

IN THE WESTMINSTER MAGISTRATES' COURT

THE GOVERNMENT OF INDIA

(Requesting State "RS")

V

VIJAY MALLYA

(Requested Person "RP")

**JUDGMENT**

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## Introduction

1. The Government of India (the “RS” or “GOI”) seeks the extradition of Dr Vijay Mallya (the “RP” or “VJM”) following an extradition request submitted on 9<sup>th</sup> February 2017 which was certified by the Secretary of State on 16<sup>th</sup> February. India is not a designated Category 2 territory under section 84(7) of the Extradition Act 2003 (the “2003 Act”) and therefore the GOI must show a prima facie case against the RP pursuant to section 84(1) of the 2003 Act.
2. A warrant for the RP’s arrest was issued on 28<sup>th</sup> March 2017 and the RP was arrested on 18<sup>th</sup> April 2017 and was granted conditional bail. Additional charges were received and the whole extradition request was re-certified on 25<sup>th</sup> September 2017 and the proceedings started afresh with a new arrest warrant which was executed on 3<sup>rd</sup> October 2017.
3. Evidence and submissions including extensive written ones were received from 4<sup>th</sup> December 2017 onwards. Mark Summers QC leading Aaron Watkins represented the RS and Clare Montgomery QC leading Ben Watson the RP. I was very grateful for their assistance. Final oral submissions were made on 12<sup>th</sup> September 2018 and judgment given on 10<sup>th</sup> December 2018.

## Issues raised by the RP

4. The GOI is making an allegation of major fraud on a bank in India. Miss Montgomery and Mr Watson raise the following issues to persuade the court not to grant the request: whether there is a prima facie case of fraud, whether extradition is barred by reason of extraneous considerations (section 81 of the EA), whether extradition is compatible with the RP’s Convention rights, in particular Articles 3 and 6 (section 87 of the Act) and abuse of process. The defence premise is that the prosecution is politically motivated. It argues that there is no evidential case against Dr Mallya and that there has been no fraud. The RP is at risk of a flagrantly unfair trial because of a combination of political pressure and media reporting. Furthermore, he should not be returned to be held in a prison which the RS has refused to allow to be inspected.

## Background to the request

5. By late 2008, early 2009 Kingfisher Airlines (“KFA”) which was owned and run by the RP and by some of the co-accused was running out of money. From the GOI documents, it was doing worse than other airlines in the same field but the financial performance of the aviation industry as a whole had been badly hit by high fuel prices and a price war. The RP and KFA had borrowed to the hilt but that borrowing was not sufficient to keep the company as a going concern.
6. KFA arranged to borrow 2000 crores to cover particular expenses which were set out in a table which is to be found in a number of places in the volumes of evidence, either documentary or in statements provided by the GOI. 1050 crores was provided by a consortium of banks early in 2009 led by the State Bank of India (“SBI”) which left 950 crores left to borrow by September/October 2009. As part of the lending by the consortium of banks, SBI had provided an appraisal note from late 2008 or early 2009 which looked at the then financial position of KFA.
7. By September 2009 KFA executives had concerns about the financial situation of KFA. The year-end losses to March 2009 were considerable and the financial position had not

improved as projected between April and September 2009 (the first half of the financial year (“FY”) 2010 or “H1 FY2010”).

8. The RP and KFA then borrowed three amounts of money in rupees from IDBI Bank (“IDBI”) which are mostly expressed in crores in the documents. I will not refer to rupees again, just crores.
9. The first loan was not part of the consortium loan but was expressed as a short-term loan (“STL”) of 150 crores. The STL was approved by IDBI’s Credit Committee on 7<sup>th</sup> October 2009 and paid on 9<sup>th</sup> October 2009. KFA failed to repay it on 7<sup>th</sup> April 2010 and after a recall notice was issued it was repaid in late May or early June 2010. The final interest remained outstanding.
10. The second loan was an advance on the third. Initially the application by KFA was for 950 crores but UCO Bank stepped in and sanctioned, (agreed to disburse), 200 crores. This left an application to IDBI for 750 crores.
11. The second amount, 200 crores, was approved on 4<sup>th</sup> November 2009 when the Chairman acting within his powers approved the loan, and noted that confirmation of the Chairman’s action was to be sought from the Executive Committee. The money was disbursed on 6<sup>th</sup> November 2009. It was noted that the Chairman Mr Agarwal had allowed 15 days for the provision of the personal and corporate guarantees. Disbursement was said to have been permitted by the Head of LCG (Large Corporate Group). The 200 crores was an advance on the 750 crores corporate loan made by the Bank on 27<sup>th</sup> November 2009.
12. The third loan proposal which I look at in detail below went to the Credit Committee first which recommended sanction on 23<sup>rd</sup> or 24<sup>th</sup> November 2009 and then to the Executive Committee at its meeting on 27<sup>th</sup> November 2009. It approved the loan and a sanction letter was issued on 1<sup>st</sup> December 2009. A loan agreement which incorporated the various conditions was executed on 2<sup>nd</sup> December 2009 and the loan disbursed in tranches. The two first tranches, 250 crores and another 200 crores to repay the second loan were paid on 3<sup>rd</sup> December 2009 and the final payment was made on 26<sup>th</sup> December 2009.
13. The amounts lent were very approximately £22m, £29m and £98m (this included the £29m) depending on the prevailing exchange rate. Each bank making a loan as part of the consortium had a separate loan agreement with KFA. with IDBI being by far the biggest lender in the consortium of banks.
14. KFA was not able to repay its interest payments to IDBI from early June 2010 and defaulted. In November 2010 a debt restructuring was proposed. In the light of the default, the banks put together a consortium of all the banks that had lent to KFA and a Master Debt Recast Agreement (“MDRA”) by which the debts were restructured was entered into.
15. The GOI case is that even after the restructuring of the debt, after KFA’s second default, Dr Mallya and UBHL went out of their way to frustrate the recovery of money and avoided their responsibilities under the guarantees. One of Dr Mallya’s most questionable actions, contrary to agreements he had entered into not to alienate any assets, was to conceal US\$40million paid to the RP as part of a deed of disengagement in relation to the sale of another Mallya company, United Spirits, to Diageo.

16. Various proceedings have been taken in the courts, some by Dr Mallya, KFA and UBHL but many by the consortium against them. That evidence is conveniently contained in the statement of the consortium's lawyer and has not in essence been contested by the defence.

### **Allegations made by GOI**

17. The allegations made by the GOI are threefold, the first is a conspiracy to defraud. Dr Mallya and other executives at KFA is said to have conspired with the Chairman Mr Agarwal and others at IDBI Bank by causing IDBI to sanction and disburse loans to KFA with the intention of not repaying the said loans as agreed and required. It was said they were able to do this by supplying the bank with false information about KFA's profitability and by permitting the bank to rely on false information in respect of the value and availability of securities to be relied on by the bank.
18. The second allegation is that of making false representations to make a gain for himself. Dr Mallya is said to have dishonestly made representations to the bank which he knew were or might be untrue or misleading by supplying false information to the bank in respect of profitability and the value and availability of securities to be relied on by the bank, intending to make a gain for himself or to cause loss to the bank. By doing so he obtained the loans which were not then spent on what they should have been spent on and the third charge is a conspiracy to launder the money obtained by KFA from IDBI.
19. Allegations 1 and 2 were investigated by the Central Bureau of Investigation ("CBI") whilst the money laundering charge was brought by the Enforcement Directorate ("ED"). The CBI and in particular the head of the CBI, Mr Asthana, was criticised by the defence in its attempt to persuade the court that the prosecution was corrupt and politically led. As will be seen later, I found no evidence that the prosecution was corrupt or politically led.
20. At the court's request, Mr Summers QC and Mr Watkins provided a Schedule of Notional Charges which makes three allegations. This is to satisfy the requirement for dual criminality. The Schedule is to be found at tab 11 of the Core Bundle. I have set the allegations out in full below:
21. The first allegation is of a conspiracy to defraud contrary to section 12 of the Criminal Justice Act 1987.
- That Dr Mallya between 1<sup>st</sup> September 2009 and 24<sup>th</sup> January 2017 conspired together (sic) and with A Ragnathan, S Borkar, A Nadkarni, A Shah, Y Agarwal, B Batra, O Bundellu, S Srinivasan, R Sridhar and others to defraud such corporations, companies, partnerships, firms and persons as might deposit funds with the IDBI Bank ("the Bank") by dishonestly causing and permitting the Bank to sanction and disburse loans to Kingfisher Airlines in the order of (a) INR 1500 million on 7<sup>th</sup> October 2009, (b) INR 2000 million on 4<sup>th</sup> November 2009 and (c) INR 7500 million on 27<sup>th</sup> November 2009 with the intention not to repay the said loans as agreed and required. In particular by:
  - Supplying to the Bank and/or permitting reliance by the Bank on false information in respect of Kingfisher's profitability;
  - Supplying to the Bank and/or permitting reliance by the Bank on false information in respect of the value and/or availability of securities to be relied upon by the Bank.

22. The second allegation is of making false representations to make a gain for himself. This is contrary to sections 1(2)(a) and 2 of the Fraud Act 2006.
- That Dr Mallya between 1<sup>st</sup> September 2009 and 24<sup>th</sup> January 2017 the RP dishonestly made representations to the Bank which were and he knew were or might be untrue or misleading, namely:
  - Supplying false information to the Bank in respect of Kingfisher's profitability:
  - Supplying false information to the Bank in respect of the value and/or availability of securities to be relied on by the Bank
  - Intending thereby to make a gain for himself or another or to cause loss to the Bank or to expose the Bank to a risk of loss by causing and permitting the Bank to sanction and disburse loan funds to Kingfisher Airlines in the order of (a) INR 1500 million on 7<sup>th</sup> October 2009, (b) INR 2000 million on 4<sup>th</sup> November 2009 and (c) INR 7500 million on 27<sup>th</sup> November 2009 which loans he did not intend to repay as agreed and required.
23. The final charge is conspiring to money launder contrary to section 1 of the Criminal Law Act and section 327 and 334 of the Proceeds of Crime Act 2002.
- That Dr Mallya between 1<sup>st</sup> September 2009 and 24<sup>th</sup> January 2017 conspired with A Ragunathan, Y Agarwal, B Batra, O Bundellu, S Srinivasan, R Sridhar and others to conceal, disguise, convert, transfer or remove criminal property, namely the (direct or indirect) proceeds of the said loans obtained dishonestly by Kingfisher Airlines from the Bank.

### **Dramatis Personae**

24. In terms of who is who, the Kingfisher Airlines co-conspirators were said to be the RP, Dr Mallya, the Chairman and CEO, Mr Raghunathan, the Chief Financial Officer, Mr Borkar, the Assistant Vice President (Finance), Mr Nadkarni, Duty General Manager (Finance) and Mr Arvindkumar Shah, Senior Manager (Accounts). Other associated companies are UB Holdings Ltd ("UBHL") the holding company run by Dr Mallya and United Spirits Ltd, another Mallya company which features, particularly after the defaults.
25. The IDBI co-conspirators were said to be Mr Yogesh Agarwal, in 2009 the then Chairman; Mr Batra, the then Deputy Managing Director, Group Head and Executive Director of the Corporate Banking Group, who ran the Project Appraisal department; Mr Bundellu, the then Deputy Managing Director; Mr Srinivasan, the then Executive Director and Mr Sridhar, the then General Manager who ran the Risk Appraisal Department between the end of October 2009 and 2013.

### **Evidence**

26. I have received a number of bundles of evidence from the GOI and from the defence which I have read. I do not summarise all the evidence that has been provided to me but just the evidence which I consider relevant to whether a *prima facie* case is shown.

### **Requesting State**

27. From the RS, I had affidavits from officers in the case including Jagroop Gusinha a Superintendent of Police in the Central Bureau of Investigation (“CBI”), who annexed schedules of the documentary evidence and statements taken by an officer in the investigation team. I had affidavits from the Enforcement Directorate (“ED”) Officer Mr Raj who produced statements and confirmed where exhibits had been taken from. I had volumes of evidence which consisted of either exhibits or statements. These statements had been taken under section 161 of Indian Criminal Procedure Code. Other evidence included documents relevant to the money laundering allegations, there was some disputed Legal Professional Privilege material and some evidence served very late consisting of an investigation into Mr Batra (alleged co-conspirator, see above) and what was said to be his unexplained wealth.
28. In terms of the prison evidence, I set it out in detail later in this judgment. Not only had I a number of assurances but also I had photographs of the prison cell Dr Mallya is to be held in if returned as well, finally, a professionally made video of Barrack No. 12.

### Admissibility of evidence

29. Ms Montgomery questioned the admissibility of much of the evidence provided by the GOI. The defence and GOI provided written submissions and I heard oral argument on 11th January and 16th March 2018 and again in May 2018 when further evidence was served by the GOI partly at the court’s request. I also had pages of written submissions from both parties. I do not repeat the submissions on admissibility.
30. Where a RS has to prove a prima facie case under section 84 of the 2003 Act, the evidence it relies on has to be admissible under English rules of evidence or fall within the admissibility provisions in section 84 of the Extradition Act 2003.
31. Section 84 reads:

#### *Case where person has not been convicted*

*(1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.*

*(2) In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if—*

*(a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and*

*(b) direct oral evidence by the person of the fact would be admissible.*

*(3) In deciding whether to treat a statement made by a person in a document as admissible evidence of a fact, the judge must in particular have regard—*

*(a) to the nature and source of the document;*

*(b) to whether or not, having regard to the nature and source of the document and to any other circumstances that appear to the judge to be relevant, it is likely that the document is authentic;*

*(c) to the extent to which the statement appears to supply evidence which would not be readily available if the statement were not treated as being admissible evidence of the fact;*

(d) to the relevance of the evidence that the statement appears to supply to any issue likely to have to be determined by the judge in deciding the question in subsection (1);

(e) to any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is sought, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings.

(4) A summary in a document of a statement made by a person must be treated as a statement made by the person in the document for the purposes of subsection (2).

(5) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(6) If the judge decides that question in the affirmative he must proceed under section 87.

(7) If the judge is required to proceed under this section and the category 2 territory to which extradition is requested is designated for the purposes of this section by order made by the Secretary of State—

(a) the judge must not decide under subsection (1), and

(b) he must proceed under section 87.

32. Unlike the evidence from the Defence, the evidence produced by the GOI in the case was poorly paginated and indexed and as a result I asked counsel for the GOI to produce a schedule of documents found within the Request. Mr Summers and Mr Watkins obligingly produced a schedule of documents found within the Request. This is in the core bundle at Divider 12. This document sets out who produces the exhibits but not the pagination in the court bundles. It was nevertheless helpful.

33. At my request I was provided with a further statement from the officer in the case in the ED, Mr Raj, who produced some further section 161 Indian Criminal Procedure Code statements which exhibited various documents including schedules of where the exhibits were taken from. This was in relation to Category 2B(i), after the receipt of the affidavits 4 at Volume E and 8 at Volume Y(4), the Defence acknowledged the admissibility of the documents exhibited by the money laundering affidavits but not any others that have not been produced appropriately.

34. In terms of the admissibility argument, the evidence was divided by the parties into separate categories, some of which were sub-divided. My approach has been to consider each category of evidence relied on by the GOI in turn. I was asked for a brief decision in relation to the categories which I sent to the parties by email on 7th June 2018. This email is in the core bundle at Divider 15.

35. So far as Category 1 is concerned, the affidavits of the officers. I have not relied on these statements when looking at the question of a *prima facie* case. I have put them to one side and they have formed no part of my consideration in this case.

36. I accept that in Category 2A the admissible documents are the First Information Reports, Charge Sheets etc. These documents help with the formalities but do not support the GOI's case in any other way. In terms of the *prima facie* case, again I have put these documents to one side.

37. Category 2B(i), (ii) and (iii) is the documentary evidence attached to the four affidavits, I rely on this evidence. Category 2B(i) was the Enforcement Directorate exhibits which are

now the subject of production statements and are clearly admissible. This evidence is mainly to do with the money laundering investigation.

38. Category 2B(ii) are the CBI exhibits which are the subject of section 161 production statements. The CBI obtained production statements, whether they were in fact required or not (see Y(1)-(4)). I find they are admissible but the weight I have given them will vary.
39. Category 2B(iii) are CBI exhibits which had not been the subject of any production statement but were seized by the investigators who received the documents as part of their investigations. Many of these documents are in fact referred to by witnesses or form part of the section 161 witness statements.
40. In terms of the prima facie case, I am particularly concerned with the emails which are exchanged at various times in 2009 where the financial predicament of KFA is discussed between the KFA executives. The emails were seized from Mr Raghunathan and exhibited. The officer, Mr Kumar, says he seized these from Mr Raghunathan's home. Mr Raghunathan has given evidence to the same effect.
41. Category 2B(LPP). The Defence relied on the evidence of Mr Saigal, the RP's lawyer in New Delhi (Defence Volume K Divider 9b) who explained that the emails in the GOI case were to and from lawyers working for VJM. One of those named, Cyril Shroff, was managing partner of a law firm in India with 34 years of corporate and banking law. A second email was from the Indian law firm Dhir and Dhir specialists in banking and finance. The further two emails referred to advice provided by Mr Munim a senior partner of a firm whose speciality was corporate and commercial litigation. The second email refers to advice provided by Mr Sarkar, a Senior Advocate and Associate Member of Six Pump Court in London. He has an extensive practice in corporate law and is an arbitrator. Mr Khaitan of Khaitan and Co. which was also mentioned in the emails is one of the oldest and largest Indian law firms.
42. Ms Montgomery argued that the emails were covered by LPP. She relied on various authorities. Mr Summers and Mr Watkins contended that the crime fraud exception to LPP applied in the circumstances.
43. I accepted that the power to use the crime fraud exception ought to be used with the greatest of care, it was only in very exceptional circumstances that privilege would be displaced. LPP is of fundamental and constitutional importance. It was not sufficient to merely assert fraudulent behaviour. There must be not just an allegation that the documents were made for the purpose of getting advice for the commission of a fraud but there must be something more, the statement must be made in clear and definite terms, and there must be some prima facie evidence that it has some foundation in fact.
44. I found that the particular emails were covered by Legal Professional Privilege and they have not been part of my consideration in the case. I found the privilege was not waived by Dr Mallya when he sent his own notes of legal advice he had received to his secretary by email. I found that the crime fraud exception did not apply and litigation was not then in contemplation.
45. The next category to consider is 3, the section 161 statements. The defence position was that none of the "documents recording witness evidence" under section 161 was admissible. Alternatively the Defence contended that the protection afforded by section 84(2)-(4) must

preclude reliance on section 161 statements for purposes beyond routine production of materials (see Defence Submissions on Admissibility at Divider 5, Paragraph 33 onwards).

46. Category 3A are the key or critical witnesses which the GOI relies on which the Defence argue ought not to be admitted in their current form.
47. The criticism made by Ms Montgomery and Mr Watson of the statements is that there was no information as to how the statements were taken, the language in which they were taken etc. The section 161 documents are unsigned and the resulting statement has no value in law except to be used as contradiction in cross-examination. Moreover she says the UK-India Treaty never envisaged section 161 statements but section 164 evidence which is taken in front of a magistrate.
48. The Defence submit that the Court's discretion under section 84(3) ought not to be exercised in favour of admission of a section 161 statement if it is critical evidence. The Defence rely on three particular concerns, firstly that the section 161 statements appear to have been prepared by the investigators and then presented to the witnesses. Certainly, I find that there is evidence that lengthy material is found verbatim in statements from different witnesses. Secondly, many of the witnesses whose statements have been taken were not contemporaneous to the events in question and are reporting on the event by reference to documents which were presented to them by the investigators. Thirdly, the risks are increased because none of the witnesses produce any of the underlying documentary material on which they rely.
49. In reply the GOI contended that section 161 regulates hearsay in Indian proceedings. Mr Summers and Mr Watkins submitted in their Submissions on Admissibility (at Paragraph 23) that as was clear from the evidence of Professor Lau, section 161 statements are recorded by (and signed by) police. Indian law prevents the state from relying on the statements (ie the officers' hearsay record of what the witness will say) at trial. Instead the witnesses are required to give live evidence at trial. The function of the hearsay statement is limited to questioning about an inconsistent statement. Section 84(2) permits the court to act upon hearsay evidence.
50. The GOI argues that the statements satisfy section 84(2), in that they were made to a police officer or investigator and direct oral evidence by the witnesses of the facts would be admissible in English courts. It is wrong for the Defence to assert that the section 161 statements have no value under Indian law because they have limited value at trial because they are required to give live evidence.
51. I have had no evidence from the officers as to how the section 161 statements were taken. I bear in mind this is a fraud case. The evidence is repetitive with many witnesses producing similar information. The officers investigating these matters often receive statements from witnesses who produce the same documents from their bank records. There is no evidence that I have heard which undermines the *bona fides* of the investigating officers.
52. I do not know the processes the officers go through to produce a statement which they read over to the witness. It would be wrong to speculate but it may involve a number of preliminary interviews before the witness statement is finalised. I have no doubt that what happens then is that the information taken from the witness which is put into statement form is then read over to the witness. If the witness accepts the truth and accuracy of the statement, the officer signs the statement and writes '*RO and AC*', read over and affirmed as correct.

53. Ms Montgomery said that it is not even known if the evidence is taken in English or translated, that is true but I noted that the email exchanges and banking information was all in English and on that basis it would seem that the formal language spoken by executives in banking in India is English. Ms Montgomery's third concern was that a number of witnesses gave evidence of matters they did not witness. I set out below the evidence I rely on. I have given less weight to the witnesses who do not give direct evidence of the matters they speak about.
54. I turn to section 84. I find the section 161 statements were made to a police officer (for example Suman Kumar Dy SP. CBI, BS & FS, Mumbai) or an investigator (Mr Raj at the ED) charged with investigating the allegations; they are both senior officers, for example Mr Kumar is a Deputy Superintendent of the CBI and Mr Raj is the Deputy Director of the Enforcement Directorate.
55. Direct oral evidence from the witnesses would be admissible at trial, the way the s161 system works is that the witness gives evidence and does not rely on the statement but he or she can be cross examined on any inconsistencies between their evidence and the statement.
56. In deciding whether the s161 statements are to be treated as admissible evidence of facts, I have had regard to the nature and source of the document and find that I am sure that the documents are authentic. The witnesses mostly produce bank documents from their records, they produce correspondence, memoranda, minutes of meetings. Others comment from their own knowledge on whether the steps taken to risk assess the loan were appropriate in all the circumstances. The witnesses will be able to be challenged at a trial if this court decides to extradite the RP.
57. This is an allegation of fraud which will rely on documentary evidence. The papers contain a number of documents which are unlikely to be challenged and as in the case of most frauds, if the RP is tried, the case will come down to his explanation of what he knew at the time the loans were being applied for, what his and the bank's intention was when they granted the loans, what then Dr Mallya did with the money and what he did or did not repay. If a prima facie case is found, the main question is likely to be whether a fact finder can be sure that he was dishonest in doing what he did. A trial will want to look at possible personal gain and what was said during the private meetings which took place between the bank and company executives.
58. The framework of the fraud will not be in dispute. In other words, the RP and the others will not contest that emails were sent in the terms they were or that representations were made, they will be questioning the intention which lay behind the acts.
59. I find that the statements supply, along with the exhibits they produce, relevant evidence which would otherwise not available; the statements are relevant to the question of prima facie case that I have to determine; I have regard to the risk of unfairness that could be caused by the admission of the statements. I noted that in this extradition hearing the evidence relied upon by the GOI was able to be considered in detail by VJM's expert witnesses in particular the banking expert Mr Rex. The RP was not prejudiced by the admission of the statements in the format that they were in. I noted too that there was no evidence from VJM and had he wanted to challenge the evidence given in the s161 statements he would have been able to.

