second Assignment**). That is the basis on which WWRT commenced the present proceedings.

16. As set out in the September 2020 judgment at §§11–12, the First Assignment, from the DGF to Star, is governed by Ukrainian law, whereas the Second Assignment, from Star to WWRT, is governed by English law.

Procedural background

17. The procedural background leading up to the present hearing is somewhat complex, but important for the purposes of (in particular) the submissions of WWRT that almost all of the arguments advanced in the present applications should be dismissed as being an abuse of process, on the ground that they either were advanced at previous hearings, or could and should have been advanced at those hearings.

18. I will therefore summarise the relevant aspects of the present proceedings. There are also ongoing domestic bankruptcy proceedings in relation to both defendants; those bankruptcy proceedings are not, however, relevant to these applications.

19. Following the grant of the initial freezing injunction at the without notice hearing on 4 September 2020, the defendants were served in this jurisdiction and were initially both represented by solicitors and counsel.

20. On 30 October 2020 the defendants made an application for extensions of time and directions, which became an application for a trial of preliminary issues of Ukrainian law. That application was rejected by Meade J at a hearing on 3 December 2020: [2020] EWHC 3584 (Ch). He gave directions for the continuation of the injunction and for the defendants' proposed application to contest the jurisdiction of the court.

21. Mr Tyshchenko then instructed a new solicitor and counsel team, and applied to challenge the jurisdiction of the court and discharge the freezing order. Mrs Tyshchenko continued as a litigant in person, and opposed the continuation of the freezing order but did not challenge the court's jurisdiction.

22. These issues, together with WWRT's application to continue the freezing order, were addressed at a hearing on 10–12 March 2021. Following that hearing, for the reasons given in the April 2021 judgment, the jurisdiction application was dismissed, the freezing orders were continued, and orders were made for the defendants to be cross-examined on their assets. Mr Tyshchenko's second set of solicitors then came off the record and Mr Tyshchenko has since then also acted as a litigant in person.

23. In May 2021 Mr Tyshchenko applied for a stay of these proceedings pending the adjudication of ongoing proceedings in Ukraine. A month later, he applied for my recusal. Both applications were dismissed at a hearing on 6 July 2021: [2021] EWHC 2129 (Ch) (**the July 2021 judgment**). The reasons for dismissing the stay application included the conclusion that the application was an abuse of process in so far as it related to Ukrainian proceedings commenced in October and December 2020, since those proceedings were commenced before the March 2021 hearing, were referred to in the April 2021 judgment, and therefore could and should have been relied upon by Mr Tyshchenko at that hearing to make the arguments raised in the stay application.

24. Mr Tyshchenko applied to the Court of Appeal for permission to appeal in relation to the July 2021 judgment and (out of time) the April 2021 judgment. Both applications were dismissed by the Court of Appeal on 15 September 2021.

25. Mrs Tyshchenko was cross-examined on her assets at a hearing on 16–17 September 2021. Mr Tyshchenko claimed that he was unable to attend to be cross-examined due to a positive Covid-19 test; his cross-examination was therefore relisted for 17 February 2022. Mr Tyshchenko then failed to attend the February hearing, claiming that he had again tested positive for Covid-19 and was unable to travel to the UK. His cross-examination was therefore adjourned for a second time, to May 2022.

26. Meanwhile, Mr Tyshchenko applied for the fortification of WWRT's cross-undertaking in damages, and sought a stay of the proceedings pending fortification. Those applications were listed to be heard alongside the adjourned cross-examination hearing.

27. The adjourned hearing was listed to commence on 19 May 2022. Mr Tyshchenko again failed to attend, this time claiming that he was unable to travel to the UK due to the war in Ukraine. WWRT, however, provided evidence that Mr Tyshchenko had been at the family home in the UK during April 2022. In those circumstances, and absent any

evidence establishing that Mr Tyshchenko was in Ukraine and unable to travel to the UK, the fortification application was heard (and dismissed) in his absence, and a bench warrant was issued for Mr Tyshchenko's arrest.

28. Mr Tyshchenko then filed the May and June applications. On 29 June 2022 Mr Tyshchenko travelled to the UK, where he was arrested and brought before the court. His cross-examination then took place on 30 June and 1 July 2022, at the conclusion of which directions were given (as noted above) for the hearing of the May and June applications, as well as Mrs Tyshchenko's proposed application (if filed in short order).

29. Mrs Tyshchenko's July application was then duly filed, followed by the October application brought by both defendants. In July 2022 Mr Tyshchenko filed a further application seeking my recusal.