60. I find that the section 161 statements are admissible under section 84(2), (3) and (4) of the 2003 Act.
61. The Category 4 material is the GOI's response document and attachments. This is a compilation of documents produced in reply to the Defence evidence. It is not relied on by the GOI to support a finding of a *prima facie* case. I have not relied on this material and I find that there is no basis to admit this evidence either in domestic law or under the statutory extradition scheme.
62. Category 5 material is evidence of what happened post default. The Defence argued it was evidence of 'bad character' which the court should decline to admit. The GOI contended that VJM's dishonest behaviour post-default throws light on his intentions at the outset. It was accepted by the Defence that the evidence was capable of establishing misconduct on the RP's part.
63. I have no doubt that the conduct which occurred after default '*has to do with the facts of the offence*' (section 98 of the CJA 2003). I accepted the argument that the offence may have started with the obtaining of the loans but it continued with the disbursement of the loan proceeds and his subsequent avoidance of his liabilities. His attitude to the two guarantees, both corporate and personal, that he gave as security against the loans, is arguably shown by what he did when he was asked to fulfil his obligations. This Category of material is admissible.

#### Defence evidence

64. The RP did not give evidence but called evidence from Mr Humphreys, an expert on the aviation industry whose evidence came down to his view that in 2009 there was excess capacity in the market and it was inevitable that one or more significant airlines would have to go bankrupt to solve the problem and that is what happened to KFA. Other witness called included Mr Rex, a banking expert, whose evidence I consider in various places of the judgment below; Margaret Sweeney, an executive of the Formula 1 Racing Team Force India; Professor Martin Lau, an expert on Indian law and Professor Saez a political economic scientist who expressed views about whether the prosecution was political and on the *bona fides* of the head of the CBI. Dr Mitchell was called to give evidence about prison conditions in India. In connection with the Article 3 argument I also had a complete medical report on Dr Mallya which is referred to below. There were also some witness statements which I read and to which I refer, if I consider them to be relevant, below.

#### **Prima facie case**

65. The test for the court to apply is set out in section 84 of the 2003 Act above. The court must decide whether "*there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him*" (section 84(1)).
66. Some of the evidence relied on is direct evidence but the GOI also relies on inferences that it says can be drawn from the evidence. The allegation of a conspiracy between the RP and others at KFA and IDBI bankers is based on inferences.
67. The approach to a submission of no case is set out in the text books and is that "... *on the proper application of Galbraith...the prosecution are not required to show that the jury could not reasonably reach any alternative inference contended for. The question is*

*whether it is properly open to the jury to reach the inferences contended for by the prosecution” (Blackstones).*

68. Lord Justice Aikens considered the approach to prima facie case in extradition in the case of *Devani v Republic of Kenya* [2015] EWHC 3535. At paragraph 49, he held that the District Judge must “*determine whether, on one possible view of the facts, he is satisfied that there is evidence upon which the requested person could be convicted at a summary trial of an information against him*”. I accept that is the test I must apply.
69. The case against Dr Mallya can be conveniently divided into different parts. I am not considering all the evidence against him and in his favour but enough for me to consider whether there is a *prima facie* case against him.

#### Framework

70. There is a great deal of evidence provided by the GOI but some of it is repetitive. The defence team has also provided a number of volumes of evidence and called witnesses of whom the most significant in my view was Mr Rex, an expert in the banking and financial sector. A great number of issues were raised by the witnesses or in argument before me. I have not considered every point raised by any means. In a summary trial, a submission that there is not a prima facie case would be followed by a short, pithy judgment, either way. I am afraid pithiness has eluded the court in this case but against that, as I have said, only a very small part of the evidence is referred to below.
71. My approach has been to consider firstly the allegations that Dr Mallya and others dishonestly made representations to IDBI Bank to make a gain for themselves or to cause loss to the bank. It is the RP’s knowledge and involvement in the events I have been particularly concerned with along with what KFA said to IDBI in the lead up to the sanction of the loans. The conspiracy which is alleged to have taken place involving some of the bank executives I have considered in less detail. Finally the allegation of money laundering, I deal with shortly. The decision in relation to the money laundering charge follows on from the conclusions I have drawn in relation to the making of false representations.
72. In looking at the allegation of the making of false representations I have concentrated on what is said in the correspondence which led up to the making of the loans, it is evidence which has not been disputed by the Defence. It consists of emails sent between the KFA alleged conspirators including Dr Mallya and it builds up a clear picture of their view of the financial situation of KFA. I have followed that with an in-depth analysis of the letters then sent to IDBI requesting loans. It is straightforward to compare what was being said in the emails sent about a month before to what IDBI was being told in the run-up to the sanctioning of the loans. It is an easy step from there to find a case to answer in relation to a number of the representations made to the bank. Then I look at what IDBI considered the loans were for. I turn then to what some of the loan money was spent on. Finally I look at whether there is a prima facie case some of the bankers were involved before looking at the allegations of money laundering.
73. There is a vast amount of evidence in the case but I am limiting myself to what is needed to prove a prima facie case, or not as the case may be.

#### KFA’s knowledge of its finances

74. Dr Mallya did not give evidence to this court and therefore did not explain what he knew about the representations made to IDBI. There was evidence too that he had private

meetings with Mr Agarwal in the run-up to the loan applications. There were no minutes made of these meetings that I have seen. Dr Mallya has not explained to the court what was said during them. The IDBI Chairman's secretaries cannot produce the 2009 diary which is untraceable but can say Dr Mallya had at least two meetings with Mr Agarwal during the week in the third quarter of 2009 (Mr Colaco and Dr Banerjee Volume D pages 441 and 444). Mr Rex' evidence on that is that it is normal practice for such private meetings to take place between the Chairman of the bank and a client applying for a large loan.

75. Mr Rex said that when the loan applications were made KFA was in "dire trouble" and indeed the annual report for FY2009 showed very substantial losses after tax and the figures for Q1 and Q2 to September 2009 showed more and continuing losses before tax. He was clear that KFA could only be saved by money coming in.
76. An email trail about returned cheques is set out in volume D at pages 642 and 643. The first is dated 6<sup>th</sup> May 2009 timed 1539 and is from Mr Nedungadi of KFA to Dr Mallya and is copied to AR Raghunathan at KFA. Mr Nedungadi says that Dr Mallya must have received the section 138 notice from IOC for the Rs 50 crores returned cheque. He believes that Yes Bank has issued a similar notice. He tells Dr Mallya that prosecutions will commence by mid-week. He then asked Dr Mallya to "instruct" AR (Mr Raghunathan) to do what was needed to be done and have the legal notices withdrawn. A section 138 notice is sent for a returned cheque and requests the amount to be paid in another way. If not paid a criminal allegation could be made.
77. On 6th May 2009 at 22.05 (volume D page 643) Dr Mallya replies to Mr Nedungadi. Dr Mallya says he does not under-estimate the seriousness of the situation but they will need to speak to "Rana" and "*explore ways to work out a satisfactory solution*". He goes on to say that the 500 crores from State Bank of India was insufficient to make "*seriously overdue operational payments and the more we use to meet Banking commitments as against operational commitments, we are sure to hit a brick wall.*". The attitude of SBI to the loan is shown by his next sentence: "*Besides, SBI are virtually auditing every payment and have told Raghu that they will only release operational payments.*". He then says he doubts that SBI will agree to release funds to Yes Bank. He says as it is out of the 500 crores, they had to pay 48.86 crores being the interest debited by SBI and the 35 crores paid to IOC "*under duress*".
78. The email exchange continues at 23.47 later that night (volume D, page 642) from Mr Nedungadi to Dr Mallya. Mr Nedungadi says he is not suggesting that they close down the airline but points out that payments due to the banks are in fact for long overdue operational dues paid by the banks on their behalf to operating creditors. He then says that IOC is behaving aggressively and would not hesitate to initiate penal prosecutions, he doubted whether a company could be run effectively with its directors trying to avoid arrest. Dr Mallya's reaction to this email is five minutes later when he asks Mr Raghunathan how many PDCs (postdated cheques) are still outstanding with IOC.
79. The answer in an email from Mr Raghunathan to Dr Mallya the following day is that there are none. He had just come from a meeting with SBI officials and collected the appraisal note with a covering letter from SBI and had given the same to PNB, BOI and BOB (various banks).
80. The evidence jumps forwards a few months to September 2009, shortly before IDBI is approached for the first STL. GOI relied on a set of emails sent between various KFA

executives, Dr Mallya and Accenture where the true financial position of KFA is being discussed. These are set out at volume C pages 189-193.

81. In chronological order therefore is first an email (volume C page 192) sent to the RP by Mr Nedungadi on Thursday 3<sup>rd</sup> September 2009 at 702pm. Mr Nedungadi encloses the latest financial projections received from KFA. He had asked for it as he has a “kick off” meeting on Tuesday 8<sup>th</sup> September 2009 with bankers and lawyers for a Rights issue for KFA. He tells the RP that at the time of the SBI loan proposal they had also presented projections for the company. For the year end 09, they had projected an EBITDA (earnings before tax, depreciation and amortisation) loss of Rs 768 crores and a PBT (Profit before Tax) loss of Rs 1594 crores. The actuals revealed an EBITDA loss of Rs 1326 crores and a PBT loss of Rs 2155 crores.
82. Mr Nedungadi then sets out the current year position. For FY 2010, they had projected a profit at EBITDA level of Rs 969 crores and a net loss of Rs 174 crores. He goes on to say that in fact in Q1 (Quarter 1, April to June) the losses had exceeded Rs 300 crores. The most recent projections he said show EBITDA at Rs 74 crores and a net loss of 931 crores but he says he is not even sure if that would be accurate as in the months of July and August their load factors had dropped from +70% *“to a mere 62% in August and that too with a lower yield (from Rs 4200 to Rs 3875). At this rate, chances are that actual loss for the current year will far exceed the projections”*.
83. Mr Nedungadi goes on to say in his email to the RP that KFA had accumulated losses of about Rs 2250 crores at the end of FY09 to which will be added the current year losses of a minimum of Rs 1000 crores. On this projection, these losses will not be recouped “even in the next five years. Investors will be hard pressed to put money into a company knowing that no dividend is possible for a minimum of five years. If the underwriters insist on the financials being adjusted for audit notes then Deferred Tax of Rs 2200 crores and Maintenance Reserve treatment of about Rs 900 crores will be added to the accumulated losses. (Volume C Page 193).
84. In his third point, he says that KFA with a high operating leverage does not appear to be incurring high losses in bad times being compensated by quick profits in good times. Also public records “will show that we have lost ground to other carriers in the months of July and August”. Finally, he says to Dr Mallya, *“I urgently seek your guidance as the reality of operations, particularly the sales performance seems to be very different from what was anticipated”*.
85. Within six minutes of this email Dr Mallya is forwarding it to Mr Raghunathan (the KFA Chief Financial Officer) and saying that he has not seen the numbers Mr Raghunathan provided to Mr Nedungadi and wants the answers to the questions raised by the latter in his email to the RP.
86. Then later on the same day, 3<sup>rd</sup> September at 9.16pm (C page 190) Mr Nedungadi emails Accenture to say KFA has kicked off a rights issue but more relevantly perhaps says that he was *“really surprised”* to see that the Q1 (April to June 2009) results were significantly worse than the full year’s projected loss given to the State Bank of India (the Lead Underwriter of the Issue).
87. Mr Nedungadi says that the months since, July and August 2009 have been *“even worse”*. Despite the discounting of tickets, seat factors have dropped to just 62% in August. He asks

for Accenture's urgent input as they have to take the underwriters through the numbers on Tuesday morning (Volume C Page 190).

88. This email is copied to SR Gupte and Mr Nedungadi adds a note that he needs his (Mr Gupte's) guidance as well. He outlines the position and says the company will have accumulated losses in excess of 3500 crores by the end of FY2010 which may increase substantially if certain accounting methods are changed. He says KFA "*may take 10 years to recoup these accumulated losses*". The fact that the most recent trajectory of the business shows a downward trend in capacity deployed, capacity utilisation and yield will all add to the concerns. He adds this final sentence, "*as a finance person you will readily appreciate what I am saying*". He wants to take his guidance on Friday 4th September.
89. The next email exhibited is an email dated Monday 7th September at 6.34pm (C page 189) to Mr Nedungadi from Accenture comparing the Q1 performance of KFA with the State Bank of India business plan. The numbers are based on the KFA Management Information System. He also attaches a comparison of KFA performance with Spice Jet's Q1 performance results on a per aircraft basis and a separate analysis of KFA ATR operations.
90. The email exchange exhibited continues on 9<sup>th</sup> September 2009 when the 7<sup>th</sup> September 2009 email of 6.34pm from Accenture to Mr Nedungadi is forwarded by the latter at 13.44 to Harish @ ubmail. Mr Nedungadi says please discuss. On 9<sup>th</sup>, Harish@ubmail then forwards the Q1 results comparison (comparing KFA's Q1 results with the KFA State Bank of India business plan) to Mr Raghunathan.
91. The importance of this evidence is that it shows the concerns about KFA in the weeks leading up to the application for loans from IDBI. It shows that KFA's advisers and management are looking at KFA's actual Q1 performance compared with the State Bank of India's business plan.
92. In the application to IDBI KFA rely on the information sent to the State Bank of India when it abundantly clear that the situation of the company had deteriorated in a significant way.
93. The true position of KFA is not set out in the letter dated 1<sup>st</sup> October 2009 where Mr Raghunathan CFO of KFA is applying for the loan. He says to Mr Batra of IDBI that the "*impact of the loss for the previous financial year (FY2009) is around Rs 1600 crores*" (Volume A Page 60). But on 3<sup>rd</sup> September 2009 Dr Mallya was being told by Mr Nedungadi that they had projected a loss of Rs 1594 crores but the actuals revealed a profit before tax ("PBT") loss of Rs 2155 crores. This is a misrepresentation on the face of it of the loss.
94. Furthermore, the letter of 1<sup>st</sup> October seems to blame KFA's situation on the price of fuel including an import duty which the GOI may abolish; the impression that is given is that the problems of KFA are that of all of the Indian aviation industry. In fact, what is clearly said to IDBI by KFA later is that the poor first half results were due to 20 aircraft suffering engine failure, a fact that is never mentioned in the emails exchanged by VJM, Mr Raghunathan and others. As too is clear from the emails from 3<sup>rd</sup> September onwards, KFA had lost ground to other carriers in July and August 2009 and their load factors had dropped from 70% to 62% in August 2009 (see Volume C Pages 192-3). As set out above, Mr Raghunathan was acting under the instructions of Dr Mallya when he sent the 1<sup>st</sup> October 2009 letter (Volume D page 644), he was to get Mr Ramachandran on the job and apply to IDBI for 950 crores.

95. Whatever the position of KFA earlier in the year when it obtained a 1050 crores loan from a consortium of banks, by 1<sup>st</sup> October 2009, the position of the company had deteriorated. The letter of 1<sup>st</sup> October 2009, on the face of it misrepresented the position as set out above. The letter of 1<sup>st</sup> October 2009 used information which was out of date. The business plan sent with the letter was the one provided to the Bank of India and it was dated January 2009. The brand valuation was dated November 2008.
96. Mr Rex took a different view of the emails set out above. He said they were a discussion between officers in the UB Group and the references to “*a minimum of 5 years*” and “*The Company may take 10 years to recoup these accumulated losses*” refers to the time it would take to reverse the negative balances in KFA’s distributable reserves. Mr Rex said it was not a suggestion that KFA’s losses would continue over that period. That would explain too Mr Gupta’s comment that “*As a finance person, you will readily appreciate what I am saying*”. That was his reading of the emails, I did not agree with him.

### Summary

97. I find the RP and the other executives of KFA knew the following:
- a. In May 2009 that cheques were not being honoured by the bank
  - b. Section 138 notices were being served and prosecutions would soon start
  - c. The SBI were only allowing operational payments to be made from their loan
  - d. That although they had presented projections for KFA for the YE2009 of a PBT loss of 1594 crores, the actuals showed a PBT loss of 2155 crores
  - e. On 3.9.09 the projected loss of FY 2010 of 174 crores was likely to be inaccurate because on that date they knew the loss for Q1 FY 2010 had already exceeded 300 crores
  - f. On 3.9.09 the most recent projections showed a net loss for the year of 931 crores
  - g. On 3.9.09 they knew that even the prediction of a PBT loss of 931 crores might be inaccurate because of load factors dropping from +70% to a mere 62% in August
  - h. They knew they had lost ground to other carriers in July and August 2009
  - i. Accumulated losses at FY2009 of about 2250 crores will be added to the FY2010 losses of a minimum of 1000 crores
  - j. The losses would not be recouped even in the next 5 years
  - k. Investors would be hard pressed to put money in knowing no dividend would be possible for a minimum of 5 years
  - l. The position could get worse if the underwriters insisted the financials were adjusted for the audit notes
  - m. KFA did not appear to be benefiting from quick profits in good times which is to be expected with a high operating leverage
  - n. Mr Nedungadi was so concerned he was seeking the RP’s guidance as to “the reality of operations”. Sales were said to be very different from what was anticipated
  - o. On 3.9.09 Mr Nedungadi told Accenture that the Q1 results were significantly worse than the full year’s projected loss given to SBI, the lead underwriter of the issue
  - p. On 3.9.09 Mr Nedungadi thought that it might take 10 years to recoup the accumulated losses.
  - q. On 3.9.09 Mr Nedungadi is telling others that the most recent trajectory of the business was downwards in capacity deployed and utilization and yield added to the concerns

The representations made by KFA to obtain the loans

The first loan

98. I have set out above what I find was known by the time KFA was making applications to IDBI to get a loan. At the time of the application for the first loan, there is evidence that the financials from Q1 were known to KFA but no evidence that I have found that the figures from Q2 were known to them. As can be seen from the emails above, the perilous position of the company was well known to VJM and the others.
99. In Volume D Annex IV/11 Page 644 is an email sent by VJM to Mr Raghunathan, the CFO of KFA, dated 1<sup>st</sup> October 2009 and timed 11.51. VJM tells Mr Raghunathan that he must put a colleague onto applying to IDBI for 950 crores. “*Do not delay*” he says. He tells him to make a file of all emails threatening legal action, meet Mr Verma and show the file to him to “*underscore the critical urgency of the situation*”. This email shows firstly VJM’s involvement in the obtaining of the loans and it shows how urgent the situation was with threats of legal action. The email results in the letter below of the same date.
100. In volume A divider 3 Annexure VI page 59 is a letter dated 1<sup>st</sup> October 2009 from Mr Raghunathan of KFA to Mr Batra of IDBI. It is KFA’s request for credit facilities to the extent of 950 crores. The Bank is being told that due to spiralling fuel prices since December 2007 the performance of the aviation sector has been adversely affected resulting in losses and erosion in liquidity of aviation companies on account of negative cash flow from operations. The silver lining is said to be the falling crude oil price and policy changes such as the abolition of import duty on fuel and the implementation of cost cutting measures by aviation companies. The combined efforts of the companies and government place aviation companies on the road to recovery faster “and emerge profitable in the mid-term”.
101. Mr Raghunathan goes on to outline KFA’s strengths as having a huge brand pull and speaks about the aggressive cost cutting they are undergoing. An Accenture study shows savings of 598 crores for 2009, 868 crores for 2010 and 902 crores for 2011. Due to steep rises in fuel prices etc KFA has been incurring losses and the impact of loss for the previous financial year FY2009 is around 1600 crores. They have been forced to defer payment to creditors. To clear these dues and to meet additional working Capital requirements they need 2000 crores, of which they have raised 1050 leaving 950 which they ask IDBI to take up, the corporate loan of 950 crores being 48% of the total.
102. Mr Raghunathan goes on to say that they have already infused an additional unsecured loan of 200 crores in FY2009 from the Group or associated companies. A further 200 crores will be “infused” in FY2010 and in FY2011. They plan to raise US\$400 million through a strategic investor but in the years FY2011 and FY2012. Mr Raghunathan then says that they have obtained a valuation of the brand KFA from “*two different reputed international valuers*” (page 61 third paragraph) and the Brand value is estimated at around 3400 crores. A strategic investor will understand the potential of the brand. The CFO says that they plan to sell between 25 to 30 surplus aircraft which could bring in about 324 crores. The money coming in from those sales has not been included in the business plan that is enclosed with the letter sent. KFA has the strong backing of UB Group which has made investments of about 1652 crores.
103. Security is dealt with at page 62, KFA offers assignment of the KFA Brand valued at 3400 crores. There is a negative lien on the fleet of HP lease aircraft, a corporate guarantee

from United Breweries Holdings Ltd and a personal guarantee from the RP. The loan will be repaid in instalments by January 2014.

104. Mr Raghunathan suggests that Bank of India would be happy to share their appraisal note with IDBI and the letter has a number of documents enclosed including the KFA Brand Valuation by Grant Thornton, the KFA FY09 Annual Report. A January 2009 Business Plan which has been reviewed by Grant Thornton etc is also enclosed it includes a number of figures including for load factor finish on October 2008.
105. At this stage in the year the figures for the half year to September 2009 are not available although the Q1 FY 2010 financials are. The Q1 are not provided to IDBI.
106. There is a follow up letter of 7th October 2009 (bundle A Annex III page 51) sent by Mr Raghunathan to IDBI; he refers to the 1st October 2009 letter I have looked at above. He says that he had had a meeting with IDBI on 5th October 2009 and that the RP had a meeting with the bank's Chairman Mr Yogesh Agarwal on 6th October 2009. In the letter he asks IDBI to grant KFA a short-term loan ("STL") of 150 crores for a period of six months. This is to meet "certain critical obligations to overseas vendors including Aircraft Lessors and other service providers". They undertook to provide a corporate guarantee from UBHL for the STL. The other securities discussed at the meeting will be looked at later once KFA had got information from the finance department.
107. Mr Rex gave evidence that the STL went to the Credit Committee for sanction and by then it had a requirement for a personal guarantee from VJM. The Credit Committee approved the loan on 7th October 2009 (Rex Volume J Divider 2 Paragraph 46 onwards). The sanction letter said it was for meeting "certain payment obligations to overseas vendors including Aircraft Lessors and other service providers". The loan was disbursed on 9<sup>th</sup> October 2009.

#### The first loan - Summary of KFA's representations made to obtain loans

108. KFA made these representations either explicitly or implicitly in the run up to the first loan:
- a. Mr Raghunathan said that spiralling fuel prices had affected the aviation sector which had resulted in losses and erosion in liquidity on account of negative cash flow
  - b. The silver lining was falling crude oil prices and the abolition of import duty on fuel
  - c. Aviation companies were involved in cost cutting measures
  - d. Aviation companies were on the road to recovery faster and would emerge profitable in the mid-term
  - e. KFA's strength was having a huge brand pull
  - f. KFA was engaged in aggressive cost-cutting
  - g. Due to steep rises in fuel prices KFA had been incurring losses
  - h. The impact of the loss for FY2009 was around 1600 crores
  - i. KFA had been forced to defer payments to creditors
  - j. They had infused 200 crores in FY2009 and would do so again in each of FY2010 and FY2011
  - k. They would raise US\$400 million through a strategic investor in FY2011 and 2012
  - l. A brand valuation had been obtained from two different international valuers and the value was estimated at around 3400 crores (this estimate was enclosed with the letter)

- m. KFA planned to sell 25 to 30 surplus aircraft which could bring in 324 crores, these had not been included in the business plan enclosed
  - n. KFA had the strong backing of UB Group which had invested 1652 crores
  - o. As to security, they offered assignment of KFA Brand valued at 3400 crores, negative lien on the fleet of HP lease aircraft, corporate guarantee from UB Holdings Ltd and the personal guarantee from VJM
  - p. Mr Raghunathan said that the Bank of India would be happy to share their appraisal note
  - q. A January 2009 Business Plan reviewed by Grant Thornton was enclosed.
109. A second letter of 7<sup>th</sup> October 2009 (Volume A Annex III page 51) from Mr Raghunathan referred back to the 1<sup>st</sup> October 2009 letter set out above and also referred to the meetings that had taken place between IDBI's Chairman Mr Yogesh Agarwal and VJM and between Mr Raghunathan with IDBI. There is a reference to the corporate guarantee from UB Holdings Ltd and it notes that other securities were discussed and they will get back to them about those.

#### The first loan from the Bank's perspective

110. I turn to the loan application from IDBI's perspective. Between the letter of 1<sup>st</sup> October 2009 and the memorandum of 7<sup>th</sup> October, there had been conversations between KFA and IDBI referred to by Mr Raghunathan in the letter of 7<sup>th</sup> October 2009 (Volume A Annex III page 51). There are no notes in evidence of what was said.
111. A memorandum was sent to the bank's Credit Committee dated 7<sup>th</sup> October 2009 by Mr Dasgupta of the Project Appraisal Department of the Large Corporate Group (memorandum is at Volume A Annex VII page 104), he made a proposal for sanction of a short-term loan ("STL") of 150 crores. The STL was being sought as a "New Relationship" client. The Risk Department had not yet rated the STL. It was said to be for "*meeting certain critical obligations to overseas vendors including Aircraft Lessors and other service providers*". A Banker's Report and Comments will be obtained as it is a new relationship. The security was set out as a corporate guarantee of UBHL, a personal guarantee of the RP and a demand promissory note of 150 crores. The enclosures with the memorandum included the latest audited financial statements and profitability and cash flow projections.
112. The memorandum goes on to consider the proposal at bundle A Annex VII page 107. The first thing to note is that point 2 on page 107 says that KFA incurred a loss of 1609 crores during FY2008-09. From an email on 3<sup>rd</sup> September 2009, it is clear that the actual loss before tax was 2155 crores. The memorandum to the Credit Committee goes on to say that in the current year with the "*improvement in domestic and global economic scenario, the performance of the company is showing improvement*" (pages 107 and 113). This information must have come from KFA and it was untrue. As the emails make clear the performance of the company was deteriorating. On the face of it the Credit Committee was being misled. At the time this was written KFA knew it had made a larger than expected first half loss.
113. The memorandum then says that KFA was expected to earn net profit in coming years "*due to various benefits including improvement in load factor accrued out of merger*". This was contrary to what had been said in the September emails that the seat factor in July and particularly in August had deteriorated.

114. The writer of the memorandum goes on to say that to improve the financial position of the company, the promoters had already “inducted” 200 crores in the FY2009 and proposed to induct another 400 crores in two tranches, 200 in FY2010 and 200 in 2011. KFA was planning to raise equity of US\$400m in FY2011 and FY2012.
115. The money was to meet “*certain urgent payment obligations and for meeting additional working Capital requirements*”. A corporate loan of 2000 crores was sought for clearing dues to creditors and working capital limit. The SBI and other named banks had sanctioned 1050 crores and applied for 950 crores repayable in five years with a 150 STL up front to meet critical obligations. KFA had a market share of over 27% as at December 2008 (A page 112). The financial position is in a box and shows a net loss of 1609 crores for the FY 2008-9 at page 112. The memorandum made it clear that VJM was looking after the day-to-day affairs of the company.
116. Financial projections for KFA were set out on page 117 of the memo. With the proactive measure taken and with the improvement of the economic scenario, the losses of 1609 crores for FY2009 would be reduced to 174 crores in FY2010 and it “is expected to start earning profits from FY2011”. As before, what is being said in this memorandum is not reflected by what VJM, Mr Raghunathan and Mr Nedungadi were saying in emails exchanged in early September 2009 about a month earlier. There is no reference either to the Q1 FY2010 losses which were said to be far larger than expected.
117. Mr Dasgupta goes on at page 118 to consider the general terms of the sanction for the STL of 150 crores. The security is set out as the corporate guarantee of UB Holdings with a net worth of 1511 crores as of 31<sup>st</sup> March 2009, the personal guarantee of VJM and a demand promissory note of 150 crores. Repayment will take place in one payment 180 days after the disbursement of the loan.
118. The recommendation to the Credit Committee at the end of the memorandum is at Volume A page 121. The net loss was due to high fuel and oil price and low load factor arising out of global economic slowdown. KFA was carrying out various costcutting measures. A minimum of 25-30 aircraft would be rendered surplus due to a rationalization policy adopted by the company. It is proposing to sell the aircraft which could result in savings of 300 crores. The staff per aircraft is lower than the competitors, Jet or NACIL.
119. The memorandum mentions the 200 crores per year inductions and the additional equity to be raised of US\$400 million. The recommendation goes on to say that the load factor which is around 65% is expected to go to 75% and “the company is expecting to start earning profits from FY2011 onwards”. According to the September emails however, the load factors had dropped in July and August 2009 to 62%. He proposes the sanction of a STL of 150 crores to KFA. Finally, the recommendation says that KFA does not appear on a defaulter list and “there are no litigations pending against the company”.

First loan - Summary of impressions the bank had been given about KFA’s financial position

120. In relation to the first loan, I set out below the impression IDBI had received about the state of KFA’s business, from correspondence as can be seen from above and other communication. IDBI understood the following:
- a. The STL was to meet certain critical obligations to overseas vendors including Aircraft lessors and others
  - b. A banker’s report would be obtained as it was a new relationship

- c. The documents sent to IDBI's Credit Committee including the audited financial statements and profitability and cash flow projections gave an accurate picture of the financial health of the company
- d. The loss was said to be 1609 crores in FY2009
- e. The loss would be reduced to 174 crores in FY2010
- f. In the current year KFA was showing improvement
- g. From FY2011 KFA was expected to start earning profits
- h. In coming years KFA was expected to earn net profit due to various benefits including an improvement in load factor
- i. 200 crores had been inducted in FY2009, 200 more would be inducted in each of FY2010 and FY2011.
- j. KFA would raise equity of US\$400 million in FY2011 and FY2012
- k. The loan was to meet certain urgent payment obligations and for meeting additional capital requirements
- l. VJM was looking after the day-to-day affairs of the company
- m. The securities were the corporate guarantee of UBHL with net value of 1511 crores as at 31.3.09, the personal guarantee of VJM and a demand promissory note of 150 crores

#### Representations in relation to the 200 crores advance

121. A letter dated 4th November 2009 is sent by Mr Raghunathan to IDBI for the attention of Mr Batra/Mr Dasgupta/Mr Sridhar. He refers to the meeting that VJM had with the bank Chairman. KFA requested an ad hoc release of 200 crores pending sanction of a 950 crores proposal. This was to meet "certain critical obligations to overseas vendors including Aircraft Lessors and other service providers" (Volume A Annex IV Page 52). Mr Raghunathan undertook to provide all the information required for IDBI to consider their loan request for 950 crores.
122. A letter dated 5th November 2009 is sent by Mr Raghunathan to Mr Sridhar at IDBI (Volume A Annex IV page 54). He has been asked to break down the major payments to be made out of the 200 crores facility. He lists the names of the various businesses including BE Aerospace, Messier Group and Air France and the nature of the expenses involved. Judging from the well-known names set out, payments are to be made for maintenance, lease rentals, engineering etc. The expenses come to 36 US\$ Mio (I assume millions). The balance of the 200 crores, "will be utilized for settling dues to various critical engineering and other vendors and to lease rental obligations". Again, there is a reference in the letter to discussions between the KFA CEO, VJM, and the IDBI Chairman.

#### Summary

123. The following representations are made in correspondence in relation to the 200 crores advance on the then 950 crores proposed loan:
  - a. That the major payments from 200 crores loan would be to the named companies to a total of 36 crores
  - b. The balance would be for settling dues to various critical engineering and other vendors and to lease rental obligations

#### Representations in relation to the third loan totalling 750 crores

124. To see what had been said to IDBI by KFA, I turn to the documents sent to the Executive Committee for their meeting of 27th November 2009 where the proposal to sanction a corporate loan of 750 crores is considered along with the confirmation of the Chairman's action in releasing the advance on the loan of 200 crores. The documents consist of a short memorandum dated 24<sup>th</sup> November 2009 ("the short memo"), an attached appendix ("the Appendix") with the proposed terms and conditions and finally a 46 page memorandum ("the long memo") which had been sent to the Credit Committee by the witness Ms Kabra and Mr Sridhar (an alleged co-conspirator in the case). These documents are to be found in Volume A from Page 122 onwards.

#### The short memo

125. The short memorandum gives an overview of the aviation industry in India. It sets out the chronology and actions in relation to the earlier loans of 150 and 200 crores. It makes it clear that the loans are to pay off the creditors including pressing creditors of 2000 crores with a total of 2511 crores. The total exposure of the bank will reach 900 crores.

126. At page 124, KFA is said to be "*confident of meeting the short-term challenges and take advantage of the growth potential in the long term*". Paragraph 8 makes it clear that the loan would be secured on a *pari-passu* basis by Escrow of specified receivables into an Escrow account in SBI, hypothecation of the KFA brand valued as at 1st April 2008 at 3406 crores by Grant Thornton and negative lien on 12 aircrafts under financial lease, personal guarantee of VJM with a net worth of 1395 crores and with a corporate guarantee of United Breweries (Holdings) Ltd with a net worth of 1511 crores.

127. It goes on to explain that the rating committee gave it a rating of "BB" with a score of 50 at its meeting on 16th November 2009 and on 23rd November 2009 the Credit Committee recommended sanction by the Executive Committee. It specifies at point 11 that the name of the company/its directors do not appear in the RBI defaulter list nor in the caution advice. The writer of the memorandum then asks the Executive Committee to relax the norm of the minimum internal Credit rating of "BBB" for new clients and sanction the loan on the terms and conditions set out in the Appendix to this memorandum as well as the usual terms and conditions.

#### Summary of representations made by KFA to IDBI in the short memorandum

128. The following representations can be understood to have been made by KFA to IDBI
- a. The loans were needed to pay off the creditors totalling 2511 crores including pressing creditors of 2000 crores.
  - b. KFA was confident of meeting the short-term challenges and of taking advantage of the growth potential in the long term
  - c. The loan would be secured via an Escrow account for certain receivables, hypothecation of the KFA brand valued as at 1<sup>st</sup> April 2008 as 3406 crores by GT, negative lien on 12 aircraft under financial lease, personal guarantee of VJM with a net worth of 1395 crores and a corporate guarantee of United Breweries (Holdings) Ltd with a net worth of 1511 crores
  - d. The company/its directors did not appear on a RBI defaulter list nor in the caution advice

#### Appendix sent to the Executive Committee

129. The terms and conditions of the loan were set out in the Appendix (Volume A page 126 onwards). The loan's purpose was to pay pressing creditors. There was additional interest to pay if the final security had not been created before disbursement. There was an up-front fee and a processing fee to be paid. The security was set out in section xii page 127. Primary security was the Escrow of IATA collections into a separate IDBI account and the assignment of credit card receivables. The collateral security was at B) firstly, the assignment of the KFA Brand, on *pari passu* first charge basis for the loans to 2000 crores. Then there was the non-disposal undertaking/negative lien on the 12 HP aircrafts. A mortgage on the aircraft was to be created on the expiry of the lease period. A DSRA (debt service retention account) should be set up to serve two months of interest immediately and building up to two months principal instalments by December 2011. Such other security as may be stipulated by the other consortium banks.
130. Guarantees are given under the column headed Security, an irrevocable and unconditional corporate guarantee of UBHL (net worth 1511 crores as on 31<sup>st</sup> March 2009) and irrevocable and unconditional personal guarantee of VJM. It specifies that no guarantee commission should be paid to the guarantors. The repayments are set out and it states that the last date of draw down will be 31<sup>st</sup> March 2010 unless IDBI extends the date.
131. The Special Terms and Conditions follow with pre-disbursement conditions first (page 128). Auditors' certificates would be obtained to cover the end use of the loan. An undertaking was to be obtained from KFA that they would bring in 200 crores each during 2009 to 2011 and bring in funds to meet a shortfall in "*achievement of the projected net profits of the company*" within three months of publication of provisional results. KFA was to furnish an undertaking that it would raise 800 crores by way of rights issue before 31<sup>st</sup> March 2010 and would raise 1880 crores by way of equity in FY 2011 and 2012.
132. A list of "*Other Conditions*" are set out at page 130. There was a reference again to the 200 crores to be raised in the three years. They were to raise the 800 crores mentioned above before 31<sup>st</sup> March 2010. They were to raise 1880 crores as mentioned above, cover any shortfall in projected net profits. In (d) the net profits projected by the company were set out: A profit after tax ("PAT") loss of 1519 crores in ye 31<sup>st</sup> March 2009, a PAT loss of 174 crores in ye 2010 then profit after tax of 257 crores in 2011 climbing to 1331 crores in 2014. There is no mention in the projected net profits of the very high loss incurred in the six months to the end of September 2009.
133. In (e) there was a condition to pay the principal and interest on stipulated dates and at (f) KFA was to undertake that the loan would be utilised for the intended purpose and "*shall in particular*" not be used for: purchase of shares, prepayments of dues to banks other than those permitted by IDBI and for extending loans to subsidiary companies or to make inter-company deposits. Non-compliance with (a) to (f) would constitute an Event of Default.
134. At (t) KFA was to submit statutory auditors' certificates certifying the end use of funds within 30 days from the date of each disbursement. (u) required KFA to submit statutory auditor certificates before 31<sup>st</sup> March 2010 certifying that the overdue creditors (totalling 2511.36 crores mentioned in the SBI appraisal note) had been paid off by the loans totalling 2000 crores. At (v) KFA was to share legal opinion about the registration on the brand of KFA which was to include an examination of how it could be enforced.
135. Basic covenants were as set out at Volume A page 133, at a. IDBI had a right to examine at all times KFA's books, at g. KFA was to keep IDBI informed of any event likely

to have substantial effect on their profit or business. If monthly revenues were substantially less than indicated to IDBI then the bank had to be informed with remedial steps to be taken. Monthly performance reports were to be submitted.

136. The negative covenants were set out at page 135. These included at (iv) that KFA should not without the approval of IDBI lend or advance funds to or place deposits with any other concern including group companies. Financial covenants were set out at page 136. They included the condition that on surrendering surplus aircrafts any premium should go to the lenders.

Summary of representations made and agreements reached with KFA according to the Appendix

137. The following representations had been made and agreements reached with KFA:
- a. The loan was to pay pressing creditors
  - b. Additional interest would be paid if the final security had not been created before disbursement
  - c. An up-front fee and processing fee were to be paid
  - d. The security was the Escrow of IATA collections into a separate account, collateral security was the assignment of the KFA Brand *pari passu* for the loans to 2000 crores, a non-disposal undertaking/negative lien on 12 HP aircrafts and a mortgage to be created on the expiry of the lease period, a DSRA account to be set up.
  - e. Guarantees were an unconditional and irrevocable corporate guarantee of UBHL (net worth 1511 crores) and an irrevocable unconditional guarantee of VJM (page 128)
  - f. No guarantee commission was to be paid to the guarantees
  - g. Auditors' certificates would be obtained to cover the end use of the loan within 30 days from the date of each disbursement
  - h. KFA was required to submit statutory auditors' certificates before 31<sup>st</sup> March 2010 certifying that the overdue creditors totalling 2511.35 crores mentioned in the SBI appraisal note had been paid off by the loans totalling 2000 crores
  - i. An undertaking was to be obtained from KFA to the effect that they would invest 200 crores each year from 2009 to 2011
  - j. KFA would bring in funds to meet a shortfall in the achievement of projected net profits of KFA
  - k. KFA was to furnish an undertaking that it would raise 800 crores by way of rights issue before 31<sup>st</sup> March 2010
  - l. KFA would undertake to raise 1880 crores by way of equity in FY2011 and 2012
  - m. The net profits were a PAT loss of 1519 FY2009, a projected PAT loss of 174 in FY2010 then profit after tax of 257 in 2011 climbing to 1331 in 2014
  - n. The principal and interest would be paid on stipulated dates
  - o. KFA was to undertake that the loan would be used for the intended purpose
  - p. KFA was to undertake that the loan would not be used for the purchase of shares nor the prepayments of dues to banks other than of those permitted by IDBI nor for extending loans to subsidiary companies or for making an inter-company deposit.
  - q. KFA was required to share legal opinion about the registration of the KFA brand which was to include an examination of how it could be enforced
  - r. Basic covenants at page 133 included the right to examine KFA's books, KFA was to keep IDBI informed of any event which was likely to have a substantial effect on their profit or business, if monthly revenues were substantially down then IDBI had to be informed with the remedial steps to be taken. Monthly performance reports were to be submitted.

- s. Negative covenants included that KFA should not without the approval of IDBI lend or advance funds to or place deposits with any other concern including group companies. On surrender of any surplus aircraft any premium should go to the lenders.

The 46 page memorandum sent to the Executive Committee

- 138. Also sent to the Executive Committee was the memorandum (“the long memo”) dated 19<sup>th</sup> November 2009 (Volume A page 137 onwards) prepared for the Credit Committee by Mr Sridhar and the witness Ms Kabra. The latter refers to it in her statements at Volume C page 254 onwards at page 277.
- 139. The long memorandum went first to the Credit Committee at their meeting of 23rd November 2009 before being part of the submission to the Executive Committee. Signed by the witness Ms Kabra and Mr Sridhar (one of the alleged co-conspirators), we have the witness statement of Ms Kabra who explained about the preparation of the long memorandum (Volume C page 254 onwards). On 19th November 2009 it was sent by Mr Sridhar to Ms Kabra. The rating concerns were attached (Volume C page 262). Ms Kabra said that whereas normally the draft memorandum was prepared by the junior officer and corrected by the General Manager, in this case it was prepared by Mr Sridhar because he had the papers.
- 140. The long memorandum went first to Mr Ananthakrishnan the Head of the Large Corporate Group (“LCG”). He endorsed the proposal on 19th November 2009. It was Mr Ananthakrishnan who wrote the short memorandum which is referred to above. Then the proposal as outlined in the long memorandum was put up to the Credit Committee in its meeting of 23rd November 2009. The LCG recommended sanction of the 750 crores corporate loan to KFA “*on the terms and conditions mentioned and proposal [sic] and also the special terms and conditions contained therein*”. The LCG also recommended relaxation in the minimum internal credit rating of BBB or equivalent for selection of new clients in the proposal. Ms Kabra says at Volume C page 277 that the risk rating reports for the 150 crores loan and the presently proposed loan of 750 crores had been received by LCG and enclosed as annexures to the proposal.
- 141. The long memorandum is at Volume A page 137 onwards. A 46 page document, it reflects the discussions which had been taking place between KFA and IDBI and within IDBI itself. It sets out at point 15 the internal rating carried out by the Risk Department as being BB with a score of 50. At 27, it is pointed out that it does not comply with the bank’s credit policy of BBB for new clients. It is set out too that a banker’s report is awaited. It specifies that the company does not appear in the RBI’s list of defaulters or in a caution advice. The security proposed is set out at Volume A page 140 onwards.
- 142. Primary security in the long memorandum was the following: the Escrow of IATA collections at Deutsche Bank and assignment of credit card receivables. Collateral was the assignment of the KFA brand, the negative lien on the 12 HP aircrafts with a mortgage to be created on expiry of the lease period. The DSRA account for 2 months interest and principal by December 2011. The guarantees were the corporate guarantee (net worth of 1511 cores as at March 2009) and the personal guarantee of VJM (no specified net worth).
- 143. The document goes on to an analysis of the company and various annexures looking at the financials. It was made clear that VJM had day-to-day control of the company (page 146). Page 148 is where the financial analysis was set out. The operating loss was said to

be 2757 crores for ye 31st March 2009 whilst the net loss was 2168 crores. The writers of the memorandum explained that the net loss was due to the price of oil and a low load factor. The load factor had dropped because of an increase in ticket prices and the economic slow-down (page 148). The net worth as at 31st March 2009 was negative at 3800 crores. The assets and liabilities were set out in detail at page 150.

144. The auditors' observations which are set out at Volume A Page 151: during FY2009 some statutory dues were not being paid regularly including taxes and national insurance, tax deducted at source which was undisputed and amounted to 111 crores had not been deposited for over six months. The company's accumulated losses at the end of the financial year were more than its net worth. Furthermore, KFA was said to have defaulted in repayment of loans and interest to banks. Long delays were noted in payment of overdue interest for example. The auditors' observations would have been concerning for any bank considering a loan of the size contemplated by IDBI in November 2009.
145. The long memorandum of 19th November went on to consider the Year to Date ("YTD") Performance at page 152. It looked at some audited figures and others which were either projections or actuals. It compared the six months to 30th September 2008 to the six months to 30th September 2009. The third column was for the 12 months ending 31st March 2010. The audited loss for the six months to 30th September 2008 was a PAT loss of 910 crores. The projection to 30th September 2009 had been a PAT loss of 283 crores, whilst the actuals were far worse, a loss of 991 crores.
146. It must be said that it is hard to see how KFA would go from an actual PAT loss of 991 crores in the half year FY2010 to a PAT loss of only 174 crores on the full year.
147. The reason for the size of the loss in the half year FY2010 is set out in the paragraph below: 20 aircraft suffered engine failure. KFA was forced to cut down on capacity and fewer seats were offered therefore revenue was down. Variable costs went down too but fixed costs such as crew lease rentals etc remained static and this meant an additional loss of 700 crores as compared to the business plan.
148. I have compared what was said about the 20 aircraft suffering engine failure forcing KFA to cut down on capacity which resulted in a reduction in the seats and passengers carried in the half year to 30th September 2009, to the email traffic between Mr Nedungadi, VJM, Mr Raghunathan and Accenture. On around 3rd September 2009 (Volume C page 190) Mr Nedungadi underlines the operating results which have been significantly worse than the full year's projected loss. They are going to have to go through the numbers the following Tuesday and Mr Nedungadi wants explanations for both domestic and international operations. There is no mention in those (admittedly very few emails) of an explanation of a number of aircraft suffering engine failure such as to affect their financial results. There is a comparison which takes place between the Q1 performance of KFA and Spice Jet. Again no mention of aircraft being grounded.
149. I note too that in the letter of 1st October 2009 sent by Mr Raghunathan of KFA to Mr Batra of IDBI, applying for the short term loan of 150 crores there is mention of some of the issue besetting KFA but no mention of grounded aircraft and problems with engines. The losses are put down to fuel prices etc.
150. An optimistic note is struck: it is said that with many of the engines getting repaired and normal operations being restored during Q3 of FY 2010 and improved loads coupled

with a good response to their international sectors during Q3, KFA expects to post better results in Q3 and Q4.