30. On 21 November 2022 the DGF applied to join these proceedings, and initially sought to participate in this hearing. At a hearing on 25 November 2022, however, the DGF withdrew its request to participate in this hearing, and agreed that its joinder application should be adjourned to the CCMC which is now listed for 19 June 2023. At the November hearing Mrs Tyshchenko also made submissions regarding the scope of the October application, which led to my direction that that application should be addressed in the present hearing so far as possible.

31. Mr Tyshchenko's second recusal application was dismissed on 12 December 2022. On the same date a limited Civil Restraint Order was made against him. I have described at §§7–8 above the unsuccessful applications thereafter by both defendants to adjourn the present hearing.

Evidence before the court

Factual evidence

32. The defendants rely on four witness statements in support of their applications: witness statements dated 18 May and 27 June 2022 from Mr Tyshchenko, and witness statements dated 7 July and 4 November 2022 from Mrs Tyshchenko.

33. In response, WWRT relies on two witness statements dated 30 September and 22 November 2022 from Ms Gutovska, a director and indirect shareholder of WWRT, and a witness statement dated 29 September 2022 from Ms Hannah Sharp, a partner in the firm of Rosling King, solicitors for the Claimant.

34. Mr Ayres questioned the admissibility of Mr Tyshchenko's witness statements, noting that they are drafted in English (and not in Ukrainian with an English translation) despite Mr Tyshchenko's confirmation that he speaks very little English, his native language being Ukrainian. That is, as Mr Ayres pointed out, a breach of CPR PD 32 §§18.1 and 19.1(8), which require a witness statement to be drafted in the witness's own language.

35. For the purposes of the applications at this hearing, I do not on that ground exclude the evidence of Mr Tyshchenko in its entirety. The reality is that the applications are all in substance made on behalf of both defendants, who have the same interests in obtaining the stay and strike out of the claims against them. Given Mr Tyshchenko's limited command of English, Mrs Tyshchenko candidly accepted at the hearing that she is

effectively conducting the litigation on behalf of both of them, and has been responsible for drafting the documents that are filed. Moreover, as regards the position taken in the evidence, nothing of any substance turns on the specific factual position of Mr Tyshchenko.

36. In any future applications, however, if the defendants intend to rely on any evidence filed by Mr Tyshchenko, the court will expect the provisions of PD 32 to be fully complied with, including the provisions regarding the language in which the witness statement is drafted and signed.

37. The more serious problem with the defendants' witness statements, for present purposes, is that all they contain repeated assertions of points of Ukrainian law, which is a matter for expert evidence. While Mrs Tyshchenko is a lawyer qualified in Ukrainian law, that does not entitle her to give opinion evidence on matters of Ukrainian law in these proceedings. I do not, therefore, place any weight on the evidence of Ukrainian law set out in the witness statements of either of the defendants.

Expert evidence of Ukrainian law

38. The defendants rely on the second report of Professor Sergiy Berveno, whose first report was before me at the March 2021 hearing. In response, WWRT relies on the fifth report of Vadim Tsiura, whose first and second reports were before me at the same hearing.

39. Complaints have been made on both sides about the manner in which the reports were prepared. In relation to Prof Berveno's evidence, his first report for the March 2021 hearing was written in Ukrainian, with an English translation provided for the court. In similar vein, the second report produced for this hearing states that it was written in Ukrainian and that it was then translated into English. The original Ukrainian version of the report has not, however, been provided either to the court or to WWRT. When asked about this on the first day of the hearing Mrs Tyshchenko gave a confused account of how (and in what language) she had received the report. On the second day of the hearing, she said that the report had been drafted in Ukrainian, was sent to a translator who translated it into English, and Prof Berveno then signed the English version. This information was, apparently, provided to her by Prof Berveno's "assistant" following the first day of the hearing.

40. It would have been helpful if that explanation had been properly set out by Prof Berveno in his report (or even a subsequent witness statement clarifying this point). As matters stand, the court has been presented with a confused and contradictory account of how the report was prepared, with the final version of events emanating from an "assistant" to Prof Berveno rather than from Prof Berveno himself. The weight that can be placed on the evidence in the report is therefore questionable. As set out below, however, even taking Prof Berveno's evidence at its highest, it does not establish that the claim should be struck out or stayed.

41. As for Dr Tsiura, his first report for the March 2021 hearing stated that it was written in Ukrainian before being translated into English, and Dr Tsiura explained that he could read and understand English albeit that he was not bilingual. By contrast his second report stated that it was written in English as Dr Tsiura considered that to be one of his "own languages". The fifth report for these proceedings was prepared on the same basis as the second report.

42. Mrs Tyshchenko argued that Dr Tsiura's level of English was not good enough for him to write his reports directly in English. This complaint was, transparently, a "tit for tat" response to the criticisms of the way in which Prof Berveno's report was prepared, and I reject it. The way in which Dr Tsiura's reports were prepared has been specifically explained by him in each report, and he has said that his English is good enough for him to have written his later reports in that language rather than having them translated from Ukrainian. I do not have anything before me to gainsay that statement.