151. Then there is another positive piece of information that can only have come from KFA. It says discussions are going on with International Aero Engines which manufactured the engines for compensation “*which has not been reflected in the Business Plan or the financials*”. When the engines come back, KFA would be able to deploy additional capacities which would mitigate the issue. Another factor for the increased losses was the monsoon and low travel undertaken during the period, a price war too was blamed, KFA was forced to drop fares. All those factors it was said had led to the increased losses in Q1 and Q2 ending 30th September 2009.
152. Mr Rex accepted in evidence that about two weeks before this, a standstill agreement had been reached with International Aero Engines so by this time KFA was not expecting compensation. Mr Rex’ evidence was that the standstill agreement was in relation to four engines on four aircraft although there were other negotiations about other engines.
153. From Mr Rex’ evidence it looks as if there were two civil court claims against International Aero Engines, the first where KFA was the claimant and there was a standstill agreement referred to above and it would appear from Mr Rex’ Volume P Divider 51 at Page 1287, that KFA signed a mutual release and waiver of its claim against International Aero on 27th October 2010. At the same time KFA agreed to repay the outstanding amounts due. In the claim it was said that KFA agreed this in the belief that Aero would repair the engines and that the particular problem was resolved. The second claim was made by UBHL which sued International Aero Engines (and others including Rolls Royce and KFA) in 2012 where it was claimed it had lost many thousand crores in relation to the losses suffered by KFA because of the air unworthiness of engines provided by International Aero. Mr Rex exhibited the Statement of Claim at his Volume P divider 51.
154. If the engine failures were such an important cause of a very poor half year, it is perhaps surprising they were not given a mention in the various emails exchanged by VJM and the other executives of KFA. I noted that in the 1st October and 7th October 2009 letters from Mr Raghunathan when no unprojected loss had to be explained, there was no mention of what must have been recent problems with the engine failures. I also queried the size of the problem. On a fairly short perusal of the claims for compensation for the engine failures I did question whether there was some exaggeration in what had been said by KFA to IDBI in the run-up to the third loan.
155. The Credit Committee knew therefore from the long memorandum that a substantial PAT loss had occurred which was many times more than expected. From this memorandum the Executive Committee also should have known of the far larger than expected loss for the half year FY2010. The combination of the unexpectedly large loss and the auditors’ observations arguably should have led to questioning of the safety of sanctioning such a large loan.
156. The long memorandum of 19th November goes on to consider the strength of United Breweries Group and of UBHL. The net worth of the company was said to be 1511 crores. It was said at Volume A Page 156 that in 2006 the Credit Committee had sanctioned a 125 crores loan to KFA subject to clearance of IDBI dues in respect of UBL. The dues were not cleared by the company but IDBI resolved the matter and a No-dues Certificate had been issued by IDBI. The related court case in relation to some money that was said to be owed was expected to be withdrawn shortly.

157. The proceedings concerning WIE Engineering Ltd, an associate company of UBL, are set out at Volume A Page 158. After IDBI received a letter of comfort from UBL the credit limit for the WIE was increased. Over time the account became a NPA (non-performing asset) and the bank filed a civil claim and various court proceedings took place. When KFA approached IDBI, for a loan UB “to develop relations” offered 25 lakhs in settlement. This was increased to 50 lakhs for the liability of WIE and UBL subject to the withdrawal of litigation. This was agreed to and Rs 491.02 lakh was waived and the no dues certificate issued in October 2009 (Page 158).
158. Part III of the memorandum to the Credit Committee gives the industry outlook and data on the Indian Domestic Airlines market data (page 162). An increase in the business has taken place and this is expected to continue but globally the state of the airline industry is grim. The forecast was that it was going to hit rock bottom by mid-2009 but start to recover by the end of the year.
159. Other problems were that credit had to be extended due to high oil prices and dropping demand also had caused problems leading to cuts and other cost reduction measures. In the crisis airlines started to incur losses and had defaulted to Oil Marketing Companies, Airport Authority of India and others. India’s cash strapped airlines were looking at raising funds by selling planes, engines etc.
160. The Defence called the expert Mr Humphreys whose evidence confirmed the problems of the Indian aviation industry at the time as set out in the long memorandum I have summarised above. I have not summarised his evidence elsewhere as his evidence of the state of the aviation industry worldwide and in particular of the state of the Indian aviation industry was not in dispute.
161. In the long memorandum a comparison is made between KFA and other major airlines operating in India (Page 166). Of note, KFA has 29% of market share and has a passenger load factor of 71% although it is not said when this was. A financial comparison is made between the four airlines. All are suffering losses but it was remarked by the memorandum writers that KFA’s PBDIT was lower than Jet Airways mainly because its fuel costs were higher due to higher aircraft utilization and lease rentals were higher. Other operating expenses were also higher.
162. The assessment of the current proposal starts at Volume A Page 169. By 31st March 2009, KFA had accumulated losses of 4247 crores. The assessment set out the estimate of creditors made by SBI in December 2008 which amounted to 2511.36 crores. 2000 crores went towards pressing creditors and 511 crores towards normal creditors within permissible credit limits. This was why KFA needed 2000 crores as support from banks. KFA’s business plan including the projected profitability statement, the underlying assumptions, balance sheet and funds flow statement were independently vetted by Grant Thornton.
163. 1050 crores had been inducted by SBI and others. The remaining 750 crores is to pay the above pressing creditors and overdue lease rentals. The familiar table of creditors amounting to 2511.36 crores was set out which set out the types of creditors but not the names of the companies concerned.
164. The memorandum made the same claims in relation to the 200 crores each year, US\$400 million (said to be 1880 cores) in equity in FY2011 and FY2012. KFA had been in discussion with potential investors in Japan. KFA also proposed to make a rights issue of

equity. The total amount to be raised by way of rights and GDR issues was 800 crores. KFA was also considering foreign investment by airlines. This was over and above the Rights issue.

165. The history of the request for the loans is set out. An application for a STL of 150 crores for six months for critical obligations was sanctioned by the Credit Committee on 7th October 2009 and disbursed. The release of the 200 crores loan was sanctioned by the Company Chairman, Mr Agarwal on 4th November 2009. This loan would come out of the 750 crores loan applied for currently. IDBI's total exposure would be 900 crores.
166. It says at page 170 that KFA had taken measures to get out of the crisis by taking cost cutting measures including the return of various aircraft in FY2009. Accenture have estimated savings of between 598 to 902 crores for the years FY09 to FY11. KFA has allied itself with Jet Airways to make further savings.
167. A box of financial projections that were provided to SBI is found at page 171. It shows a PAT loss of 174 crores for FY2010 and a PAT of 257 crores in 2011 and then increasing every year. It says that the SBI had allowed for a total equity of 800 crores (the US\$400 million) to be brought in rather than the 1880 crores planned by KFA. The memorandum looks at the debt service coverage ratio which was covered in the SBI's memorandum (I assume the appraisal note) and says that KFA's ability to cover debt is sensitive to the profitability assumptions and is dependent on infusion of adequate equity. It sets out the figures relied on and explains that the projections come from the SBI's appraisal note and assessment in December 2008 and have not been adjusted. The additional shortfall to FY2009 was 550 crores. KFA had managed to get a longer credit period from their creditors.
168. The memorandum goes on to discuss the additional shortfall for the first half year of FY2010. It says "the company expects to close Q3 and Q4 without any further loss". To meet the shortfall FKA is planning to raise 800 crores by way of additional equity (page 172-173). It goes on to explain the differences between the projections in the SBI's appraisal note and what KFA is doing. One example given is that the SBI appraisal took into account a fleet of 86 aircraft for FY2010 whilst KFA actually had a smaller fleet being used for more hours.
169. A table for the cash flow is set out taking into account the shortfall in FY2009 and in H1 of FY2010 but met by the additional equity inflow (see page 173). The figures in this table therefore rely on the input of 800 crores equity. This information must have come from KFA. The table at page 174 adjusts the DSCR (debt service coverage ratio) for the actual performance in H1 (first half of) FY2010. It looks at the figures without any infusion of equity, with the infusion of 800 crores equity and with the entire 2680 crores infusion set out in the preceding paragraphs (1880 crores plus 800 crores).
170. I noted that with the unexpected loss in the first half of FY2010, KFA had to provide some comfort to the bankers and that would appear to be behind KFA's new suggestion of an infusion of 800 crores of additional equity quite apart from the equity it had already committed to bringing into the company. On the face of it, the impression I had gained from the correspondence and the promises made was that KFA was saying whatever it could to obtain this loan. It had to explain the unexpected loss and blamed it on the engine failures and then had to promise to bring some extra equity in to cover that loss.

171. The memorandum notes that KFA was expected to start earning profits from FY2011 but because the projections were not met during FY2009 and H1 FY2010 and KFA's ability to service debt was sensitive to variation in the profitability assumptions, they had set a condition that KFA should arrange to raise funds from the promoters/associates, to meet any shortfall in achieving the projected profits within 3 months of publication.
172. The Key Risks were set out at page 176. Financial risks were being dealt with by KFA taking steps to boost profitability. The internal rating concerns are set out at page 176 onwards. For the STL of 150 crores, the rating committee on November 7th (after it had been sanctioned on 7th October 2009) rated it as a BB with score of 2.47 out of 6. For the 750 crores loan the Risk Department had assigned a rating of BB with a score of 50 on 16th November 2009.
173. The recommendations are at Page 178. There is a certification that neither the company nor its directors appear in the RBI defaulter list. There are no litigations pending. All formalities regarding security creation for existing facilities have been completed except for the furnishing of personal and corporate guarantees for the 200 crores loan for which time has been given. There are no cases pending against the borrower or guarantor in relation to bank dues. The purpose of the loan was said again to be for pressing creditors. The last date of draw down was 31st March 2010. It gave the processing and upfront fees. The primary security was Escrow; the collateral were assignment of the brand, a non disposal undertaking on 12 HP aircraft with a mortgage to be imposed on expiry of the lease period. A DSRA account was to be set up. Guarantors were the irrevocable and unconditional guarantees of UBHL with a net worth of 1511 crores and of VJM. It then specifies no guarantee commission was to be paid to the guarantors.
174. At Page 180, the background to KFA is set out. Its financials were affected by the economic slowdown and KFA incurred a loss of 1609 crores in FY2009. KFA had taken measures to improve profitability. The promoters had inducted 200 crores in FY2009 and would induct another 200 each in FY2010 and FY2011. There is a plan to raise 800 crores in additional equity in a Rights issue during FY2010 to make up for the shortfall in the H1 FY2010. "Further" it plans to raise US\$400 million in FY2011 and FY2012 through a strategic investor. Although profitability remains a concern for the airline in the short term, KFA is hopeful that the ongoing dialogue with the GOI will result in measures that revive that revive the company.
175. With the economy recovering etc (no mention of KFA's particular problems there), cost reduction and the backing of the strong UB group, the expected improvement in financial position through equity funds of over 3000 crores proposed to be raised had made the UB group/company confident of meeting the short term challenges and of taking advantage of the growth potential in the long term. The company was hopeful of earning profits from FY2011 onwards. Finally, the Credit Committee was asked by Mr Sridhar and Ms Kabra to recommend to the Executive Committee the sanction of the loan of 750 crores on the terms set out in the Appendix after relaxing the minimum internal Credit rating of BBB for new clients.

Summary of the long memorandum originally sent to the Credit Committee and then sent on to the Executive Committee

176. The following representations were made:
- a. A banker's report was awaited.

- b. The company did not appear in the RBI's list of defaulters.
- c. Primary security was Escrow of IATA collections and assignment of credit cards receivables.
- d. Collateral was the assignment of the KFA brand, the negative lien on the 12 HP aircrafts with a mortgage to be created on expiry of the lease period and the DSRA account.
- e. The guarantees were the corporate guarantee (net worth 1511 crores as at March 2009) and the personal guarantee of VJM.
- f. VJM had day-to-day control of KFA
- g. The operating loss as at FY2009 was 2757 crores whilst net loss was 2168 crores.
- h. The loss was due to fuel prices and a low load factor
- i. The low load factor was due to an increase in ticket prices and an economic slow-down.
- j. The net worth as at FY2009 was negative at 3800 crores
- k. The audited loss for 6 months to 30.9.08 was a PAT loss of 910 crores. The projection to 30.9.09 was a PAT loss of 283 crores but the actual PAT loss was 991 crores for six months whilst the full year loss was projected to be only 174 crores
- l. The reason for the H1 FY2010 loss was that 20 aircraft suffered engine failure. KFA had to cut down on capacity and fewer seats were offered.
- m. KFA expects to post better results in Q3 and Q4 because of improved loads and a good response to their international sectors during Q3.
- n. Discussions were going on with International Aero Engines for compensation for the engine failure. This is not in the Business Plan or financials.
- o. Another factor for the increased losses was the monsoon and low travel then, a price war was also to blame, KFA was forced to drop fares. All these led to increased losses in Q1 and Q2.
- p. The net worth of UBHL was 1511 crores as at FY2009
- q. KFA had a passenger load factor of 71%
- r. KFA's PBIT was lower than other companies because its fuel costs were higher and it paid higher lease rental
- s. By FY2009 KFA had accumulated losses of 4247 crores.
- t. The usual table of creditors was set out totalling 2511.36, of which 2000 crores were to pressing creditors, 511 were towards creditors within permissible credit limits. The payments were to pay pressing creditors.
- u. KFA's business plan included the projected profitability statement, the underlying assumptions, balance sheet and funds flow statement which had been independently reviewed by Grant Thornton
- v. The remaining 750 crores was to pay the above pressing creditors and overdue lease rentals.
- w. The promoters had inducted 200 crores in FY2009 and would induct another 200 crores in FY2010 and 2011.
- x. KFA proposed to make a rights issue of equity. The total amount to be raised by way of rights and GDR issues was 800 crores. Later in the document it says whereas the SBI had allowed for a total equity of 800 crores (the US\$400 million) KFA was planning on bringing in 1880 crores.
- y. Later too in the document it said KFA planned to raise 800 crores in additional equity in a rights issue in FY2010 to make up for the shortfall in the H1 FY2010. Further KFA planned to raise US\$400 million in FY2011 and FY2012 through a strategic investor.
- z. There was a plan to raise equity funds of over 3000 crores which had made the UB group/company confident of meeting the short-term challenges and take advantage of growth potential in the long term.

- aa. KFA was also considering foreign investment and KFA had been in discussion with potential investors in Japan.
- bb. KFA had taken cost cutting measures including return of aircraft in FY2009
- cc. Accenture had estimated savings of between 598 to 902 crores for FY2009 to FY11.
- dd. KFA had allied itself with Jet Airways to make further savings
- ee. The financial projections set out were a PAT loss of 174 crores for FY2010 and a PAT of 257 crores in FY2011. KFA was hopeful of earning profits from FY2011 onwards
- ff. The ability to cover debt depended on infusion of adequate equity
- gg. Not covered by the SBI figures was an additional shortfall of 550 crores in FY2009
- hh. In the H1 FY2010 there was an additional shortfall but KFA was expecting to close Q3 and Q4 without any further loss. To meet this shortfall KFA was planning to raise 800 crores by way of additional equity.
- ii. A table for cash flow shows the shortfall in FY2009 and H1 of FY2010 in three stages, once with no equity put in, once relying on the input of 800 crores equity and the final projection with 2680 crores with the full infusion.
- jj. As there were questions about KFA's ability to service the debts there was a condition that KFA will raise funds to meet shortfall in projected profits
- kk. No litigation was pending.
- ll. Guarantors were the irrevocable and unconditional guarantees of UBHL net worth of 1511 and of VJM.
- mm. No guarantee commission was to be paid to the guarantors

## **Representations made in the loan requests/applications**

### The brand valuation

177. At bundle D Annex IV/1 page 588 is an email dated 10th September 2008 from Dr Mallya to Mr Raghunathan CFO KFA, Mr Bhat the Group Treasurer of United Breweries (Holdings) Ltd amongst others. He says that the KFA brand is very valuable. "With proper international valuation backed by recent survey result, the brand can form a significant potential security in relation to proposed additional borrowings from ICICI".
178. On 24th November 2008 Mr Bhat had sent an email (at D page 589) to Mr Raghunathan about the brand valuation from Grant Thornton. GT had completed the valuation exercise and was ready to submit the report subject to VJM meeting Grant Thornton. He attached the Engagement Letter. The Engagement Letter dated 5th November 2008 (page 590) made it clear that the valuation was to be as of March 31st 2008 and was not an audit and GT did not carry out verification work but their conclusions were based on financial information provided by the company.
179. The brand was then valued at 3406 crores by Grant Thornton with a date of valuation of 1st April 2008 and the report dated November 2008 (see B Annex IV page 217 – on the left hand side of the page and at page 238). It made it clear it was based on amongst other things forecasts which were provided by the management in October 2008. Financial projections for FY 2009 to 2012 were provided by the management. GT did not take into account any changes since the projections were provided in October 2008 (B Annex IV page 213 onwards).
180. There is a second valuation this time one carried out by Brand Finance. At D Annex IV/4 page 605 is the email dated 3rd December 2008 from Mr Bhat of UBHL to KFA copying in Mr Raghunathan. He attaches the letter of engagement of Brand Finance. The

email says “As per VJM’s direction, the valuation needs to be completed ASAP”. He asks for the initial advance payment.

181. On 20th December 2008 Brand Finance gave a presentation to VJM as Chairman of UB Group and came to a conclusion that that KFA Brand Valuation was 1911 crores (B, annex IV page 261 on and at page 283). Its conclusions were based on annual reports, projected profit and loss statements for the period from 2008-9 to 2014-15 and a business plan.
182. Clearly this was much lower than the GT brand valuation. This was not provided to IDBI in the letter of 1st October 2009 where a reference was made to the brand value and it was said to be 3400 crores.
183. Mr Rex in evidence accepted that the second valuation carried out by Brand Finance was never disclosed to IDBI. The defence case as set out, for example, in their Defence Closing Submissions at divider 16 in the core bundle, is that there could not have been a dishonest misrepresentation because IDBI would have known that the document dated back to April 2008 whilst the bank was provided with KFA’s updated revenue position in September 2009. They say KFA did not suppress a subsequent lower valuation because there were three others, the Brand Finance one of December 2008 which was substantially lower (1911 crores), a second Brand Finance one of January 2009 which was slightly lower (2349 crores) and a second Grant Thornton assessment of April 2010 which valued the brand at 4,111 crores.
184. When considering the representation made in the letter of 1st October 2009, signed by Mr Raghunathan, I note he wrote about having obtained a valuation of the brand KFA from “two different reputed international valuers” (page 61 third paragraph) and the Brand value is estimated at around 3400 crores. I ignore the second brand valuation made by Grant Thornton which postdated the letter and I am left with the Grant Thornton one of 3406 crores and two Brand Finance ones.
185. The lowest Brand Finance valuation is 1911 crores and the other is 2349 crores, some 1000 crores less than the Grant Thornton one. 1000 crores is roughly £125m, a substantial amount. Neither of the very much lower Brand Finance valuations were mentioned in the 1<sup>st</sup> October 2009 letter yet Mr Raghunathan mentioned two different reputed valuers and a brand value of around 3400 crores. Whether IDBI could or should have worked it out for itself is neither here nor there, I find that on the face of it without hearing from the RP nor Mr Raghunathan there was a misrepresentation in that letter as to the brand value. The letter implied that both brand valuations came to around 3400 crores, whilst the truth was very different.

#### Other representations made

186. The RP and KFA gave a number of guarantees for the loan. I have dealt with the assignment of the brand above. Another security offered was the negative lien on aircraft covered by Hire Purchase (“HP”). IDBI had asked for details of the HP agreement but it was not provided with them. Of course, Mr Rex is right when he says that IDBI should have done more work to check the state of the HP terms. If it had it would have discovered that the hire purchase terms exceeded the loan terms, in other words if KFA defaulted, the aircraft would not be available to IDBI as they would still be subject of hire purchase. The question is what was KFA doing offering this worthless security for the loan in the first

place. The bank may have been able to find out it was worthless but KFA knew this was the case, yet put it forward as a security, with an implication that it had value.

187. KFA said there would be equity infusions into KFA. The size of the equity infusion increased once KFA had to admit to IDBI that the half year FY2010 had had a far larger loss than expected. By the time of the application for the 750 crores, KFA was saying that it was going to infuse 1880 crores of equity, this was more than double what they had said in the first loan application when there was mention of raising US\$400 million. At the time of the application for the first loan, they would have known the great increase in the projected loss, yet they made no mention of 1880 crores of equity being required. I accept there is some evidence that they were trying to bring equity into the business but I questioned the sudden increase from US\$400 million to 1880 crores in seven weeks. It was an easy representation to make, that the company would find 1880 crores equity to make up for the unexpected loss.
188. KFA represented that 200 crores had gone into the business in FY2009 and that a further 200 each would be inducted in FY2010 and FY2011. The GOI's case is that the money was going round and round between accounts (a round robin). There is certainly some evidence of that and Mr Rex said, when asked about the evidence, that it may have happened but without knowing why the money was circulating it was rather difficult to say it was dishonest. I found it indicative of the way KFA was facing its financial problems, it was borrowing money from one bank and contrary to the conditions of the loan paying some to another.
189. The guarantee in relation to the 150 crores loan was signed by VJM on 4<sup>th</sup> November 2009 after the sanction of that loan and indeed at the same time as the 200 crores advance on the corporate loan was paid out. Attached to Dr Mallya's guarantee was a list of VJM assets and liabilities as at 9<sup>th</sup> April 2009. His assets totalled 1395.04 crores. This list of his assets and liabilities were provided to IDBI. The guarantee was said to be irrevocable and enforceable against VJM even if there was a dispute between IDBI and KFA. This guarantee was rejected by IDBI on legal grounds and a new one provided dated 2<sup>nd</sup> December 2009 but on this occasion without the list of assets and liabilities.
190. It is not clear why the second guarantee which replaced the unsatisfactory first one did not have a list of Dr Mallya's liabilities. Whether it should have done or not, IDBI had the list of assets with first guarantee and the GOI case is that it misrepresented his position. According to their case, the SBI were told that the RP's net worth was only 248.94 crores only a week after the asset list sent to IDBI. It may have a very innocent explanation but none has been given so far.
191. Another security offered was the corporate guarantee of UBHL. It had already offered guarantees in relation to a number of its associated companies. I noted the position in 2009 of UB according to emails to and from VJM between 19<sup>th</sup> and 21<sup>st</sup> March 2009 had similar problems. The email exchange is about trying to get a larger loan to pay off the smaller loans. The email to VJM from Mr Murali of UB Spirits ends with this sentence *"Again, this will leave you with no option but to restrict our Capex spending to just Rs 25 crores, till infusion of equity into the business. However, given the situation, the best way is to use up any loan as soon as possible and keep it in an escrow for repayment which will demonstrate our clear intent to repay the instalments that are becoming due in May '09 and we can approach the bankers with a credible story with an escrowed amount to assure them of repayment of the amount due in May while seeking covenant breach waivers and*

*relaxation of covenant going forward till December '09*". The picture of UB Spirits was remarkably similar to that of KFA at a similar time (Volume A page 273).

192. Furthermore, in the same email which was from Mr Murali to VJM he says that the bank PNB are willing to make a 500 crores short term loan against their need for 750 crores but the conditions are some brick and mortar security and a personal guarantee of VJM's with a certified statement of VJM's net worth "*which will be taken on board without any due diligence*".
193. Whether or not UBHL was exposed as to three times its net worth (the evidence of Mr Rex) or 15 times (Mr Vittal's evidence) it was still guaranteed to others to a significant extent. In the end of course, it never paid up on the guarantees it made for these loans or for the MDRA.

#### **What the loans were supposed to be used for**

194. The competing arguments are on the one hand the witness Mr Rex and the Defence team who say that once the money was in the account, it became fungible and could be used for any company expense and on the other the prosecution which says that the loans were specifically to be used for certain creditors only.
195. The way I have approached this is by looking at what representations were being made by KFA to the bank. These are set out above in the correspondence between KFA and the bank and they also can be inferred from the memoranda provided to the Executive Committee.
196. In the letter of 1<sup>st</sup> October 2009 at Volume A Annex VI page 60, Mr Raghunathan of KFA tells IDBI that due to erosion of liquidity, they have been forced to defer payment to creditors. To "*clear the accumulated dues to the creditors and for meeting additional working Capital requirements*", they need the corporate loan of 2000 crores of which a balance of 950 crores is left.
197. On 7<sup>th</sup> October 2009 Mr Raghunathan says the 150 crores is to meet "certain critical obligations to overseas vendors including Aircraft lessors and other service providers".
198. On 4<sup>th</sup> November 2009, Mr Raghunathan says in a letter to Mr Sridhar, Mr Batra and Mr Dasgupta referencing a meeting between Dr Mallya and the bank chairman that the 200 crores was needed to meet "*certain critical obligations to overseas vendors including Aircraft lessors and other service providers*" (Volume A Annex IV Page 52). He is repeating what was said on 7<sup>th</sup> October 2009.
199. There must have been a response from IDBI as Mr Raghunathan sends another letter to Mr Sridhar on 5<sup>th</sup> November in which he explains that "*as desired by you*" he gives the breakdown of the major payments to be made from the 200 crores.
200. He lists the names of the various businesses including BE Aerospace, Messier Group, Honeywell and Air France and the nature of the expenses involved. All except one payment which is for lease rentals are for maintenance. The expenses come to 36 US\$ Mio (I assume millions). The balance of the 200 crores, "*will be utilized for settling dues to various critical engineering and other vendors and to lease rental obligations*". Again, there is a reference in the letter to discussions between the KFA CEO, VJM, and the IDBI Chairman.

201. In relation to the total 750 crores loan, the memorandum to the Executive Committee dated 24<sup>th</sup> November 2009 makes it clear that the loan is linked to the approach to SBI for financial assistance in December 2008. SBI estimated 2511 crores was needed for creditors (oil marketing companies, lessors, AAI etc), out of which 2000 crores was needed for pressing creditors and 511 crores for payments to normal creditors within permissible limits which explained why KFA needed 2000 crores. The Bank of India had sanctioned 1050 crores, UCO Bank very recently had sanctioned 200 which left 750 crores for IDBI.
202. The Appendix which I have summarised above which also went to the Executive Committee says the loan was for paying pressing creditors. It makes it clear that the loan is part of the 2000 crores loan of the consortium and at page 132 item u) under the Other Conditions in the Appendix, it says that the company “shall submit statutory auditor certificate before March 31, 2010 certifying that the overdue creditors (creditors aggregating Rs 2511.36 crores as mentioned in SBI’s appraisal note) have been paid off by utilization of the Corporate Loan aggregating Rs 2000 crores. At f) Page 130, KFA has to undertake that the loan will be utilized for the intended purpose and will not be used for certain payments to banks etc.
203. The long memorandum sent to the Executive Committee at the same time, confirms what is said in the Appendix. The section entitled Requirement for a loan at Volume A Page 169, has the SBI Appraisal Note with the particulars of the creditors set out in the table. They are set out in the following types: lease rentals, engineering, oil marketing, AAI (airport authorities), ground handling, catering and in-flight. 83 crores had been owed for more than a year when the list was put together in late 2008 or early 2009. It is to be noted that there are no company names mentioned just the type of service sold.
204. The memorandum goes on to say that the balance of 750 crores was for “paying the above pressing creditors and overdue lease rentals” (Volume A Page 170). Finally, in the recommendation section, it says again that the loan of 750 crores is for payment to pressing creditors.

## **Conclusion**

205. From these documents which were based on information provided by KFA, it seems clear that the bank had stipulated the loans of 200 and 550 crores were to be used to pay the pressing creditors amounting to 2000 crores originally set out in the SBI appraisal note.
206. Mr Rex makes the point that the original creditor list referred to would have been paid off by October/November 2009. Of course, Mr Rex is right, but the list of creditors did not give names of companies just the type of creditor. It seems to me that according to the documents above the loan totalling 750 crores obtained from IDBI should have been used to pay off companies which provided the services listed in the table of pressing creditors. Based on the documents set out, the loans should not have been used to pay any other creditors. The various documents make that abundantly clear.

## **What were the loans in fact used for?**

207. The GOI case is that the loans were used for paying up front and processing fees to IDBI including funding the DSRA account, paying the lease on the private jet KFA provided to VJM, clearing existing bills and debts including overdrafts and bank charges

incurred by KFA with other banks, servicing other KFA loans and payments to the RP and cash withdrawals.

208. An email from Dr Mallya to Mr Nedungadi copied to Mr Raghunathan dated 27<sup>th</sup> December 2009 (Volume A Annex X Page 259) sets out the desperate state of the business and the money that was available to it as at 31<sup>st</sup> December 2009. Dr Mallya's involvement is clear, he says he had spent several hours on planning receipts and payments. They need to make critical payments of 546.23 crores by 31<sup>st</sup> December 2009. They are needed to keep the show on the road. He identified the following cash that was available to them, 110.12 crores from IDBI Bank, ticket revenue of 194.50 crores and cargo revenue of 6 crores. The net deficit is 236 crores.
209. Dr Mallya said he hoped to cover the 236 with 300 crores due from UCO Bank but the bank had said they would only pay immediately 200 crores and another 100 ten days after. He then set out the bank loan repayments due before 31<sup>st</sup> December. These total 350 crores plus A 340 PDP finance (pre-delivery finance on planes).
210. Dr Mallya then asked AKRN (Mr Nedungadi) to get on top of this with the banks, he was to persuade them to renew the facility with no payment or secure a committed roll over with payment and renewal immediately. The 200/300 crores from UCO Bank, Dr Mallya says is definitely for operations. He goes onto say "we can use funds to achieve 'round robins' but if the Banks keep the money and we lose the use of the funds we will be grounded". This email reveals firstly the difficult state the company is in but also the lengths he would go to to keep KFA going.
211. In terms of my approach I have concentrated on the second and third loans where the Executive Committee received a very detailed outline of what the loan funds should be used for. I have not considered whether the first loan was or was not used in accordance with the representations of KFA in any particular way although I noted that the processing fee was taken out of the 150 crores loan account (Mr Patne Volume C Page 321). I did note though that the loan was not repaid on time.
212. Mr Rex said in his evidence that the GOI had gone through individual transactions in detail and that the GOI simplistic approach ignored the way large companies work. KFA would make a large number of payments daily including paying salaries, tax, when the figure would change. This process could be considered as part of cash flow analysis. He said that any corporate lender would have realized that the loans would not have been used for the creditors in the SBI appraisal note list as nine months had passed and those would have long been settled. What IDBI should have had was an up-to-date list of creditors as at the end of October 2009 so appropriate undertakings could be obtained.
213. Mr Rex makes the point that even if IDBI's loan proceeds had been used to pay certain categories of creditor, loans from the other lenders would have had to fund KFA's other operating expenses, so that KFA's "*overall financial position on an aggregate basis would have remained unchanged*" (Rex report Volume J Divider 2 Page 67 Paragraph 185).
214. He suggested "*many of the payments should not have surprised experienced corporate lenders, since proceeds of bank loans tend to be fungible once they have gone into corporate operating accounts*". He gives the example of a STL from Bank A being used to pay a pressing creditor and then being repaid by a new loan from Bank B.

215. Mr Rex says that “*normal practice in this situation*” would be for the banks to obtain monthly management accounts which would include aged listings of debtors and creditors and would enable the bank to have a clear view of KFA’s financial position at the end of October. Then they would have been able to track how the funding was being used by KFA. By not doing so, IDBI and the others left themselves in a very weak position to monitor KFA’s performance.
216. Mr Rex’ view was that the focus of IDBI should have been on the current and projected funds in and out of KFA, not on the list of creditors.
217. Mr Rex was asked about the position of where the money went to and was referred to the list of creditors totalling 2511.36 crores (Volume A Page 169). His evidence was that contrary to what had been said by the witness Mrs Sinha, the pressing creditors listed (2000 crores in total) would have been paid off by October to December 2009. He said the payments could not have been stretched for another 9 months and even had they been stretched a little they would have been paid off. He said that if indeed the loan had been intended to pay for specific pressing creditors then an up-to-date list would have been provided. There would have been more pressing creditors by October to December 2009.
218. In terms of what the loans were used for, I noted that the list of creditors totalling 2511.36 crores did not give any names of supplier companies. On the face of it the loans were to pay creditors of the general description given in the table. The description given included lease rentals, engineering, oil marketing, Airports authorities, ground handling, catering and in-flight. Mr Rex described the funds as fungible once they enter the account, in other words the funds could be used for other goods. If other money has been used to pay off a particular debtor, the loan money could be used to pay off something of the same kind, goods and services are mutually interchangeable. The question for this court is whether there is a prima facie case that the loans were used to pay for items not on the list approved by the consortium banks.
219. Amongst the many exhibits Mr Rex produced were two end user certificates provided by Chartered Accountants at Volume Q Divider 60 and 61 Page 1643 and Page 1645. The first relates to the 150 crores short term loan and is dated 10<sup>th</sup> December 2009 and it certifies that the loan “has been generally used by KFA to pay for lease rent, overseas engineering vendors, airport authority charges, ground handling expenses, in-flight costs including catering”.
220. The second end user certificate is dated 18<sup>th</sup> March 2010 and certifies that the corporate loan of 750 crores “has been generally used” for the same items listed in the letter of 10<sup>th</sup> December 2009 but not for the airport authority charges.
221. In terms of the loans being used to pay off disbursement fees or other bank dues, the terms and conditions of the financial assistance for the 750 crores Corporate Loan is attached as an appendix (Volume A Page 126) to the memorandum to the Executive Committee (Volume A Page 122). It is clear from Page 130 where the other conditions for the loan are set out, KFA is to undertake that the loan will be used for the intended purpose and it will not be used in particular for subscription of shares and debentures, prepayment of dues to banks or other institutions/associate concerns other than those permitted by IDBI, if any; for extending loans to subsidiaries or making any inter-company deposits (Volume A page 130).

222. The above summary of Mr Rex' views is an indication of his views generally, that the banks, such as IDBI, should have done more to check the representations put forward by KFA. His view appears to be KFA may have misrepresented X, Y and Z but that banks as experienced corporate lenders should have known to check what KFA was saying. It was their fault if they didn't. That may be an argument in mitigation but it does not undermine the allegation that GOI is making in relation to KFA representations. Overall his position came down to saying that there may have been payments that fell outside the stipulated usage but he had seen "no material evidence" that the loans were not used for KFA's corporate benefit. He said it would not be surprising if a minority of payments could be criticized but the majority met the definition of payment to pressing creditors. I do not accept his evidence.
223. Turning to the GOI case, it is that the KFA used its IDBI account directly or through transfer from that account to other bank accounts and onwards to pay for services not included in the pressing creditor list.
224. In terms of the evidence, the banking documentation is produced by more than one witness, for example, Mr Patne (Volume C Page 320) who was the Assistant General Manager in the Corporate Banking Branch of IDBI at the relevant time. He along with a number of others, were running the KFA accounts in IDBI; they dealt with the transactions on the accounts which occur via the use of vouchers. He is shown the vouchers in relation to transactions in the KFA accounts and produces a table of transactions in relation to the account between various dates based on the banking records. The evidence of Mr Parikh is identical in content at Volume C Page 139 onwards. Other witnesses produce bank statements from other KFA accounts which show the money coming in from the IDBI loan account and going out to pay for services which were not shown on the SBI Appraisal Note.
225. Mrs Nair was the Assistant Manager of the Operations Department of IDBI in the Corporate Banking Branch in Mumbai during the period of the loans. Mrs Nair was shown the account opening form for the KFA current account with IDBI which was opened on 9<sup>th</sup> October 2009. The account ending in the number 7299 was opened with the credit of 150 crores from the first loan.
226. Mrs Sinha, the Inspector from the Reserve Bank of India, was inspecting IDBI after the year end of 31<sup>st</sup> March 2010. KFA's account was one of a sample looked at by Mrs Sinha and her team. They noted that payments had been made from the corporate loan of 750 crores to creditors which were not on the pressing creditor list.
227. An example Mrs Sinha gives is the income tax payments made. There were no other credits of significance in the loan account which would cover the tax payments and the tax authorities were not named in the list of creditors totalling 2511.34 crores. The payments of this could be said to have come from the proceeds of the loan. The IDBI witness Mr Bhatkhande (Volume C Page 366) was involved in making the payments to the tax authorities as he recognized his writing on the documents.
228. Mrs Sinha goes through various other remittances from the account opened on 9<sup>th</sup> October 2009. She looks specifically at a payment of the upfront and processing fees of 10.34 crores which was paid on 3<sup>rd</sup> December 2009 from account 7299 from funds which came from the payment of 250 crores from part of the 750 crores paid into account no. ending 4046. This payment was from the loan and Mrs Sinha said this should be treated as a diversion from the terms of the loan. Mrs Sinha said the upfront fee was to be recovered

from the borrower pre-disbursement and should not be recovered from the loan funds lent by the bank. The processing fee also has to come from KFA's own funds.

229. Mrs Sinha explains that such a diversion also would be in breach of the Willful Defaulters guidance set by the Reserve Bank of India. Any use of the loans for purposes other than that specified will be a deviation in terms of the Reserve Bank of India guidelines. Mrs Sinha says that using the loans other than for the specified purpose would be a deviation in terms of the guidelines. In the light too of the sanction memorandum and the sanction letter the corporate loan of 750 crores was to be used only for the purpose of payments to the creditors specified.
230. She sets out the details of the creditors amounting to 2511.36 crores and says that in the light of the sanction memorandum and the sanction letter which had been shown to her, the corporate loan of 750 crores was to be used only for the purpose of payments to the said creditors specified in the note.
231. Mrs Sinha also said the DSRA (Debt Service Retention Account) Funding, was required to be funded from Cash Flows and not be funded by the loans. She said from what she had seen in fact the DSRA had been funded in part by the loan. A number of transfers had been made into the fund. This too she said was a diversion as it should have been funded by cash flow and not from the proceeds of the loan.
232. Finally, this witness makes the point that payments made to the Bank of Baroda to pay the Airports Authority of India etc, from the loan (54.86 crores) were improper as if it had been a straightforward payment, they would have made the payment direct. What in fact they were doing was paying Bank of Baroda for bill discounting facilities which were discounted in June/July 2009 for 120 days and were overdue. So KFA was in fact using the loan money to settle overdue bills in Bank of Baroda. (Volume D Page 431).
233. Mr Biswal (Volume D Page 432) is another manager at the Reserve Bank of India in the Department of Banking Supervision and he has confirmed the points made by Mrs Sinha. After the introductory part of the statement, the statement is identical to Mrs Sinha's. The statements are based on documents they are shown which they explain. Both consider that the loan funds were used for purposes other than that specified on sanction. Mr Panda was another such witness who after some initial comments confirmed precisely what Mrs Sinha said.
234. Other payments seen from the loan fund account were the payment of the lease on the private jet used by Dr Mallya, paying off debts owed to banks other than the Bank of Baroda mentioned above and servicing other KFA loans including for India Bulls,
235. A Vice President of Axis Bank produces an account of money that came in from IDBI and were then paid out on behalf of KFA. At Volume D Page 477 is the transfer for the lease on the personal jet which was used by VJM. US\$2m was due. A witness Mrs Jagtiani (Volume D Page 555) from the Corporate Aviation Terminal in Mumbai but who was not in post in 2011 was able to produce from records the passenger manifest for two private planes. One with the personalized registration number of VT-VJM was operated by KFA whilst the other N272VJ is owned by UB Holdings.
236. Mrs Jagtiani produces records which are not complete but show that the KFA VJM airplane had never been used for commercial flights. The records produced do not show flights in 2009 but before and afterwards and in very nearly every case VJM was the

passenger usually with others. The defence evidence came in a statement from Elsa D'Silva found at Defence Volume K Divider 11 where she says she was the Vice-President-Network Planning at KFA responsible for aircraft charters including the corporate jet VT-VJM. She confirmed that the jet was also chartered to other individuals. No records or exhibits were produced to confirm what she said but the defence explained that the records were held either by the liquidator or the GOI. It was a very short statement, lacking in detail. I did not accept her evidence and considered that even without documentary records to back it up she could have named individuals or companies which chartered the airplane.

237. I heard evidence from Margaret Sweeney who is the CFO of Force India the formula one racing team that Dr Mallya owned for a few years. Her evidence was that the sponsorship deal with KFA had with Force India the Formula 1 racing team was very valuable. The KFA logos on the racing car could be seen in races shown on 200 television stations. She produced a schedule which valued the sponsorship obtained. KFA paid £3.2m to Force India from a contract in 2010 which was for 12 years at £122m reduced to £72m if paid within a six year period. There was an extra pre-payment in 2009 which was accounted for in the 2010 accounts. She said that as a favour to Dr Mallya in 2011 they started to pay KFA back.

238. This evidence shines a light on the priorities of KFA at a time when they were in deep financial trouble. When they were trying to ensure their continuation as a business, KFA were investing in Force India which was owned, as I understand it, by Dr Mallya at the time.

## Conclusion

239. I do not accept Mr Rex' evidence that in such a case as this where the use of the loans was specified and granted on the basis that they would be used to pay off the pressing creditors of the type listed that the funds could be used more generally. Because the account was opened to hold the funds paid by IDBI to KFA, the GOI can show clearly how the funds were used. As I have said above they were not used in the ways required by the terms of the sanctions.

240. Mr Rex may be right when he says that even if IDBI loans had been used to pay the non-pressing creditors, loans from other lenders would have had to have funded KFA's operating expenses, so that KFA's overall position would have remained unchanged. The overall position is not of significance, the point is that the loans by IDBI were made on a specific basis to pay certain types of pressing creditor and on the face of it they were not used in that way.

241. Mr Rex makes the point that the bank should have done more to ensure that the loans were being used as the terms allowed. That is the case but it still does not get around the fundamental point again that the loans were not being used according to the clear terms. He is right that the bank has a responsibility but so did KFA. It is clear from the emails sent to and from Dr Mallya and others that they were spending any money that came in on anything that needed to be paid, whatever the terms of the loans. It may well be that the lack of tracking carried out by IDBI is a reflection on the honesty or otherwise of the bank.

242. There is a prima facie case that the funds were misused.

## Findings in relation to whether misrepresentations were made to IDBI

243. I find that, on the face of it, on 1<sup>st</sup> October 2009 Mr Raghunathan is misrepresenting the state of the company but setting out the issues with the aviation industry. He says the combined efforts of the companies and the GOI place aviation companies on the road to recovery faster so that they will emerge profitable in the mid-term. What he is implying is that KFA is suffering the same problems as the other companies involved. From the email correspondence in September 2009, it is however clear that in fact they are not expecting KFA to emerge profitable in the mid-term.
244. Mr Raghunathan represents that the loss for FY2009 is around 1600 crores. On the face of it and according to the emails, this is a misrepresentation as the actuals show a loss of 2155 crores.
245. In the memorandum originally sent to the Credit Committee KFA had given the impression that Q3 and Q5 of FY2010 would close without any further loss. I find that KFA did not honestly believe that.
246. The representation is made that the 200 crores were infused in FY2009 and would be infused again in 2010 and 2011. As can be seen from above that is questionable. Mr Rex accepted there was some evidence there was money going from one KFA account to another, he said the detail would have to be looked at to uncover what had happened. Dr Mallya did not give evidence so it was not possible to ask him about this.
247. Another misrepresentation is that the two different international valuers have valued the KFA brand and the value is estimated at around 3400 crores. As can be seen from above in the section brand valuation, the two valuers valued the brand at very different amounts. Only the highest was sent to IDBI with the letter of 1<sup>st</sup> October 2009.
248. From the memorandum sent to the Credit Committee dated 7<sup>th</sup> October 2009 IDBI officials have been given the impression that with the improvement in the domestic and global economy KFA's performance is showing improvement. This is simply untrue if the forecast for the FY2010 is compared with the actuals in Q1 and by 7<sup>th</sup> October, Q2. It is a misrepresentation that is being made to rely on the projections of a loss of 1609 crores being reduced to a loss of 174 crores in FY2010 when it is known that the first half of FY2010 has shown a loss many times greater than the total projected loss for the year.
249. I am ignoring the possible misrepresentation that KFA expects the load factor to increase to 75%. It had been only 62% in August. There was no mention of KFA expecting the load factor to increase to 75% in the emails but the topic was not covered.
250. There is a misrepresentation that KFA is confident of meeting the short-term challenges and taking advantage of the growth potential in the long term. Judging by the emails of September 2009, KFA was not confident at all.
251. There was either a misrepresentation about the value of VJM's net worth made to SBI or to IDBI.
252. A possible misrepresentation is the explanation for the H1 FY2010 loss which was many times more than the projected full year FY2010 loss. There is evidence that there were planes that suffered engine failure and the claim against International Aero Engines mentions a perished screw which had to be replaced and grounded some planes for a short period of time but I do not consider that the half year loss was due to the grounded aircraft. This is not a significant point when looking at whether there is a prima facie case against Dr

Mallya. What is clear is that the mention to IDBI of discussions being carried out in relation to compensation also give some comfort and presents a positive picture to IDBI, even if Mr Rex' point that it does not mean they will in fact obtain compensation of course is right.

253. I find that there was a misrepresentation about what the loans would be used for. I do not accept that KFA at the point of applying for the loans was intending to use the money just for the services set out in the SBI Appraisal Note. At that stage, with the desperate financial situation the company was in, it was going to use the money in any way it wanted to, whatever the terms of the loan or loans. Mentions of '*round robins*' in the documentation show what KFA was capable of doing. There is a prima facie case of making false representations to make a gain for himself or a loss to another.

## Conspiracy to defraud

### Arguments

254. The question for this court is whether there is a prima facie case that some executives of the bank were complicit in the fraud alleged against VJM and his KFA colleagues. Were Mr Agarwal and other top executives at IDBI, for example, having meetings and corresponding and in some way working out a corrupt agreement with Dr Mallya and his colleagues Mr Raghunathan and Mr Nedungadi or did the bank executives believe that the UB Group had the commitment to KFA that it would step in if KFA had trouble repaying the loans? Were the bank executives taken in by the flashy cars and jewellery, the bodyguards, private jet and formula one racing car team, which meant they thought that this very rich man would step in and not allow KFA to fail?

255. The defence case is that the allegation is intrinsically problematic. The suggestion that the bank's Chairman agreed to cheat his own bank in favour of a borrower company without any evidence of any gain on his part, is as Ms Montgomery and Mr Watson say "*inherently improbable*". The defence team point out that the lending carried out by IDBI is just one loan in a group of loans lent by a consortium of banks. It is not being said by the GOI that the other banks were involved in dishonesty so why is it being alleged in the case of IDBI. They contend it is "*genuinely extraordinary*" that it should be alleged that IDBI's executives should be lending with an intention that the moneys should never be repaid.