The issues

43. The issues raised by the defendants in the applications and their witness evidence are poorly-defined. Both the defendants' witness statements and Mrs Tyshchenko's skeleton argument for this hearing were discursive and unstructured, making their arguments very difficult to follow. WWRT identified, however, the following main issues arising from the four applications:

    i) Assignment argument: A central theme of the defendants' submissions and evidence is an argument that Star and in turn WWRT were not assigned the right to bring the tort claims that are brought in these proceedings against the defendants, and that the only party with the right to bring those claims is the DGF.

    ii) Article 1166 argument: This is the argument that Article 1166 of the Civil Code of Ukraine cannot be relied upon as a freestanding tort.

    iii) Banking records: The defendants argue that the banking records relied upon by WWRT to prove its claim were unlawfully obtained.

    iv) Limitation argument: This is an argument that the limitation period has expired.

    v) Fraud argument: This is an argument that under Ukrainian law fraud is exclusively a matter for Ukraine's criminal jurisdiction, and cannot be pursued as a tort claim under Article 1166.

    vi) Freezing order revocation arguments: The revocation of the worldwide freezing order is sought on various grounds.

    vii) Jurisdiction argument: This is the argument that Ukraine is the proper jurisdiction to hear the claim.

    viii) DGF claims: The defendants argue that the "same claims under Article 1166" had already been submitted to the Kyiv Commercial Court by the DGF before the present proceedings were commenced by WWRT.

44. At the hearing, Mrs Tyshchenko said that the defendants were not pursuing the Article 1166 argument, the limitation argument, the freezing order revocation arguments or the jurisdiction argument. I will not, therefore, say anything more about those arguments. The issues that remain for determination are the assignment argument, banking records, fraud argument and the DGF claims, which I will address in that order.

45. While the application notices are framed in terms of applications for strike out or stay of the proceedings, the substance of the defendants' case on the issues set out above is that

the case was fatally flawed and should not be permitted to proceed. I will therefore address the issues primarily in terms of an application for strike out of the claim.

Relevant legal principles

Strike out applications

46. There was no dispute as to the principles to be applied in determining whether WWRT's claim should be struck out on any of the grounds pursued by the defendants. While the defendants' applications do not articulate the specific legal basis on which their strike out applications are pursued, it is clear from their evidence and Mrs Tyshchenko's submissions that the defendants rely upon CPR r.3.4(2)(a). That provides that the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim.

47. The principles applied to strike out applications on that basis were summarised in *Benyatov v Credit Suisse Securities* [2020] EWHC 85 (QB), §§57–60. In particular:

    i) If the court is confident that the case is "unwinnable" such that continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides, it may be struck out: §60(3).

    ii) Where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or is in any way sensitive to the facts, an order to strike out should not be made: §60(5).

    iii) A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence: §60(7).

48. The defendants' central arguments in these applications turn on points of Ukrainian law. It is well-established that issues of foreign law are treated as issues of fact, albeit a special kind of fact; and that as such, they are to be proved by expert evidence: see the discussion of Simon Bryan QC in *The Kyrgyz Republic v Stans Engergy Corporation* [2017] EWHC 2539 (Comm), [2018] 1 Lloyd's Law Rep 66, §44 *et seq*.

49. As I noted in *AM Holdings v Batten and Le Page* [2018] EWHC 934 (Ch), §§43–44, that does not prevent the court from deciding a point of construction of a foreign statute summarily, if the experts are agreed on the statutory provisions that are relevant, the principles of statutory construction under the foreign law, and the relevant source material. In such a case, what remains is for the court to apply those principles and the relevant source material to the question of construction of the foreign statute, which is a matter for the judge, not the experts.

50. Similar principles apply to the interpretation of a contractual document governed by foreign law, where likewise the role of the foreign law experts is to identify the rules of interpretation of the contract, and not to express opinions on what the contract means having regard to those rules of interpretation: *National Iranian Oil v Crescent Petroleum* [2022] EWHC 2641 (Comm), §53. As that case demonstrates, it may be possible to determine such a question summarily if the court considers that there are no reasonable grounds for considering that the position which might emerge at trial, as regards those

principles of construction, would be materially different in a way that favoured the party against whom summary judgment is sought.

51. Equally, the court can reject expert evidence that is clearly and obviously wrong, or patently absurd, on the materials before it. But the power to do so must be exercised with great caution, and expert evidence should certainly not be rejected on the basis of submissions as to the interpretation of materials that are ambiguous, incomplete or otherwise unclear: see the April 2021 judgment, §26.