256. Ms Montgomery criticises the structure of Mr Summers and Mr Watkins' 'Conspiracy Note'; she says the evidence does not support the wide allegations made in the note and that there is no prima facie evidence of a conspiracy to defraud between the senior executives at IDBI and VJM.

257. The defence point out that the note relies heavily on text in witnesses' statements which are identical between one statement and another. They allege that the evidence has been prepared by the investigators and then put into the mouths of the witnesses. The defence contends that very little weight should be placed on the evidence which should be treated with extreme caution. They point out that the GOI has only partially quoted from statements and give the example of a witness who said the proposal was recommended because KFA had the support of what they thought was a strong UB Group and Dr Mallya "*who were offering Guarantees for securing the loans*".

258. Ms Montgomery and Mr Watson conclude with various strong arguments including that no reasonable jury could conclude that the Chairman of IDBI would lend to KFA as part of a dishonest agreement knowing that KFA would never return the monies lent, that

having done so, that he would then lend more as part of the MDRA, that they agreed to take shares in a company as part of the MDRA arrangement when they knew KFA would collapse, that Dr Mallya gave a personal guarantee and corporate guarantee when he knew that IDBI would lend the money as part of a corrupt agreement anyway, that Dr Mallya put further investments into the company while knowing it would collapse, the monies coming from UB Group and Force India and directed that KFA made long-term investments in projects. Finally, the Defence point out that there is no evidence of any personal gain or promises of personal gain.

259. This has been the question that has troubled me from the beginning and resulted in the court asking Mr Summers and Mr Watkins to set out clearly how they put their allegation that the bank was involved in this alleged fraud.

260. The GOI contends that of course their Conspiracy Note was provided at the court's request to clarify the case against the bankers, to show how the bankers are said to have been knowing participants in the defendant's fraud on IDBI. The note focusses on the bankers' actions and conduct such as the inexplicable bending of the rules, secret unrecorded meetings with Dr Mallya and the inferences that could be drawn from that.

261. It made the allegation that loans were obtained based on known misstatements made to IDBI material to the grant of the loans (misstating the projected rate and stage of profitability of KFA and the value of the securities it was prepared to provide). The loans were then misused and then the allegation is that Dr Mallya's post default conduct was to obtain the funds knowing that he did not intend to repay them if they were called in.

262. The GOI contended that all this was done in a conspiracy with KFA officials and that the loans were granted in the full knowledge that they did not meet the criteria for lending. As the Government's Closing Submissions make clear at Page 19 Paragraph 73, *"This involved significant misconduct by public officers within the bank. That misconduct was so stark, and so divergent from their public duties to the state-owned bank for which they worked, that it supports the additional inference that the bankers involved also knew at the material time what the defendant was up to and assisted him"*; this explained the conspiracy charge.

### Evidence

263. Conspiracies are very rarely proved with direct evidence and there is none in this case but there is evidence that the GOI relies on from which it says the court can draw inferences that the bankers were involved in a conspiracy with KFA.

### Audits

264. Mrs Sinha was in the Inspection Division of the Department of Banking Supervision of the Mumbai Reserve Bank of India, (the Indian equivalent of the Bank of England) when she headed the inspection team which undertook an inspection of IDBI under section 35 of the Bank Regulation Act 1949 (which gives the Reserve bank a power to inspect). The team inspected between 28<sup>th</sup> October 2010 and 28<sup>th</sup> January 2011, they were concerned with the bank's position as at 31<sup>st</sup> March 2010. They followed a specific pattern of approach to the inspection.

265. Mrs Sinha produces the report the Inspectors created and points out that they made some critical observations about irregularities in the appraisal and supervision of the KFA

account. She summarizes the criticism at Volume D Page 427 onwards. She noted the terms and conditions of the loan were changed by Mr Batra whilst the sanctioning authority merely noted the deviations and did not remark “in a single instance as to why such variations were required within a short span of less than a month”.

266. Mrs Sinha said competitive pricing was not considered when looking at the rating of the customer. Credit facilities were sanctioned to this new borrower without obtaining credit reports from existing bankers which broke banking rules. KFA a “new borrower” did not meet the hurdle rate, ie ‘BBB’ and the loans were sanctioned in deviation from the loan policy. No analysis had been made regarding the sanction and use of limits in other banks.
267. IDBI had sanctioned a STL and a Corporate Loan to KFA in deviation from internal guidelines regarding the hurdle rate and disbursement was made prior to the rating being carried out. IDBI already had exposure in relation to two subsidiaries of the company (in fact of UBHL) on the date of sanction which was pending in the DRT (Debts Recovery Tribunal) Bangalore.
268. Mrs Sinha continued by saying that the security charge remained pending. Funds were disbursed without complying with the sanction terms and conditions.
269. The above is a brief summary of the conclusions reached by external auditors for the Reserve Bank of India, the internal IDBI auditors reach similar conclusions. They give evidence that KFA was treated differently to other new clients.
270. Mr Kashyap of IDBI’s Internal Audit and Regulatory Compliance Department (Volume C Page 292) carried out an operational audit of the Large Corporate Group in Mumbai in January 2010. They noted that the criteria for client selection was not discussed in the Credit Committee memorandum. The bankers report was still due. The fact that the security creation for the earlier loan was still pending had not been indicated in the sanction memorandum for the 750 crores. End of use certified by the Statutory Auditor did not exactly match with the intended purpose of loans and the No Objection Certificate (“NOC”) for ceding *pari passu* charge by the other banks had not yet been received. These comments were placed before the Audit Committee who asked the Large Corporate Group to monitor the account in view of “the large exposure coupled with low credit rating” (Volume C Page 294). It is relevant that although alarm bells were rung it did not lead to anything other than monitoring of the account.
271. A second quick review was undertaken by Mr Kashyap with Mr Bhattacharjee, both from the same Internal Audit and Regulatory Compliance Department to look at IDBI’s compliance when it came to loans to KFA. They produced a report dated 17<sup>th</sup> June 2010. He noted that at the time of sanction of the 150 crores loan, no risk rating was available. The Credit Committee ordered that it be risk rated and the Risk Department had rated it at BB with a score of 2.47 out of 6. The Risk Department had said the proposal did not comply with minimum rating requirements of BBB as the norm for new clients. KFA’s financial position was unsatisfactory. Bankers reports although requested from the other lender banks were not received.
272. Mr Kashyap goes through the security offered including the corporate guarantee of UBHL at Rs 1511 crores as at 31.3.09 and the personal guarantee of VJM said to be of a net worth of 1395 crores. He points out that two securities, the escrow of IATA collections which was to be divided up with SBI had not in fact been executed and the assignment of credit card receivables to service the loans was yet to be executed too. So although they

were addressed in the memorandum placed before the Executive Committee they had not been attended to as at 16<sup>th</sup> June 2010 the day of the quick review by the witness.

273. Mr Kashyap said the loan was disbursed without the creation of security and without compliance with pre-disbursement conditions. He had examined the documentation and could say that this had been allowed by Mr Batra and Mr Ananthkrishnan, the Head of Large Corporate Group. Mr Kashyap said that a number of the security conditions were still pending in June 2016.
274. Mr Kashyap said that KFA defaulted on the 150 crores loan which was due on 7<sup>th</sup> April 2010. He goes on to explain what happened after the default. The company received a number of reminders to repay the 150 crores. Both that loan and the 750 loan were recalled on 13<sup>th</sup> May 2010 but in the event the company repaid the 150 crores. As at 15<sup>th</sup> June 2010, the interest of 1.88 crores on the 150 crores and 9.18 crores on 750 crores was overdue.

#### Failures of the bank processes

275. Ms Kabra was Assistant Manager in the Project Appraisal Department of the Large Corporate Group in late 2009. The Project Appraisal Department dealt with the appraisal of large corporate loans of 100 crores and above. Ms Kabra says at Volume C Page 275, that rating of borrowers in all proposals is mandatory according to IDBI guidelines. She also said at Page 270 that before considering the facility to a new borrower, name clearance process or flash report (ie a snapshot of key financials at a given time) should be undertaken so the bank can obtain a preliminary examination of the financials to determine whether the proposal from the borrower can be taken up for appraisal. This was not done in KFA's case.
276. Ms Kabra said that generally a proposal coming from a loss-making borrower with weak financials, negative net worth and previous instances of default would not be recommended for sanction of a loan. In KFA's case despite the shortcomings, Mr Sridhar told her that they had to positively recommend the proposal because KFA had the support of the strong UB group and VJM who were offering guarantees for securing the loans. Any contact between VJM and IDBI would have taken place at a higher level than Mr Sridhar's. Ms Kabra goes on to say that they had asked KFA to confirm that the loans of 150 and 200 crores would be part of the overall loan of 950 crores but VJM did not agree. He had said the first loan of 150 crores would be separate and outside the overall 2000 crores facility (Kabra Volume C Page 270).
277. Ms Kabra (Volume C Page 284 onwards) and Mr Gupta (Volume C Page 410 at 412) who was the General Manager in the Project Appraisal Department of IDBI's Large Corporate Group at the relevant time are the witnesses who look at IDBI's circulars which consider norms for lending and set out in box form whether KFA conformed or not with the norms. KFA was a new client known as a 'target client' and any lending should have complied with those norms. Essentially KFA did not comply with the norms in a number of respects (Volume C Page 284 onwards).
278. The first criterium looked at is profitability and the norm which was that there should be profit in the last two years. KFA's financials did not comply with this. The next, credit history, where the norm required is that there should be no known default by the company or group. This was not complied with. It is a fairly convoluted story involving the bank suing United Breweries Ltd and the latter approaching the bank for a one-time settlement ("OTS"). The OTS was accepted by the Credit Committee including two alleged

co-conspirators, Mr Batra and Mr Bundellu at a meeting held on 8<sup>th</sup> September 2009, an outstanding amount of 541 lacs was settled by a payment of 50 lacs. A No Dues was issued in October 2009, immediately before the STL of 150 crores was processed. It is the timing which is significant. Ms Kabra and Mr Gupta described the OTS as a sacrifice of Rs. 491 lacs. A number of other criteria were not complied with.

279. Mr Gupta and Ms Kabra say that KFA was not complying with the Corporate Loan norms nor with the Target Client norms. He suggests “*perhaps the sanctioning authorities considered the loans because the company was having a reasonable market position in the aviation sector, that the promoters were undertaking to infuse Rs 600 crores in tranches of 200 crores each in FY2009, 2010 and 2011 by way of unsecured loans, Rs 800 crores by way of GDR/Rights Issue by 31.3.10 and equity of Rs 1880 Crores through strategic investors in the FY2011 and FY2012*”. He said the projected infusions were critical to the company’s turn-around and the sanctioning authorities “*could have probably considered stipulating a thorough monitoring mechanism*” to ensure KFA complied with the projections. One way that could be done would be by releasing the money in tranches rather than the entire loan to a borrower with “*weak financials*”.
280. The significance of this evidence is that it indicates that KFA was being treated in a different way to other new clients.
281. Mr Gupta then goes through the same detail for the 200 crores loan. He considers the original proposal for the sanction of the loan. The request was dated 4<sup>th</sup> November 2009. Mr Raghunathan had submitted the application and Mr Sridhar the General Manager in PAD, Large Corporate Group and an alleged co-conspirator then submitted it for sanction. Mr Gupta recognized Mr Sridhar’s signature on the document.
282. It was to meet certain critical obligations to overseas vendors including aircraft lessors and other service providers. No risk rating had taken place. Mr Gupta says that the 200 crores loan was to be released pending the main corporate loan being sanctioned. The proposal went from Mr Sridhar to Mr Batra. It was said that the rating report had been asked for by the CC and was still awaited. It comments on the concerns (see p419) expressed by Risk Department and the financials of UBHL to the CC. Mr Gupta says Mr Batra, the Bank’s Deputy Managing Director (alleged co-conspirator) had written on it “*this needs to be expedited*”. The proposal went from Mr Sridhar to Mr Batra to Mr Agarwal, the Managing Director of IDBI.
283. Mr Gupta identifies various remarks including by the Bank Chairman Mr Agarwal (alleged co-conspirator) who approved the loan and said that it should be put up to the Executive Committee for the sanction of the company’s proposal for a corporate loan of 955 crores and to seek confirmation of the chairman’s action in releasing 200 crores in anticipation of the Executive Committee sanction.
284. By the time of the sanction of the 200 crores loan on 4<sup>th</sup> November 2009, there still had not been a risk rating nor had there been credit reports from existing bankers. By the time the proposed loan of 750 crores was being looked at, there still had not been a credit report from the bankers.
285. The rating of the 150 crores loan was only completed on 7<sup>th</sup> November 2009, the Risk Department gave KFA a ‘BB’ rating with a score of 2.47.

286. In terms of conversations going on between VJM and Mr Agarwal, Mr Gupta says that from the emails it is clear that the reason the 150 crores STL was not part of the larger corporate loan is that VJM had spoken to Mr Agarwal and it had been accepted by the bank that the loan would be outside the consortium; this is despite Mr Sridhar emailing MR Raghunathan seeking his confirmation that the STL would be part of the overall corporate loan (Volume C Page 420).
287. A point which may have significance when considering whether VJM and the Chairman of IDBI were having meetings is that Mr Colaco, who was a private secretary at IDBI Bank was asked about the records of meetings and phone calls between VJM and Mr Agarwal. Although Mr Colaco was not the Chairman's Principal Private Secretary, he helped him maintain the records and by arranging appointments. These records are retained but in the case of the 2009 diary it had disappeared. It was untraceable as at 23rd August 2016. I recognise this may be a weak point as firstly by now the diary may well have been found and secondly, it is not in dispute that meetings took place, if it has not been found then it is of course a stronger one. The number of meetings and whether they were minuted is of importance to the case against the alleged co-conspirators and it may not be a coincidence that the 2009 diary has disappeared.
288. Mr Colaco said that the RP had been to see Mr Agarwal on at least two occasions. He described the RP as coming in a flashy manner in a big car, wearing white flashy clothes, and wearing earrings. He usually came with an entourage of bodyguards etc.
289. On 1<sup>st</sup> October 2009 a letter from Mr Raghunathan to Mr Batra (IDBI), makes it clear that Mr Raghunathan had met Mr Batra prior to submitting the loan request (Kabra C, page 255). Mr Dasgupta received the same letter and the business plan from Mr Raghunathan directly.
290. Ms Kabra (Volume C Page 269) says that while approving the 200 crores loan Mr Yogesh Agarwal had directed the proposal for the 750 crores loan "*may be put up*" and confirmation of his action in having released the 200 crores may be sought at the next EC Meeting. After this, Mr Sridhar told Ms Kabra that "*we have to process and recommend the proposal to sanction Corporate Loan of 750 crores*" to KFA "*before the next CC/EC meeting positively*". They then had to stay until late to prepare the proposal. KFA senior managers such as Mr Nadkarni and juniors Mr Vinay Agarwal used to come to them for discussions. They emailed and had conversations with them as the bank sought clarification from them. This was an appraisal process in which Mr Raghunathan too sent two to three emails. The emails were kept at the Nariman Point Branch of the bank.
291. Mr Gupta pointed out that in terms of the Bank's guidelines, obtaining credit reports from existing bankers is the norm for new proposals. In the proposals for the 7th October 2009 and 4th November 2009 loans there is no mention of credit reports from lender banks. In a memorandum for the 750 loan, credit reports were asked for and awaited.

#### Chronology - loans and evidence that KFA was treated differently to other IDBI customers

292. Mr Gupta says that Mr Dasgupta, the General Manager of the Large Corporate Group, approved the first 150 crores loan of 7<sup>th</sup> October 2009 when it was said that the proposal had not yet been risk rated. According to Mr Gupta, Mr Dasgupta recommended the STL on the justification that KFA was the largest single airline in India with more than five years of experience, the company had incurred losses because of high fuel costs and the

load factor was low because of the economic slow-down. KFA had taken cost cutting measures and would reduce losses from 1609 crores in 2009 to Rs 174 crores because of those measures (Volume C Page 417). Mr Gupta points out that in fact Mr Dasgupta has quoted the wrong net loss figure, the net loss for FY2009 is not 1609 crores but 2168 crores. Mr Gupta identifies Mr Dasgupta's signatures on the document as he has worked with him for several years.

293. Mr Gupta sets out the securities (Page 418). Mr Gupta said usually guarantees (in KFA's case these were from UBHL and VJM) were set up before disbursement but Mr Dasgupta suggested in this case that the security creation should be done within 15 days after the disbursement. This was another example of KFA being treated differently to a normal client.
294. Mr Gupta goes onto say that Mr Dasgupta's proposal went to the Credit Committee on 7th October 2009 and was approved. The Credit Committee consisting of the alleged co-conspirators Mr Batra, Mr Srinivasan and Mr Bundellu and others decided that the loan had to be repaid 180 days later. The Credit Committee also decided it should be risk rated.
295. In the meeting, the Credit Committee asked for the financials of UBHL but they arrived after the loan of 150 crores had been sanctioned. Ms Kabra said the whole process was very fast, with the proposal for the loan being sent to Dasgupta at 11.31am and the Credit Committee having approved it by 3.40pm (Kabra Volume C Page 256). Ms Kabra drafted the sanction letter for the 150 crores which was dated 8th October 2009. She says that although the processing fee should have been paid in advance, a cheque dated 8<sup>th</sup> October 2009 was received but cleared on 12<sup>th</sup> October 2009 after disbursement (Kabra Volume C Page 264).
296. Ms Kabra said a credit rating was mandatory as per IDBI guidelines and had not been carried out prior to the loan being sanctioned.
297. Much has been made of the undoubted fact that the credit rating on KFA was not done in a timely manner and when done was set at a level which would normally lead to a refusal to sanction the loans.
298. According to Ms Kabra (Volume C Page 275), credit rating was usually carried out as follows: initially, level 1 credit rating exercise was undertaken by the concerned branch or group by an assistant manager or a manager. Then the rating was done by the General Manager or his or her deputy or assistant which was called level 2. Then the proposal with the rating recommendation was sent to the Risk Department of Head Office for Level 3 rating. Any of their concerns could be commented on by the concerned branch or group. Then the facility was considered by the sanctioning authority. In the case of the 150 crores this was the Credit Committee ("CC") and in the case of the 200 crores the CMD Mr Agarwal sanctioned the advance on the 750 crores loan.
299. Ms Kabra explains that in the case of the 150 crores this was not rated at level 1 or 2. Instead it was said to the CC on 7<sup>th</sup> October 2009 that the Risk Rating had yet to be done. The minutes of the CC show it was approved by the CC with the observations that the proposal had to be risk rated by the Risk Department. *"Dealing Group to report the Rating, its comments on the observations/concerns expressed by RD and the financials of UB Holdings to the committee"*. The attendance record of the CC meeting was signed by the bank accused, the alleged co-conspirators: Mr Bundellu, Group Head of Retail Banking and Chairman of the Credit Committee, Mr Batra, Group Head of Corporate Banking and Mr

Srinivasan Head of MCG as members, they were not alone though and there were other bank executives present. Ms Kabra identified their signatures at Volume C Page 276.

300. Ms Kabra said that UB Engineering had taken out a loan in April 2009, but in the proposal for the STL of 150 crores the loan had not been mentioned as part of the group exposure. That was mentioned in email of 27th October 2009 (Volume C page 257).
301. Over the days that followed the granting of the first loan on 7<sup>th</sup> October 2009, emails go back and forth as KFA's financial position is investigated by the bankers. KFA is asked for information. On 3<sup>rd</sup> November Ms Kabra said she discovered that UBL had defaulted against an earlier loan made by IDBI Bangalore. Ms Kabra asked the IDBI in Bangalore for information in relation to the default.
302. On 20<sup>th</sup> October 2009, the Risk Department of the Large Corporate Group ("LCG") branch rated the 150 crores loan (that had been granted on 7<sup>th</sup> October) as a BBB with a score of 3.72. Mr Trasy, the Assistant General Manager of the Risk Department, then rated it a BB in a report dated 7<sup>th</sup> November 2009. This went up to the Rating Committee. The report mentioned the BBB given to it by the LCG branch. The Rating Committee approved the BB score on 7<sup>th</sup> November 2009 (Kabra Volume C Page 276). She names the members of the Rating Committee and it does not include the bank alleged co-conspirators.
303. By 4<sup>th</sup> November 2009, Ms Kabra discovered that the personal guarantee of VJM had not been executed but it was said it would be the same day. There was also overdue interest of 1.21 crores which would be cleared by 5th November 2009. The corporate guarantee had been executed on 3rd November 2009 (Volume C Page 258).
304. On 4<sup>th</sup> November 2009 too, KFA had sought and obtained a further loan of 200 crores. A letter was sent by Mr Batra of IDBI to Mr Sridhar of IDBI seeking release of 200 crores with "*a direction that they put up a proposal recommending sanction the same day*" (Ms Kabra Volume C Page 259). This was forwarded by Ms Kabra to Mr Dasgupta the next day on 5th November. According to Ms Kabra, the processing fee for the loan of 200 crores should have been paid before sanction, in fact a cheque issued for the processing fee payment was cleared on 7<sup>th</sup> November 2009 after disbursement of the loan (Volume C Page 264).
305. Ms Kabra at Volume C Page 276 went through the original proposal for sanction of the loan of 200 crores. She was able to say from his signature that Mr Sridhar, the General Manager of the Project Appraisal Department, Large Corporate Group submitted the proposal on 4th November 2009 (she identified his signature) and a request had been submitted the same day by Mr Raghunathan of KFA. It was to be released in anticipation of the sanction of the Corporate Loan by the Executive Committee to meet certain critical obligations to overseas vendors including aircraft lessors and other service providers.
306. The proposal went from Mr Sridhar to Mr Batra. The credit rating exercise had not been done and the rating report was awaited. Mr Batra wrote "*this needs to be expedited*" (Ms Kabra Volume C Page 277).
307. Mr Batra and Mr Sridhar discussed repayment and Mr Batra then recommended the proposal for the 200 crores loan to the Chairman of IDBI for sanction in anticipation of the sanction of the corporate loan, according to Ms Kabra he said "*CMD may kindly approve the proposal as recommended at para 7.05. Sanction of EC and confirmation of CMD's action in releasing the facility would be sought at the next EC Meeting*". The proposal went

next to the Chairman Mr Agarwal who wrote “*approved as recommended. Please put up to EC for sanction of company’s proposal for corporate loan of Rs 955 crores and seek confirmation of chairman’s action in releasing Rs 200 crores in anticipation of EC sanction*”. Ms Kabra identifies the signatures of Mr Sridhar, Mr Batra and Mr Agarwal on the proposal (Volume C Page 277).

308. On 5<sup>th</sup> November 2009, Mr Sridhar emailed Ms Kabra the sanction letter for the 200 crores loan. Then Mr Vinay Agarwal (not the Chairman of IDBI) sent Ms Kabra, Mr Sridhar and another an email saying how payments from the loan should be made. On the same day, Mr Sridhar sent Ms Kabra a draft memorandum for the corporate loan which would be forwarded to the Credit Committee meeting later held on 23rd November 2009. The loan proposal was being prepared by Mr Sridhar (Kabra C page 259).
309. On 5<sup>th</sup> November 2009, the sanction for the 200 crores loan was conveyed to KFA in a letter from Mr Sridhar. (Kabra Volume C Page 277).
310. Ms Kabra says that they tried to explore the possibility of getting a pledge of the unencumbered shares of KFA before they forwarded the proposal to the Risk Department for rating and Mr Sridhar tried to contact Mr Raghunathan of KFA but he did not pick up his phone. On 12th November 2009 an email was sent by Mr Raghunathan to Mr Sridhar saying that the share question had been referred to VJM but he did not agree to pledge any shares nor did he agree that the 150 crores loan should be recovered from the corporate loan. The first loan of 150 crores was outside the consortium and would be repaid on maturity at six months. The witness Mr Gupta’s contribution was that he said that the RP had spoken to the highest authority and it had been accepted by IDBI that the 150 crores should not be part of the consortium loan.
311. In relation to the shares, VJM had said if they made an exception for IDBI the other banks would want the same. I accepted Mr Rex’ evidence that this was a perfectly acceptable explanation (Volume C Page 270).
312. As to the risk rating, on 7<sup>th</sup> November 2009, the rating for the short term loan of 150 crores was sent on by the Risk Department (“RD”) which assigned a rating of BB and score of 2.47 to KFA. This rating report and the comments of LCG on the RD’s concerns were not sent up immediately but were incorporated into the proposal for sanction of the corporate loan of 750 crores (Ms Kabra Volume C Page 277).
313. On 13<sup>th</sup> November 2009 a scanned copy of a Chartered Accountant’s certificate regarding end use of the short term loan of 150 crores was forwarded to Ms Kabra and Mr Sridhar. On the same day, an email was sent to Ms Kabra and Mr Sridhar showing the status of borrowing from the various banks in the consortium showing total loans of 1050 crores disbursed by SBI, BOI, BOB and UBI.
314. On 13<sup>th</sup> November 2009 too, Mr Sridhar of IDBI sent an email, which contained the proposal for a corporate loan of 750 crores which was submitted to the Risk Department for rating. One thing noted was that there were internal rating concerns. This is all according to Ms Kabra at Volume C Page 261.
315. On 16<sup>th</sup> November 2009, a scanned copy of the UCB Bank sanction letter for the loan it gave to KFA, was emailed to Ms Kabra and Mr Sridhar. Also a no dues certificate dated 7<sup>th</sup> October 2009 issued by IDBI Bangalore to WIE Engineering was forwarded by email to Ms Kabra and Mr Sridhar. On the same day, an email with an approved internal

rating report for the corporate loan of 750 crores was forwarded to Mr Sridhar by Mr Trasy. The next day the comments on internal rating concern were forwarded from Mr Sridhar to Ms Kabra. Also a minute later, Mr Sridhar sends to Ms Kabra that final memorandum for the corporate loan of 750 crores.

316. On 17<sup>th</sup> November emails go back and forth with queries. In particular Mr Sridhar of IDBI asked KFA the reasons for the huge difference between the Jet Airways losses of 173 crores whilst KFA were 1889 crores, to which the reply comes “we will send you a response shortly” which they did. Then Mr Sridhar asks why is only 2000 crores was being sought as opposed to 2500 crores indicated in SBI’s appraisal note. The answer from Mr Ramchandran was that of 2511 crores of creditors, 2000 crores were the pressing creditors and 511 crores were normal creditors within permissible credit limits. That was why they were seeking 2000 crores as support from the banks. (Kabra Volume C Page 267). It is quite clear that Mr Sridhar, who is alleged to be a co-conspirator at the bank was looking into the financials of KFA.
317. Then on 19<sup>th</sup> November 2009, an email goes to Mr Sridhar and Ms Kabra, forwarding a note on creditors’ payments in the KFA Business Plan for FY 2009. It was said that due to economic conditions, sky high fuel prices and dwindling airline domestic market, KFA suffered a loss larger than envisaged in the business plan for FY 2009. A creditors’ payment of 700 crores planned for in January 2009 had to be deferred and only 400 crores was paid to the creditors in the business plan. (Ms Kabra Volume C Page 262).
318. On 19<sup>th</sup> November 2009 too the memorandum is written by Mr Sridhar and Ms Kabra to the Credit Committee. This is the long memorandum that I have looked at earlier in this judgment. It was eventually considered by the Executive Committee before it sanctioned the 750 crores loan.
319. The proposal for the loan which went to the Credit Committee included various concerns raised by the Risk Department and comments put in by others. These included a comment that the net worth of VJM may need to be ascertained. The reply was that the net worth had been obtained and was 1395 crores. It was said that the Chartered Accountant’s certificate had been obtained but no field verification done. All the time the proposal was being prepared KFA was in touch with Mr Sridhar by email and phone. According to Ms Kabra, they did not send any letters (Volume C Page 281). KFA provided answers to the risk concerns raised by the Risk Department.
320. Ms Kabra says that the risk concerns raised by the Risk Department and their comments (ie the comments of the Project Appraisal Department in the Large Corporate Branch) were also enclosed along with the proposal and placed before the Credit Committee. Ms Kabra set out the risk concerns in Volume C Page 278 onwards.
321. Mr Gupta said the Large Corporate Group recommended sanction of the loan on the terms and conditions mentioned and also the special terms and conditions. The LCG recommended a relaxation of the norms for the minimum credit rating of BBB for new clients. The risk rating report for the 150 crores loan and for the 750 crores loan were annexed to the proposal.
322. The Rating Department said that though the company had projected gross profit and reduction in net loss during FY 2010, the YTD results were not in line with these projections. Ms Kabra and Mr Sridhar’s comments were in the memorandum and added to this. They said that the company had incurred an additional loss of 700 crores during the

half year ended 30<sup>th</sup> September 2009 as compared to the business plan. KFA had faced certain unforeseen problems including 20 aircrafts suffering engine failures and this led to reduced revenue.

323. They said with the engines getting repaired and normal operations being restored, during Q3 FY 2010, an improved load factor and yield during Q3, coupled with good response on its new international sector, KFA expected to post better results in Q3 and Q4. Discussions were also said to be on-going with International Aero-Engines (“IAE”) who were the manufacturers of those engines for compensation. Ms Kabra said she was told this by KFA in an email dated 12th November 2009 from Mr Nadkarni to Mr Sridhar cc'd to Mr Raghunathan and others. In this email, a note on Half 1 FY 2009 (sic - this must be 2010) performance was attached where Mr Nadkarni attributed the poor performance in the first half of FY 2009 (sic 2010) to the engine failure in 20 aircraft (Ms Kabra Volume C Page 272). Further to make good the shortfall in profitability, the company proposed to raise additional equity of 800 crores through Rights/GDR issues by March 2010.
324. It was curious that in the emails exchanged between Mr Nedungadi, the RP and others in September 2009, there was no mention of the engine failure of so many aircraft when it was being suggested it was the main reason for a much larger than expected loss. I note too that in the event International Aero Engines never paid compensation to KFA but were paid money owed instead
325. Ms Kabra said at Page 274 that to protect the bank's interests they had originally stipulated that a pre-disbursement condition in relation to a tripartite agreement between SBI, Deutsche Bank and KFA which had led to the opening of an Escrow Account in Deutsche Bank with the IATA collections credited to that account would be that a no objection certificate (NOC) was to be obtained from the existing charge-holders for creation of security and *pari passu* letters (ie dealt with on an equal footing) from the other lenders involved in the 2000 crores corporate loan.
326. The Credit Committee, to protect the bank's interest, strengthened the stipulation, in that it said that the IATA and credit card receivables should come instead directly to IDBI Bank in proportion to their exposure. This was shown as agreed in the minutes of the meeting of 23<sup>rd</sup> November 2009. Ms Kabra was shown a relaxation to this condition allowed by Mr Batra and Mr Ananthakrishnan after the meeting. *“Mr Batra had given temporary relaxation for 30 days by creation of security. I state that this was against the bank's financial interest”*. This was significant evidence from Ms Kabra (Volume C Page 274).
327. On 23<sup>rd</sup> November 2009, Mr Panicker told Mr Sridhar and Ms Kabra that the personal guarantee of VJM had not yet been executed for the previous 200 crores loan. The original personal guarantee for the 150 crores loan had to be re-executed as it was on the wrong type of paper. (Ms Kabra Volume C Page 263).
328. The Credit Committee meeting was held on 23<sup>rd</sup> November 2009 where the issue of the pledge of shares was taken up (Ms Kabra Volume C Page 270). The meeting adjourned and continued on 24th November.
329. On 23<sup>rd</sup> November, at 9.39pm, an email was sent by Mr Sridhar of IDBI to Mr Raghunathan of KFA copied to Ms Kabra etc asking for clarification regarding pledge of shares, escrow and plan for equity infusion. He indicated that the sanction would be subject to the following: dues towards the corporate loan of 2000 crores and built up of DSRA

should be recovered first and only thereafter the balance in the account would be available for payment to other lenders and for operational expenses; a large number of KFA's unencumbered shares had to be pledged for the corporate loan; there had to be a confirmed commitment and detailed programme for infusion of unsecured loans of 200 crores each in FY 2009, 2010 and 2011, rights of issue of equity/Rights (800 crores) by March 31 2010 and equity infusion of 1880 crores in tranches of 705 crores by March FY 2011 and 1175 crores by March 2012. KFA was asked to report on progress in respect of each infusion. They asked KFA to respond by 9.15am as the meeting was being re-convened by 10am. (Kabra Page 271).

330. On 24<sup>th</sup> November at 9.02 am Mr Raghunathan responded to the mail sent on 23<sup>rd</sup> November at 9.39pm by Mr Sridhar to him. The former said on behalf of KFA “*we confirm*” that priority from the Escrow will be to the consortium of 2000 crores. This will be dealt with within the joint documentation amongst the banks participating in the consortium.
331. Secondly, the response from Mr Raghunathan said as mentioned previously, no security of pledge of shares had been provided or discussed with the other banks in the consortium. “*As explained by our Chairman in the meeting, this may derail the entire process with other banks who have already sanctioned the loans*”. Ms Kabra (Volume C Page 271) said she knew VJM had come to IDBI Bank Head Office on two to three occasions because his car was there and the news of his visit spread.
332. Thirdly, Mr Raghunathan said that group support of 100 crores has been provided to date in the current FY (FY 2010) and a balance of 100 crores would be provided in FY 2010. In addition, group support of 200 crores would be provided in FY 2011, in FY 2009 the group support has been in excess of 200 crores. As to the equity plans he said that KFA was having a meeting with Citi Bank and Nomura to formally launch the GDR issues. They expected the infusion to come in by February 2010 in the amount of \$100m. They then intended to complete the rights issue within 90 to 110 days after. The size of the rights issue was expected to be 450 to 500 crores. KFA has received “an expression of intent from financial investors for US\$400million” and expected to complete that in FY 2011 and FY 2012.
333. After receiving the email the Credit Committee resumed their meeting from the day before and after the meeting on 24<sup>th</sup> November 2009, Mr Sridhar prepared a draft memorandum to go to the Executive Committee which included the condition of the pledge of shares.
334. In the draft memorandum sent on 24<sup>th</sup> November 2009 by Mr Sridhar to Ms Kabra, in paragraph 10, according to Ms Kabra, the pledge of unencumbered shares specifically mentioned in it, had been struck out by Mr Batra. It said “*Consequential changes to be made!*”. That draft was signed by Mr Ananthkrishnan head of LCG who marked it to Mr Sridhar (Volume C Pages 263, 268 and 282). The reference to shares had certainly gone by the time of the final memorandum which was circulated by email on 24<sup>th</sup> to 26<sup>th</sup> November 2009.
335. Mr Agarwal, the Chairman of IDBI chaired the 27<sup>th</sup> November 2009 Executive Meeting which was attended by Mr Bundello and others, plus Mr Batra and Mr Anathkrishnan as invitees in relation to the proposed corporate loan for KFA.

336. On 1<sup>st</sup> December 2009 Ms Kabra and Mr Sridhar were informed that despite follow up VJM was yet to execute the personal guarantee.
337. Mr Gupta explains that the Credit Committee recommended the facilities on 23rd November 2009 without the pledge of shares and the Executive Committee sanctioned the loan on 27th November 2009.
338. Mr Gupta says that the conditions especially the pre-disbursement conditions and security creation conditions recommended by the Large Corporate Group and the Credit Committee in the minutes dated 23rd November 2009 were vital conditions and without compliance the Executive Committee would not have sanctioned the loan.

Analysis and conclusion in relation to a conspiracy involving some at IDBI

339. This is the most difficult decision of the ones I have to take in the case. On the one hand there is no doubt as can be seen from the chronology set out above that there has been a catalogue of failures of the bank at different levels. The failings were before the loans were sanctioned and afterwards. On the other hand, there is not a great deal of evidence from which I could draw inferences that various bank executives were involved in a fraud to defraud their own bank and that when they sanctioned the loans they intended KFA not to repay the loans as agreed and required.
340. It is either a case that the various continuing failures were by design and with a motive (possibly financial) which is not clear from the evidence that has been put in front of me, or it is a case of a bank who were in the thrall of this glamorous, flashy, famous, bejewelled, bodyguarded, ostensibly billionaire playboy who charmed and cajoled these bankers into losing their common sense and persuading them to put their own rules and regulations to one side.
341. The bank's failings include, as set out above, the failure to abide by their own rules when it came to a new client and an example of this was that despite the low rating the loan was waved through. In fact the first loan was granted even before the risk rating had been carried out. There was a failure to ensure that the guarantees were formally taken when they should have been and a failure to investigate the representations that KFA made at various stages to obtain the loans. With a bit of care the worthless negative lien on the hire purchase aircraft would have been exposed. There was a failure to obtain credit reports from other banks involved with KFA. There was a failure to give proper consideration to the past failures involving loans granted to associated companies. Mrs Sinha said the funds were dispersed without complying with the sanction terms and conditions. IDBI if it had looked more carefully at the loan account would have been able to see where the money was going.
342. The test to apply is to be found in *R v G & F* [2012] EWCA Crim 1756. This is quoted in the GOI's Closing Submissions at paragraph 20, "*the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference*". Lord Justice Aikens applied the same approach in the extradition case of *Devani* again I quote from paragraph 21 of the GOI Closing Submissions: "*The DJ who has to decide there is a case to answer for the purposes of section 84(1) must determine whether, on one possible view of the facts, he is satisfied that there is evidence upon which the requested person could be convicted at a summary trial of an information against him*".

343. Having applied the test set out above and considered what inferences could properly be drawn from “*the evidence as a whole*”, I find that there is a case to answer on which a jury properly directed could convict. The catalogue of failures set out above are so numerous and so fundamental, not just prior to the sanctioning of the loans, but also after the loans had been granted, that I consider a reasonable jury, on one possible view of the evidence, could reach a decision that particular co-conspirators such as Mr Agarwal, Mr Batra and Mr Sridhar in particular were involved in a conspiracy to defraud.
344. If the criteria for lending to KFA had been applied, if the background checks had been carried out, the loans should not have been granted. If the end use certificates and all the other post sanction conditions applied, the loans would not have been misapplied in the way they were. The evidence as currently before me is not as strong as the evidence in relation to the other allegations being made, nevertheless I find a prima facie case of a conspiracy to defraud which involves not just the KFA executives but also the named bankers in IDBI.

### Money Laundering

345. I have found above a prima facie case of fraud. I turn to consider what happened after the default. The paragraphs on what the loans were in fact used for are also helpful when considering this allegation (see Paragraph 207 onwards above). The GOI argues that this sheds light on the RP’s approach to the loans in the first place. I have found that on the face of it, the RP was doing everything he could by using honest or dishonest means to keep the company going, possibly, and this is conjecture, until he could get a foreign company to invest in the business. He had been teetering on the edge of being grounded for a number of months before the loans were granted and once he had obtained them, was not above playing ‘*round robin*’ as he himself described, to keep the company afloat. At the same time, he was using the KFA loans to fund anything that became due to be paid.
346. These payments included what some might say were two vanity projects, the formula 1 racing team and a corporate jet for his own use. In the case of Force India formula 1, IDBI’s loan proceeds were used to clear a bill discounting facility with the Bank of Baroda and to release credit facilities which were later used to fund sponsorship payments to Dr Mallya’s motor racing team in July 2010. The timing of the payments were significant, in 2009 and 2010, payments were made by KFA to Force India at a time it was struggling to remain in business. Money from the loans was transferred to Axis Bank then went to HSBC in London, they were said to be payments for operating expenses in relation to flights but the funds were transferred to the racing team. Essentially it appears as if KFA was funding Dr. Mallya’s team. I have already referred to Margaret Sweeney’s evidence that formula 1 is valuable sponsorship to have and that in 2011 they voluntarily refunded KFA.
347. After the defaults, the banks turned to put into effect the guarantees. The evidence relied upon by the GOI is the statement of Mr Joseph whose statement is to be found at Volume B Page 504. He is a partner in a law firm and represents the State Bank of India and others of the Consortium banks in legal proceedings taken in various courts in relation to the default of KFA. He is also involved in the proceedings arising from the Diageo deal between USL (United Spirits Ltd) and UBHL and Diageo. Mr Joseph outlines the many failures of the guarantors, UBHL and Dr Mallya.
348. To give but one example, the GOI relies on the email sent by Dr Mallya where he says: “*I have been receiving mails from IDBI regarding the KFA a/c becoming NPA. They*

*may suddenly do something. Take the 10 crd out of my account into USL tomorrow itself. VJM*". He is trying to avoid his responsibilities under the guarantee.

349. Mr Joseph explained that when the lenders were considering selling the shares then subject to the guarantee for the MDRA, the RP went to the High Court in Mumbai and claimed for the first time that he had been forced by duress to give his personal guarantee for the loan. It was said he had been coerced into providing it (Volume B Page 507). The Debt Recovery Tribunal ("DRT") rejected his assertions.
350. He also claimed that the corporate guarantee was invalid.
351. Mr Vittal (Volume B Page 329 at Page 343) is now the Deputy General Manager of the Commercial Branch of the State Bank of India at Tamilnadu but before this he was in the Stressed Assets Management Branch in Bangalore and was a Relationship Manager in the same branch of the SBI. He had dealt with the KFA account which was categorized as NPA (non-performing asset) as of 20.12.2011 before the date was of NPA was revised to 30.4.09 because of failed restructuring.
352. In terms of the personal guarantee and the asset and liability statement of 9<sup>th</sup> April 2009 that had been included in the first guarantee which had to be re-taken in the case of IDBI, it included shares in two South African companies valued at US\$150 million and US\$10 million respectively. Mr Vittal of SBI (Volume B Page 343) said that those assets were not declared in later asset and liability statements dated 31.3.2010, 31.3.2011 and 31.3.2012 sent SBI nor to the Supreme Court on 26<sup>th</sup> April 2016. The investments were alienated at some point between 2009 and 2015.
353. Mr Vittal goes on to say that a clause in the personal guarantee of 21.12.2010 executed by VJM says that he "*shall not convey, sell, lease, let or otherwise dispose of or create any sort of encumbrance on ... all or any part of his property or assets without the prior written approval of the Lender's Agent and the lenders*". Mr Vittal explains that having given that undertaking and without seeking prior approval, Dr Mallya entered into a deed of disengagement dated 25<sup>th</sup> February 2016, with Diageo PLC and others by which he resigned as Chairman and from the board of USL in exchange for a payment of US\$75 million. US\$40million was paid at the date of the agreement, 25<sup>th</sup> February 2016 and US\$35 million was to be paid at the rate of US\$7 million every year. The Deed of Disengagement showed that between 2<sup>nd</sup> April 2015 and 28<sup>th</sup> May 2015, Dr Mallya had divested of at least a 50% stake in the company and sold it to Diageo PLC. Mr Vittal makes the point that this breaches not just the conditions of the guarantee but also violated injunction orders made by the High Court of Karnataka.
354. The evidence is confirmed in the statement of Mr Joseph who says the contention that the US\$40million deal constituted an asset subject to the personal guarantee was confirmed by the Supreme Court. It is clear that the RP hid this asset and divested it on to his three children in trust for their benefit. The Supreme Court held that the diversion of funds was in flagrant breach of injunction orders which prevented him from alienating, disposing or creating third party rights in respect of this. Dr Mallya was held in contempt by the Supreme Court.
355. There is clear evidence of dispersal and misapplication of the loan funds and I find a *prima facie* case the Dr Mallya was involved in a conspiracy to launder money.

## Extraneous considerations

356. Section 81 of the Act reads as follows:

- a. A person's extradition to a Category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that
- b. the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions or
- c. if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

357. On the plain wording of this section, the question for this court is whether the request for extradition has been made on account of Dr Mallya's political opinions or whether he might be prejudiced at his trial on account of his political opinions.

358. Ms Montgomery's argument which introduces the Defence Skeleton Argument is that this is a flawed criminal case which has been brought "to meet a political objective to quell public anger at the accumulation of bad debts by Indian state-owned banks". The case is driven not by the evidence but by the belief that the sheer size of the loss must mean there has been criminality. Dr Mallya, she says, is seen as the embodiment of all the ills of capitalism.

359. Ms Montgomery relies on what she says is "the atrocious state of the papers" in this extradition request. It smacks of an intention "to throw everything" at the RP. She suggests the investigation has not been conducted by a neutral, independent and rational investigator as can be shown by the state of the papers. The allegation of a conspiracy involving bank officials is a result of the government's agenda to blame others rather than the government.

360. Ms Montgomery's attack on the prosecution is maintained in other submissions, particularly the Defence Closing Submissions where she contends that the prosecution is politically motivated which is seeking to have him extradited when there is no evidential case against him. It is advanced on the basis there is no fraud. She contends that the prosecution is brought to assuage the anger of the public at the debt incurred by the state banks. There is a risk of a breach of Article 6 on the basis that of political pressures and the associated press reporting.

361. In terms of evidence, the defence relies on Professor Saez who provided reports in which he said that Dr Mallya had been a politician for a small party. This was not of significance, but what was his prominence as a businessman. He relied on reports of exchanges when the two political parties, the BJP and Congress blamed each other for what had happened. The politicians were using the controversy around VJM to score political points against each other. In terms of Dr Mallya's connection with political parties, it was said the former Prime Minister of the Congress Party had helped him get the loans.

362. He explained that India is a democracy with a free press and public sentiment can be gauged by reading newspapers.

363. The Professor's next suggestion was that the CBI who had investigated the case was susceptible to political interference. There was concern about the lack of independence of

the CBI. He described the CBI as a “*caged parrot*” speaking with its master’s voice. Former directors of the CBI had shown these concerns but the latest of these dated back a decade although it was possible they had an axe to grind. One example the Professor relied on dated back to 1996. He was of the view that in the initial years the CBI was more independent than it is now. With the BJP government the CBI had become less independent. He relied on an academic who doubted whether the body tasked with oversight, the Central Vigilance Commission, could fulfil the task to ensure integrity.

364. Professor Saez considered another reputed journal where data obtained showed what was said to be a significant correlation between scheduled elections and allegations of corruption which appear to be politicised. The Professor relied on another example in November 2017 where CBI officers had left out from their evidence of a confession, the defendant’s exculpatory statements.

365. The Professor then considered the senior officer in the case, Mr Asthana who was in the court at the time. He made serious allegations about the character and professional integrity of Mr Asthana. He was proposed as the director of the CBI because Mr Sinha the last director was retiring. The next senior officer who was due to take over was Mr Dassa but he left. He relied on a new report in which a NGO supported Professor Saez’ views. There was a complaint of corruption being made against Mr Asthana. The Committee which considered his appointment decided not to consider the complaints as they were not proved. The Professor explained that the Supreme Court had upheld the appointment and overruled the objection.

366. The Professor’s view of the appointment was that not only he was raising but quite separately a NGO was raising issues which were dealt with in a surprisingly swift manner by the courts. As to the Enforcement Directorate, the Professor had no concerns about its impartiality or independence, he said there was less evidence of political interference with it.