52. If, however, the point of foreign law is one on which it is clear that the experts are disputed as to the relevant provisions or principles or source material to be applied, in circumstances where neither expert's evidence can be dismissed as being clearly and obviously wrong, that will render the point unsuitable for summary determination. Rather, it will be a matter for cross-examination at trial on the basis of all of the relevant materials before the court.

Abuse of process

53. The principles to be applied in relation to abuse of process of the *Henderson v Henderson* variety were set out in the July 2021 judgment, as follows:

> "22. In *Henderson v Henderson*, 3 Hare 100, Sir James Wigram, VC said at pages 114–115:
>
> > 'Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.'
>
> 23. The principle was subsequently set out authoritatively by Lord Bingham in *Johnson v Gore Wood* [2002] 2 AC 1, 30–31:
>
> > 'The underlying public interest is ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. …
> >
> > It is however wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of all of the facts of the

> case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.'
>
> 24. Mr Ayres has also drawn my attention to the recent judgment of [Lord] Justice Popplewell in *Koza v Koza* [2020] EWCA Civ 1018, §42, in which he made clear that the *Henderson* principle will apply to interlocutory hearings as much as to final hearings, such that if a point is open to a party on an interlocutory application and is not pursued, then it cannot be taken at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change in circumstances, or new facts of which the applicant was not aware and could not reasonably have discovered at the time of the first hearing."

54. That case-law was applied more recently in *Discovery Land Company v Axis Speciality Europe* [2022] EWHC 585 (Comm), where the claimants sought summary judgment on a point of contractual construction. Moulder J refused the application as an abuse of process, on the grounds that the claimants could have raised the issue at an earlier contested application for permission to amend the defence to plead a point relying on the clause in question, but had chosen not to pursue the point then.

55. Separately, it may also be an abuse of process to bring new proceedings as a collateral attack on a previous decision of the court. Whether that amounts to an abuse will turn on the same merits-based analysis of the facts as described in *Johnson v Gore* Wood: i.e. whether in all the circumstances a party is abusing or misusing the court's process: *Michael Wilson v Sinclair* [2017] 1 WLR 2646, §48(3). Relevant considerations, in that regard, will include "(1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings, and (3) any grounds relied on to justify the collateral challenge (if it is found to be such)": *Arthur JS Hall v Simons* [2002] 1 AC 615 (CA), §38.

Stay of proceedings

56. To the extent that any stay of the proceedings on case management grounds is still pursued, the principles are as set out in *Mad Atelier International v Manes* [2020] QB 971, §82, summarised at §60 of the April 2021 judgment.

Assignment argument

The parties' submissions

57. By the time of the hearing, the assignment argument was the main argument advanced by the defendants. The essence of the argument was that the subject of the First Assignment from DGF to Star, under clause 1.1 of the assignment agreement which I have cited above, was rights under loan agreements concluded by the bank with its customers; and that those rights did not include any tortious rights the bank might have in relation to the parties to the loan agreements or any third parties. Those tortious rights, according to the defendants, remained exclusively with the DGF following the First Assignment. Accordingly, since Star was not assigned any tortious rights, the Second

Assignment to WWRT could not operate to assign the tortious rights under Article 1166 of the Ukrainian Civil Code, on which WWRT's claim in these proceedings is founded.

58. Since the First Assignment is governed by Ukrainian law, the question of what rights were assigned in that agreement requires consideration of issues of Ukrainian law. In that regard, leaving aside submissions of her own as to the position under Ukrainian law (which I disregard for the reasons given above), Mrs Tyshchenko relied on the expert report of Prof Berveno. In turn, Prof Berveno in his report relied upon:

    i) A judgment of the Kyiv Commercial Court dated 25 May 2020, dismissing an application by Star under Article 58 of the Ukrainian Banks Law, seeking to be recognised as a creditor in pending insolvency proceedings relating to Mr Tyshchenko (**the *Star* judgment**).

    ii) A judgment of the Grand Chamber of the Supreme Court of Ukraine dated 28 September 2021.

    iii) A "clarification" of the Star judgment issued by the Kyiv Commercial Court on 16 May 2022 at the request of Mr Tyshchenko.

    iv) A letter from the DGF to the parties in these proceedings, dated 12 October 2022.

    v) His own opinion that, under Ukrainian law, non-contractual obligations cannot be assigned by operation of a contract; rather, only contractual obligations may be assigned.

59. In addition, the defendants relied on a letter from the DGF dated 18 May 2022, written to Mr Tyshchenko's Ukrainian lawyer in response to an approach by that lawyer, and a judgment of Jack J in the Eastern Caribbean Supreme Court, British Virgin Islands, in the case of *WWRT v Carosan and Kaufman* (30 December 2021). (There is a second letter from the DGF to Mr Tyshchenko's Ukrainian lawyer, also dated 18 May 2022, which addresses the banking records issue, and which I discuss further below.)

60. Mr Ayres submitted that the assignment argument was an abuse of process, on the basis that Mr Tyshchenko abandoned the point during the March 2021 hearing, and Mrs Tyshchenko did pursue it but her argument was rejected by the court. In any event, Mr Ayres submitted that the argument was not capable of being resolved summarily in light of the competing expert evidence before the court, relying on the expert report of Dr Tsiura which disputed the position taken by Prof Berveno.

Abuse of process

61. As recorded in the April 2021 judgment at §§102–3, the assignment argument was initially pursued by Mr Tyshchenko (then represented by solicitors and counsel) among his arguments resisting continuation of the freezing order. On the second day of the hearing, however, Mr Tyshchenko's leading counsel, Mr Machell KC, confirmed that he no longer pursued that argument.

62. Mrs Tyshchenko did pursue the point. Her submissions were, however, rejected at §§107–9 of the judgment, on the basis that the issue was disputed between the experts, and that dispute was not something that could be resolved on the evidence before the

court. As noted above, Mr Tyshchenko's application for permission to appeal the April 2021 judgment was dismissed by the Court of Appeal.

63. The defendants' attempt to re-run the argument now is plainly an attempt to have yet another bite at the cherry. The arguments relating to the *Star* judgment were specifically raised at the March 2021 hearing, though I note that what was before the court at that hearing was a translation of the part of that judgment relating to Star's application, bearing the date of 2 June 2020 which was the date referred to in the April 2021 judgment. I have now been provided with a translation of what appears to be the complete judgment, with what I understand to be the correct date of 25 May 2020. Nothing turns, however, on the differences between the two documents.

64. What is relevant is that the argument based on the *Star* judgment was rejected in the April 2021 judgment on the basis that, on its face, the judgment turns on a claim to damages brought under Article 58 of the Ukrainian Banks Law, which the court decided was not assigned to Star. Dr Tsiura's evidence was that Article 58 of the Banks Law and Article 1166 of the Ukrainian Civil Code are provisions of a different nature which give rise to different claims, so that the *Star* judgment is not determinative of the question of the assignment of the Article 1166 rights which are relied upon in these proceedings. Dr Moroz, one of the defendants' experts who had addressed the assignment issue at the March hearing, had not addressed this point (§108 of the April 2021 judgment). Prof Berveno had also given evidence for that hearing, but his evidence was rejected on the grounds of non-compliance with the CPR (§15 of the April 2021 judgment).

65. Prof Berveno has now sought to provide further evidence addressing the *Star* judgment, including an assertion that as a matter of Ukrainian law non-contractual obligations cannot be contractually assigned. These are, however, arguments that could have been advanced in CPR-compliant evidence at the March hearing. In so far as no such evidence was provided, it is abusive for it to be relied upon now.

66. As regards the documents generated since the April 2021 judgment, starting with the 16 May 2022 "clarification" of the *Star* judgment by the Kyiv Commercial Court, the decision records that it was issued specifically at the request of Mr Tyshchenko, who (in requests dated 24 November 2021 and 4 May 2022) asked the court to explain that tortious rights had not been transferred to Star by the First Assignment. Mr Tyshchenko in his June witness statement candidly admitted that he had asked the court to clarify its judgment following the rejection of the defendants' arguments in the April 2021 judgment.

67. It appears, therefore, that in the face of this court's observation in the April 2021 judgment that the *Star* judgment turned on Article 58 Banks Law and made no reference to Article 1166 of the Ukrainian Civil Code, and following the refusal of permission to appeal to the Court of Appeal, Mr Tyshchenko sought to obtain from the Kyiv court a ruling in more general terms.

68. Whatever the merits of that request under the Ukrainian court procedural rules (a matter on which Dr Tsiura has commented), it is plain that Mr Tyshchenko's request for "clarification" could have been made well in advance of the March 2021 hearing. The *Star* judgment was referred to at the original September 2020 hearing, and both defendants initially at least took a point on the interpretation of that judgment in their submissions for the March hearing (although that point was eventually abandoned by Mr

Tyshchenko). There is no evidence suggesting that it was not possible for a clarification to have been obtained prior to the March hearing, if the defendants considered that the *Star* judgment was in any way unclear or uncertain. The fact that the requests for clarification were only made long after judgment had been given following the March 2021 hearing indicates that this is nothing more than an abusive attempt to reopen an issue that has been finally determined against the defendants.

69. The same is true of the letters from the DGF dated 18 May and 12 October 2022. Mrs Tyshchenko relied on an earlier letter from the DGF for the purposes of the March 2021 hearing, regarding the records provided to WWRT. There is no evidence before me suggesting that it would not have been possible for the defendants to obtain, in addition, letters from the DGF as regards the assignment issue for the purposes of that hearing.

70. The final new document relied upon by the defendants is the Ukrainian Supreme Court judgment of 28 September 2021. It is not apparent from the judgment (or evidence before me) whether either of the defendants was involved in the proceedings which led to that judgment, and Mr Ayres did not suggest that reliance on that judgment was in itself an abuse of process. His submission was, however, that it was not probative for the reasons which I address below.

71. With the exception of the defendants' reference to the Supreme Court judgment, therefore, the defendants' assignment arguments are an abuse of process, in that they turn on evidence which could and should have been produced at the March 2021 hearing where the assignment argument was pursued by Mrs Tyshchenko (and could have been pursued by Mr Tyshchenko if he considered it to be a good point). As established in *Henderson v Henderson*, parties to litigation should bring forward their whole case when a particular claim is adjudicated. It is not open to the parties to raise precisely the same issues repeatedly in proceedings, with a drip-feed of arguments as and when they decide that they might be good points. That is what the defendants have sought to do with the assignment argument, and the court will not condone it.

Merits of the assignment argument

72. Even leaving aside the abuse of process point, however, it is quite apparent from the evidence before me that the conclusion in the April 2021 judgment, that the assignment argument cannot be determined summarily in favour of the defendants, continues to hold true:

    i) Whichever translation of the First Assignment is used, there is at the very least an arguable case that, on the face of the disputed clause 1.1 and as a matter of pure contractual construction, the language of "other rights" related to the rights of claim is broad enough to encompass tortious rights under Article 1166. Mrs Tyshchenko made submissions at the hearing as to what she contended should be the interpretation of the clause, but was unable to support that by reference to Prof Berveno's report. In so far as the experts do disagree, however, as to the relevant principles of contractual construction under Ukrainian law, that will be a matter for oral evidence in due course. It is certainly not suitable for summary determination at this hearing.

    ii) Dr Tsiura's evidence is, moreover, that even if the relevant rights were not expressly transferred by the First Assignment, they were transferred by the

operation of Article 514 of the Ukrainian Civil Code. Prof Berveno's response to this in his report is not very clear, and is on any basis insufficient for Dr Tsiura's opinion to be rejected summarily.

iii) Prof Berveno's opinion that only contractual rights can be assigned under Ukrainian law is disputed by Dr Tsiura, who relies on a 2022 judgment of the Pechersk district court of Kyiv. This is plainly a matter for determination following oral evidence of the experts.

iv) The April 2021 judgment determined that the *Star* judgment did not give rise to an issue estoppel in these proceedings (§33). In any event, however, the experts are divided as to the interpretation and effect of the *Star* judgment, and I cannot resolve that dispute summarily on the material before me. It is manifestly a matter for oral evidence at trial.

v) The May 2022 "clarificatory" decision of the Kyiv Commercial Court gives rise to more questions than it answers. Quite apart from the circumstances in which it was procured, the translation of the key passage of the decision relied upon by the defendants is materially disputed, on a point which would in principle require determination on the basis of expert translation evidence. There is also in any event a question as to whether that decision can carry any independent legal force, and (in light of that question) the effect of the decision on the interpretation of the *Star* judgment, questions which would require further exploration with the experts if the court were to reach any final view on this. Prof Berveno's evidence on these points is limited, expressed in rather conclusory terms without detailed analysis, and is certainly not a sufficient basis for me to reject Dr Tsiura's detailed opinion that the clarificatory decision is of no independent legal effect, and does not change the content of the original *Star* judgment.

vi) The 18 May and 12 October 2022 letters from the DGF cannot carry any decisive weight. The DGF's position as expressed in those letters is that it has the exclusive right to bring claims against third parties who were not debtors under the disputed loan agreements, and that no claims in tort under Article 1166 were assigned by the bank. The DGF is not, however, a judicial body, and its expressions of its position are plainly self-serving. Moreover, to the extent that any weight could be placed on the DGF's opinion, that would require (at the very least) evidence from the DGF. The DGF chose, however, not to pursue its request to participate in this hearing, and I do not therefore have anything before me explaining the DGF's position – which is in any event disputed as a matter of law by Dr Tsiura. The DGF letters are, therefore, a wholly insufficient basis on which to reject Dr Tsiura's evidence on this point.

vii) The Ukrainian Supreme Court judgment concerned a claim by a creditor of the bank suing for damages caused to the bank, under Article 58 of the Banks Law. The court concluded that no such claim arose; but did not on its face find that the DGF has exclusive rights of claim under the different provisions of Article 1166. Mrs Tyshchenko made submissions as to the relevance of the judgment for the assignment argument; that is plainly a matter for determination at trial. In any event, Prof Berveno himself concedes that the Supreme Court judgment does not address the position of assignees of loan agreements. He says that this was because no such claim could arise under Ukrainian law. But the correctness of that

proposition turns on his earlier arguments which, as I have found, cannot possibly be determined summarily on the material before me. The Supreme Court judgment therefore takes matters no further forward.

viii) In the *Carosan* judgment, Jack J concluded (among other things) that an assignment to Star of the rights arising from a different package of loans granted by the bank did not operate to transfer claims in tort under Article 1166. That judgment is, however, not admissible in these proceedings as evidence of Ukrainian law: Civil Evidence Act 1972, s. 4. In any event, the judgment concerns a different contract of assignment, whose terms as to the scope of the assignment are quite different to those in the First Assignment in these proceedings. The judge was, therefore, considering the construction of an entirely different contractual clause, on the basis of evidence from different experts to those relied upon in the present proceedings. In those circumstances, even if the judgment had been admissible, it is difficult to see how any weight could have been placed on it.

73. The suggestion that the claim should be struck out on the basis of the assignment argument is, therefore, hopeless.

Banking records

74. The banking records argument is, essentially, a complaint that the banking records of the borrowers of the disputed loans relied upon by WWRT for the purposes of its claim were unlawfully obtained. The same contention was made by Mrs Tyshchenko at the March 2021 hearing, and dismissed in the April 2021 judgment at §§11 and 115. It was not part of the submissions for Mr Tyshchenko, but could have been. It is plainly an abuse of process for the point to be raised again now.

75. The only new document relied upon by the defendants now is a second letter from the DGF dated 18 May 2022. According to the defendants' translation, that letter says that Star was not provided with the "general database" of clients of the bank, "except for documents and information, relating to property rights under the agreements specified in Annex No. 1 to [the First Assignment agreement]". As with the DGF's first letter of the same date, relied upon by the defendants in relation to the assignment argument, there is no evidence before me suggesting that it would not have been possible for the defendants to obtain this information from the DGF prior to the March 2021 hearing, for the purposes of that hearing.

76. In any event, the letter takes the matter no further and certainly does not suggest that "no banking records were provided to Star", as claimed by Mrs Tyshchenko in her skeleton argument. On the contrary, it confirms that Star *was* provided with "documents and information" relating to property rights under the disputed loan agreements.

77. As to what was meant by that, on the second day of the hearing Mrs Tyshchenko produced a long letter from Mr Tyshchenko's Ukrainian lawyer to the DGF, which had prompted the DGF's second letter. She submitted that the DGF response should be read together with and in the light of the letter from Mr Tyshchenko's lawyer. The letter sent on behalf of Mr Tyshchenko does not, however, shed any light on what the DGF considered to be comprised within the "documents and information" relating to property rights under the disputed loan agreements. Nothing in this exchange of correspondence, moreover, supports Mrs Tyshchenko's submission that the only documents that were

provided to Star were the disputed loan agreements themselves and the documents relating to the securities for those loans.

78. Regarding the propriety under Ukrainian law of the transfer of banking documents to Star, Dr Tsiura's report reiterates his position (as set out in his evidence for the March 2021 hearing) that Article 62(6) of the Banks Law expressly permits the transfer of banking documents to those who purchase assets of insolvent banks. Despite that provision having been referred to in Dr Tsiura's earlier evidence and at §11 of the April judgment, Prof Berveno does not address Dr Tsiura's analysis of that provision in his report.

79. The application for strike out of the claim based on this argument is therefore utterly hopeless.

Fraud argument

80. The fraud argument has been raised in the earlier proceedings by both defendants. In their October 2020 application, which became an application for a trial of preliminary issues of Ukrainian law, one of the issues raised by both defendants was whether a claim in fraud must under Ukrainian law be pursued as a criminal claim. As recorded above, the preliminary issues application was rejected by Meade J.

81. Mrs Tyshchenko then returned to the point at the March 2021 hearing, and her submissions were rejected in the April judgment at §110, after considering the expert reports of both Prof Berveno and Dr Tsiura on the point. As with the banking records argument, Mr Tyshchenko could have raised the argument at that stage, but did not do so.

82. No new material is put forward to support the resurrection of the argument now. The application for strike out on this ground is therefore clearly an abuse of process.

83. In any event, as a matter of substance the fraud argument is a wholly inadequate basis for the strike out of the claims. Dr Tsiura's report reiterates the position set out in his earlier evidence that civil liability can be based on fraudulent conduct that has not been the subject of criminal proceedings, and supports that by reference to recent Ukrainian judgments post-dating the April 2021 judgment. Dr Berveno's report by contrast provides very limited evidence on this issue, again expressed in rather conclusory terms, and does not address the detail of Dr Tsiura's analysis. His evidence does not come close to providing a basis for rejecting Dr Tsiura's evidence summarily at this stage.

84. Dr Tsiura's report also addresses the defendants' argument that a criminal fraud investigation in relation to the assigned loans was closed in Ukraine in 2019. As he explains, the criminal investigation referred to by the defendants did not deal with the tort claim now pursued by WWRT, but closed the proceedings on the basis that the investigator had not established the existence of a crime. Although the same position was set out by Dr Tsiura in his earlier evidence, the point is not addressed by Dr Berveno in his report for this hearing. I do not, therefore, have any basis to reject Dr Tsiura's evidence on this point. In so far as the closure of the criminal proceedings has, in those circumstances, any relevance to the issues raised by WWRT in this case, that will be a matter for further submissions at trial.

DGF claims

85. The final argument still pursued by the defendants at the hearing was their argument relating to two damages claims by the DGF in the Kyiv Commercial Court, commenced in 2020 before the present proceedings commenced. The claims are claim number 46-8333/20 against Mr Tyshchenko and seven other defendants, and claim number 46-8001/20 against members of the bank's supervisory board other than Mr Tyshchenko. Mrs Tyshchenko is not a defendant to either of the two claims.

86. The DGF claims are referred to the October application, although neither that application nor Mrs Tyshchenko's evidence in support of the application makes clear what point exactly is to be derived from the existence of these claims.

87. At the hearing Mrs Tyshchenko accepted that the DGF claims had been mentioned, albeit very briefly and "for information", at the March 2021 hearing. I agree with that characterisation of her earlier submissions: the only reference to this point in Mrs Tyshchenko's skeleton argument for the March hearing was in the background section, where Mrs Tyshchenko noted in passing that "the Deposit Guarantee Fund is currently pursuing some of the bank's officials with the same claim which relates to the loans allegedly assigned to the claimant." On the second day of the March hearing, Mrs Tyshchenko referred to the claims in her oral submissions as part of her argument that Article 1166 was not a freestanding tort, submitting that one of the claims had been brought on the combined basis of Article 1166 and Article 58. She did not suggest that any separate argument arose on the basis of the DGF claims.

88. The April 2021 judgment did not refer explicitly to the DGF claims. In relation to the argument that Article 1166 was not a freestanding tort, however, the judgment recorded at §106 that Mrs Tyshchenko had advanced various legal submissions of her own on this issue, which could not be regarded as an adequate substitute for an expert report, and in any event did not materially engage with Dr Tsiura's evidence on the point. There was no appeal on that point.

89. In the present hearing, Mrs Tyshchenko said that she now relied on the DGF claims for the different submissions that (i) jurisdiction had been seized by the Ukrainian courts by the time that the present claims commenced, referring to similar comments in the judgment of Jack J in the *Carosan* case, and (ii) the Article 1166 claims were never assigned to Star.

90. At the March 2021 hearing neither of the defendants pursued arguments that the DGF claims supported either Mr Tyshchenko's jurisdiction challenge or Mrs Tyshchenko's assignment argument. Those arguments, however, plainly could have been advanced by both defendants if they had wished to do so. In those circumstances, it is clearly abusive for the DGF claims point to be recycled now in the way that the defendants seek to do.

91. In any event, yet again, the arguments are hopeless. Shortly after explaining the basis on which the DGF claims were relied upon in these applications, Mrs Tyshchenko confirmed that she was not pursuing the jurisdiction argument "because it has been resolved". In so far as the DGF claims relate to that argument, therefore, they can go absolutely nowhere.

92. As for the assignment argument, Dr Tsiura's report opines that the DGF claims were not brought on the basis of Article 1166 of the Ukrainian Civil Code, but were claims based on Article 52 of the Deposit Guarantee Law. Prof Berveno's report provides no analysis of how the claims, in those circumstances, support the defendants' case on assignment. The material before me on this point does not, therefore, come close to supporting the defendants' case that the claim should be struck out on the basis of the assignment argument.

The applications for a stay of the proceedings

93. In so far as the defendants pursue their request for a stay of the proceedings on case management grounds, as an alternative to their strike out application, it suffices to say that the applications before me provide no conceivable basis for such a stay.

Conclusion

94. I reject all four applications. Many of the grounds of the applications were abandoned by the defendants at the hearing. The remaining grounds pursued by the defendants are all points that have been unsuccessfully raised by one or both defendants, in one guise or another, at one or more earlier hearings in these proceedings. Having failed before, it is abusive for them to be revived now. In any event, for the reasons set out above, the defendants' arguments are wholly unmeritorious in any event.