367. In cross examination Professor Saez agreed that VJM’s political beliefs were not the most significant element with relation to the prosecution that was being brought against him. The Professor accepted that the RP did not have any relationship with any of the main political parties. He had not alignment with BJP or Congress and had no privileged access to the government in power. What the Professor had seen was that the the two political parties were seeking to use the affair for their own political purposes, they were each saying this had happened on the other’s watch.

368. When asked whether he had saying that the underlying allegations of fraud were untrue and that the prosecution was being brought about to punish the RP for his political opinions, he said no, but that the RP was a prominent businessman who became a politician. Both parties have used the case for their own political reasons. He said he was not an expert on fraud but on the political system. He was not qualified to say whether the allegations were true or untrue.

369. The Professor explained that that his contention was that on the basis of the RP’s involvement in the political system he had been unfairly targeted by both political parties trying to score political points against each other.

370. As a secondary point, the Professor said there could be a problem too on the basis of the lack of independence of the CBI from the current government. The Professor accepted that he did not damn the CBI institution overall, just in some instances. He accepted that there were different opinions on that issue. In many cases he accepted the CBI acted in a

fair manner. He accepted that he had not mentioned the oversight carried out by the CVC as he was just evaluating the independence of the CBI.

371. In cross examination he agreed he had relied on press articles which he had not verified. It was not the job of an expert to track down the original report of a specific story but to evaluate the stories he read.
372. Finally, he accepted he had not put before the court the Supreme Court judgement that had exonerated Mr Asthana when there had been an attempt to challenge his appointment as head of the CBI. The Professor said he had not considered it in his reports as it had only been drawn to his attention two days before he gave his evidence to this court. He agreed that the Supreme Court had found that the press reports the Professor was relying on were factually incorrect.
373. The Professor agreed that that he was no longer saying there were issues with Mr Asthana but there were with the independence of the CBI. He said that although he could no longer rely on the reports the Supreme Court had found to be incorrect, he was still relying on some such as the Indian Express and the Economic Times which are highly regarded newspapers. He was asked whether he had changed his views since the Supreme Court ruling and said he accepted that some press reports were less reliable and he had not used them in his evaluation.
374. He accepted that the investigation began in July 2015 long before a suggestion in March 2016 that VJM was going to settle the bank claims. He was aware too that the State Bank of India had been pursuing civil claims since at least 2013.
375. Professor Saez did not accept he had attacked the integrity and independence of CBI courts but said he had assessed the risks and concerns. He accepted that judges were independently appointed and agreed that although he suggested partiality he had not set out any examples of this.

### Findings

376. Professor Saez accepted that Dr Mallya's political involvement was of little significance in this case. It was his role as a businessman that was. I find that because both Congress and the BJP are blaming him and others for the state banks' losses that does not mean that he is being prosecuted for his political opinions, even in the wide sense of the word. By a finding of a prima facie case, I acknowledge that this case is being brought on evidence which may or may not lead to the conviction of the RP. There is no sign that this is a false case being mounted against him to assuage CBI's political masters as Professor Saez would have it.
377. Allegations were made against the professional integrity of Mr Asthana who leads the CBI and is the prosecutor which makes the first two allegations in this extradition Request, a serious allegation to make. I find that there is no evidence that Mr Asthana has acted corruptly. I noted the Supreme Court cleared Mr Asthana of the allegations made against his integrity and there was no reliable or significant evidence produced by the defence expert Professor Saez which undermined that finding.
378. The defence relied on the "atrocious state of the papers" in the case which they said indicated a willingness to throw everything at the RP. There is no doubt that the state of the papers in this case doubled the work of this court. What was missing was a volume by

volume index and pagination which were clearly set out on every page. The state of the papers was not an indication that the CIB or ED were trying to throw everything at the RP, but rather indicated that it had not stood back and considered what would help this court in making its decisions.

379. Without an index to each volume of papers and with sometimes three different paginations on each page, the court's job was made much more difficult. As I have said I do not consider this had anything to do with a lack of evidence or a willingness to prosecute the RP, come what may.
380. Professor Saez produces some evidence that in the past on some occasions the CBI had failed to act with complete integrity, that may be the case but that did not help this court when looking at section 81 in relation to these proceedings being taken against VJM.
381. I find that the fact the prosecution was started by a state prosecutor rather than on complaint of a bank neither here nor there, it is certainly not indicative of a section 81 breach.
382. I find no evidence to support the contention that the request for VJM's extradition is in fact being made for the purpose of prosecuting or punishing him on account of his political opinions. The argument in relation to extraneous considerations fails. There being no bars to extradition I must decide whether Dr Mallya's extradition would be compatible with his Convention rights within the meaning of the Human Rights Act 1998.

### **Human Rights – section 87 of the Act**

383. section 87 of the Extradition Act reads as follows:
- a. *s87 Human rights*
- (1) *If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).*
  - (2) *If the judge decides the question in subsection (1) in the negative he must order the person's discharge.*
  - (3) *If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited*
384. Ms Montgomery and Mr Watson raise Article 6 and 3 issues under section 87 of the Act. I must decide whether Dr Mallya's extradition would be compatible with his Convention rights within the meaning of the Human Rights Act 1998. If I decide in the negative I must order his discharge.

### Article 3

385. The test for this court to apply is whether there are substantial grounds for believing that the RP, if extradited, would face a real risk of being subjected to treatment contrary to Article 3 (*Saadi v Italy* (2009) 49 EHRR 30). The burden on the defence is less than on the balance of probabilities but the risk must be more than fanciful. *In Elashmawy v Court of Brescia, Italy* [2015] EWHC 28 (Admin) Lord Justice Aikens said that “*in general, a very strong case is required to make good a violation of Article 3. The test is a stringent one and*

*not very easy to satisfy*". The case underlines the importance of making findings about the actual conditions and what their effect will be on the particular RP.

386. The evidence in this case has not ranged widely over the general conditions on the prisons in India and I noted that there have been findings in other Indian extradition cases in relation to the conditions going either way. Some have been found to breach Article 3 and some not. The evidence that this court has had to consider in detail is in relation to the assurances received that the RP will be held not just at Arthur Road prison in Mumbai but in a particular cell in that prison, Barrack No. 12.
387. The European Court of Human Rights' in its decision of *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1 listed a number of matters a court would wish to look at when considering the weight to give to any assurance received from another country. I will come to look at those considerations later.

### Evidence from GOI

388. There are a number of assurances relating to prison conditions, they are sometimes repetitive. There is also an assurance which responds to a detailed report on Dr Mallya from the Wellington Hospital. The defence questioned the bona fides of the photographs sent by the GOI and in August 2018 the court asked that a video be made of the entry into and of the layout of the cell including the sanitary facilities. That was produced.
389. I set out the RS's various assurances below in date order.
390. An assurance was received by letter dated 4th July 2017 (Volume E Divider 4), from Ajay Ramesh Sule, the Joint Secretary in the Ministry of Home Affairs in New Delhi. It gives the assurance that Dr Mallya will be held at the Barrack No. 12, in the Arthur Road prison complex in Mumbai if extradited. It was accompanied by a note to show how the terms of the assurance would be delivered in practice.
391. The letter explains that the RP will have a minimum of 3m square of personal space not including the furniture throughout detention (pre-trial, and post-trial, if convicted). He will be provided with a clean thick coating mat, pillow, sheet and blanket. A metal frame/wooden bed can be provided on medical grounds. Adequate light and ventilation and storage of personal belongings is also available. He will have "sufficient" access to clean drinking water each day and 'adequate' medical facilities are available 24 hours a day. He will have access to 'adequate' toilet and washing facilities each day and be allowed out for exercise for more than one hour a day. He will receive 'adequate' food.
392. In the attached note, Ajay Ramesh Sule is aware of the minimum space requirements set out by the CPT. It recognises that assertions of overcrowding are often made but he says that does not apply to Barrack No. 12. The barrack measures approximately 20 ft x 15 ft and has a ceiling which is 20 ft high. It has a separate toilet/wash room. Towards the end of the note he says that occupancy (in July 2017) is at five prisoners when the capacity is six, three in one of the Barrack no. 12 cells and two in the second. There is more detail on the maintenance and cleaning of Barrack No. 12 and it says that access to drinking water is at will.

393. Daylight is provided by the two grilled windows and one grilled door both facing a passage which itself receives natural light throughout the day. There is adequate artificial lighting. Ventilation is provided by the three ceiling fans in the cell and in the passage.
394. In terms of sanitary facilities, there is a flushing lavatory and a wash basin with constant supply of water. There is a door between the cell and the bathroom.
395. There is a high level of security at the entrance to No. 12 and CCTV cameras monitor 24 hours a day. A prison officer and a guard are on duty 24 hours a day and the inmates in the Barrack do not mix with other prisoners. There has been no violence in Barrack No. 12 because of the nature of the facilities and the type of prisoners held there. Exercise takes place between 7am to noon and 3pm to 5.30pm. Board games are made available to the prisoners. Inmates can do yoga and use a library but also can bring in their own reading matter. Daily newspapers are available too. A television showing terrestrial channels is in the Barrack.
396. In terms of medical assistance, four medical officers along with four nursing orderlies and two pharmacists are available, there is a prison hospital with 20 beds and outside experts come in when required. There is a public hospital within 3 km of the prison.
397. Meals are provided three times a day and the prison will try and accommodate special dietary considerations. Home food is allowed with the permission of the court. A canteen provides toiletries, mineral water and snacks, and prisoners are given a banana daily.
398. In terms of contact with lawyers, Dr Mallya will be allowed to meet his lawyers daily (apart from Sunday and public holidays). Video conference facilities are also available.
399. Paragraph four of the letter makes it clear that the assurance is a sovereign assurance made by the Government of India in consultation with the State Government concerned. This is also confirmed in the note where it says the assurances set out in the note are factually accurate and capable of being delivered by Barrack no. 12 for the duration of Dr Mallya's detention. The prison authorities are bound by it. Any complaints can be made to the prison administration and also to various other Human Rights bodies and the Judiciary.
400. A letter was received dated 13th December 2017 (Volume E Divider C) dealing with questions that had arisen in relation to the photographs of the cell. Dr Vitthal N Jadhav, the Spt Inspector General of Police in the Maharashtra State, explains that Barrack No. 12 has two cells on the ground floor. At the time of the photographs two of the five prisoners held in the Barracks had been moved out which explained why one cell was empty. The writer then gave examples of additional items provided to specific prisoners, one received a bed, chair and table and another received a chair and mattress by order of the court.
401. Further information was provided by letter dated 8th January 2018 by the Office of the Superintendent of prisons in Mumbai. This was written partly in response to Dr Mallya's medical report received from the Wellington Hospital. The Superintendent said that Barrack No. 12 consisted of two rooms with grilled windows which let sufficient natural light in to enable a prisoner to read during the day. He enclosed photographs showing one of the cells. A bed rather than the usual mattress could be provided if ordered by the court. Home food had been allowed by a court in three cases (named).

402. The Superintendent considered the medical requirements of Dr Mallya. The prison could provide a range of medication and treatment for Dr Mallya's health issues including physiotherapy which was provided in the hospital. In relation to his diabetes, a blood sugar testing facility is available. In terms of coronary heart disease, the treatment is available whether medication or surgery and there is an ambulance available for prisoners who require it 24 hours a day. In relation to apnoea, a CPAP machine would be made available. Various specialist services would be provided. The Superintendent pointed out that Mumbai was a metropolitan city with a number of national and internationally reputed hospitals and research facilities. There are a number of pharmacies in the city. There are a number of hospitals nearby, private and public, if the court permits.
403. At various times during the proceedings, Ms Montgomery asked the GOI to allow Dr Mitchell, the defence prison expert, to visit Arthur Road prison. On 4th September 2017 the Ministry of Home Affairs wrote to the Crown Prosecution Service to say that in the light of the exhaustive assurance in Dr Mallya's case and the detailed legal and factual framework, the RS was not acceding to a visit from Dr Mitchell.
404. The next assurance is dated 10th January 2018 and is from Mukesh Mittal, the Joint Secretary (Internal Security) at the Ministry of Home Affairs. The document is copied to the Joint Director of the CBI and the Indian High Commission in London. The GOI assures the court that Dr Mallya "*would be provided with a specialist doctor/private doctor of his choice as and when required by him*".
405. The RS relies on a letter of assurance dated 28th July 2018 from Punya Salila Srivastava the Joint Secretary to the Government of India in the Ministry of Home Affairs based in New Delhi. This was in response to a Report on Inspection Visit made by the Indian National Human Rights Commission which had visited Mumbai Central Prison in Arthur Road, Mumbai on 25th and 26th May 2017. The Report had been published on 23rd April 2018.
406. The GOI said the Inspector's report on the poor conditions he had observed was not relevant to Barrack No. 12 where specific assurances had been given. It re-confirmed that Barrack No. 12 in the Arthur Road Prison would be where the RP would be held whilst on remand, during the trial and, if convicted, post-trial. The letter said he would be produced at court with adequate security and police escort. It said that the occupancy statistics did not reflect the situation in No. 12 which is a separate building where there is no overcrowding. As of 28th July 2018, although the Barrack had capacity for six, only four prisoners were in it. The Joint Secretary said "*there is absolutely no overcrowding*". It said the conditions had adequate, clean and hygienic space for each of the prisoners.
407. It repeated the letter of 4th July 2017 (see above) where it was said that the RP would be afforded a minimum of 3m square of personal space (excluding furniture). He would be provided with a clean thick cotton mat, pillow, bed-sheet and blanket and have access to adequate washing and toilet facilities. The 28th July 2018 letter referred to photographs which showed the cell has an attached private separate lavatory and shower. The Joint Secretary said they are cleaned regularly to maintain a good standard of hygiene.
408. As to medical access, there is a 24 hour a day prison hospital, access to a local hospital by prison ambulance would also be provided and in Dr Mallya's case as per the assurance of 10th January 2018, he would be provided with a private doctor of his choice "*as and when required*".

409. The court had expressed concerns that the Inspector's Report had spoken about structural deficiencies; the letter of 28th July 2018 explains that the Inspector had not visited Barrack No. 12 and that since the Inspection in May 2017 the Public Works Department ("PWD") had renovated various Barracks including no. 12. The letter of July 2018 then enclosed a letter from the PWD and photographs of the Barracks.
410. The letter dated 27th July 2018 from the Office of the Deputy Engineer sent to the Superintendent of Mumbai Central Jail, Arthur Road, confirms that it is maintaining various Barracks in the prison including Barrack No. 12. It carried out renovation works in the FY 2017-18 when plastering, painting, water proofing etc were carried out. The building housing Barrack No. 12 is "*structurally stable and secure for housing inmates*".
411. The photographs provided show a separate blue building which is Barrack No. 12 in Arthur Road prison. The more useful evidence is the video of Barrack No. 12 inside and out. The video was shot in the morning in natural light in August 2018, at this court's request. This shows the approach to the cell and the Barrack itself. It was clear that some redecoration had taken place. The bathroom tiling had been replaced, it looked as if there was a new lavatory and basin. The cell had a large television screen high on the inside wall and an outside wall had been recently painted white. It was clear and showed the cell had some daylight during the filming. It showed a clean, large, well-appointed cell which had no prisoners or furniture in it. It showed where a detainee could exercise.

#### Prisons - Defence evidence

412. Dr Mitchell was called by the defence and had provided a report. He spoke generally about visits to other prisons in India where he had seen appalling conditions, in particular he mentioned the prison in Alipore.
413. In relation to Arthur Road, he had not visited it despite the Defence asking that he should be allowed to. He said Arthur Road was very overcrowded, it had only 112 guards, he noted that though orders had been made for its improvement in March 2017, there was non-compliance by June 2017. A court order was made and not complied with because the State had not given them the resources to do the work. He accepted that Barrack No. 12 is a self-contained facility containing up to six prisoners. He had seen no information to show that Barrack No. 12 had problems and he accepted the photographs provided by the Indian Government showed Barrack No. 12. His concerns were about ventilation, light and access to water. He said the assurances used the words 'adequate' to describe the light, ventilation and water and there was no explanation of what adequate would look like.
414. He spoke about what had happened to the Chennai Six who were retired British soldiers who were working as security on a ship. They had been held in appalling conditions in prison in Chennai in Tamil Nadu when they had been arrested for being armed on a ship. He accepted they had not been extradited to India with assurances and also agreed that there were 28 states in India and each one operated its own prisons with its own rules and regulations. He accepted that the conditions in Alipore and Chennai may not correspond with those in Mumbai.
415. In relation to the Chennai Six, he had spoken to one of the men whom he called "A". Eventually "A" was shown to be Mr Armstrong and a statement from him dated 19<sup>th</sup> December 2017 is to be found at Defence Volume K at Divider 12. He had been locked in a mental institution because he had been walking around the exercise area in what the authorities called an excessive way. He was tied up, gagged and beaten; he was forcibly

injected; force fed. He was held for two weeks and was warned that if he did not drop the complaint about his treatment it would cause him trouble.

416. Mr Armstrong described the conditions of the prison in Tamil Nadu, there was an open lavatory area, there were rats, cockroaches and snakes, there was bribing of the guards, infrequent electricity, for one year there was no access to a telephone and they had no mattress for five months. They had to pay to be referred to hospital.
417. There were medical concerns and one had not had the treatment he required. He had to petition the High Commission before he was seen at a private hospital. He was diagnosed with cancer and it had spread to his bones; he was then sent back to prison for six months where he received no treatment at all. Mr Armstrong had a tooth abscess which was not treated as there was no dentist in the Chennai prison. There were inadequate meals, one meal a day of three or four ounces of chicken. Any food parcels were confiscated and did not reach the six men. In terms of water, the running water stopped for two weeks and they had to drink from an open well with a high risk of infection. They repeatedly made representations but it had no impact on the authorities.
418. An extensive medical report on Dr Mallya was received from the Wellington Hospital dated 27th July 2017 (Volume U Divider 22 Page 353 onwards) which informed Dr Mitchell's observations. It said that Dr Mallya suffers from type 2 diabetes, for which he receives a range of oral medication which is to prevent deterioration of eyesight and of kidney function, and an increase in various vascular diseases. His daily intake of calories is controlled. It very important for him to maintain a balanced strict diet to control his diabetes. He needs regular small meals, four to five times a day. He needs a minimum three litres of water each day.
419. The RP has coronary artery disease and has a number of different medications for that. He should be on a strict low cholesterol diet for the narrowing of his coronary artery. He should also take regular exercise, stop smoking and reduce his salt intake. He has chronic hyperacidity which causes severe both abdominal pain and acid reflux. He takes medication for that. If he did not take the medication it might contribute to the development of a duodenal ulcer. He has to take vitamin supplements and is to avoid excess alcohol (likely in prison), spicy food, cigarettes and stress.
420. Dr Mallya has sleep apnoea, this involves the use of a CPAP machine which delivers oxygen to him while he sleeps. If he was not able to use the machine then he could be at risk of hypoxia and in extreme cases, brain damage. The machine is powered by electricity and an interruption of supply would put Dr Mallya at risk of suffering insufficient oxygen to the brain. He needs to do regular exercise.
421. The report explains Dr Mallya has chronic asthma and receives medication. There would be short and long-term consequences if he were not to receive the medication.
422. The RP has osteoarthritis in his left knee. He receives painkillers but also has physiotherapy. If he was unable to have either it would lead to increased pain and decreased mobility. He also has osteoarthritis in the lumbar sacral spine and has severe low back pain and it gives him difficulty in walking, standing, bending and sleeping. He has medication to control the pain and he had received a lumbar epidural injection two years or so before. He would suffer increased pain if unable to receive physiotherapy or the medication.

423. He has a blocked salivary gland and is on pain killers and at the time of the medical letter he was waiting for an appointment with a consultant specialist. If unable to take the medication it would lead to increased pain. Finally, he has left Achilles tendonitis and in July 2017 was on analgesia awaiting an appointment with a specialist.
424. In relation to the various medical problems set out, Dr Mitchell noted VJM has diabetes which requires treatment and is affected by diet. Dr Mitchell said it was difficult to see how Arthur Road prison would manage with only four doctors and four nursing assistants (rather than nurses) and a population of 3000. He compared it with the United Kingdom where there would be about 12 doctors and 60 nurses for the size of the Arthur Road prison population.
425. He responded to more recent evidence relied on by the RS, including photographs and assurance received on 28th July 2018 and the video filmed in Barrack No. 12.
426. In terms of assurances, Dr Mitchell said that India was not signed up to the United Nations CPT. He said he did not think the assurances could be reliable without independent monitoring, a discussion of the problems with prison management and then a follow-up visit. He did not think the compliance with assurances could be objectively verified.
427. Any diplomatic monitoring would not work as seen in the case of the Chennai Six where assurances given by the United Kingdom government in the House of Commons could not be relied on. He accepted however that breaches could be brought to light by the national or state Human Rights Commission in India, consular access might also do that and the RP's own lawyers who could see their client daily. He agreed too that the Indian judiciary was fiercely independent and had the power to make random visits to Barrack No. 12. He agreed too that extradition arrangements between India and the United Kingdom went back to 1992. He said that the strong media spotlight on the case would bring any breach in the assurances to light. He did not agree that it made breaches less likely.
428. Dr Mitchell produced a final report dated 30th August 2018 (Volume X Divider 5) in which he commented on a Report by the National Human Rights Commission on their inspection of Mumbai Central Prison in Arthur Road, Mumbai, the letter of assurance dated 28th July 2018, photographs of Barrack 12 and a video of Barrack No. 12 taken on 16th August 2018. Finally, he attached a newspaper article in the Mumbai Mirror on 30th August 2018.
429. He reviews the report extracts which were sent to me on 24th July 2018 by email by Mr Anand Doobay of Boutique Law for Dr Mallya. The inspection took place on 25th and 26th May 2017, a report was written dated 5th September 2017 and made public on the NHRC's website on 23rd April 2018. I was sent a link to the main report.
430. The report makes it clear that on 25th and 26th May 2017 the prison was overcrowded with 2801 detainees in a prison which has a capacity of 804. Accommodation was said to be severely insufficient. There was a shortage of police escorts so some prisoners were not produced at court. The prison hospital was overflowing with 30 beds and 56 in-patients. The fabric of the barracks/buildings were said to be "*outdated and unsafe and may have total collapse at any point of time (sic)*".
431. Dr Mitchell then turned to the assurance given dated 28th July 2018 where it was said that the report of the National Human Rights Commission did not apply to Barrack No. 12. He made the point that although the Report said a member of the Commission had not

visited Barrack No. 12, it was unclear whether the officer from the investigative division of the Commission had visited the Barrack. The assurance said public works had been completed on a number of barracks after the visit, including No. 12. since the visit of the Commission. He then went on to say that the fact that the Commission did not visit Barrack No. 12 meant that the Court could not be satisfied the assurances could be relied upon.

432. He also made a point that based on the measurements provided compared with the number of prisoners, each one would have a minimum of nine square meters of personal living space compared to the overcrowding in other barracks. He complained that nowhere was it said how the capacity of Barrack No. 12 had been determined at six prisoners. Rather weakly, he said that the RS had not explained what would happen if future high-profile prisoners had to be accommodated. His concern remained in relation to access to medical professionals.
433. In relation to light, he noted from the photographs that the only provision for natural light or air is at the ground level of the barracks.
434. He commented on the video made of Barrack No. 12. He makes the point that it shows a large room which is empty and bare. There are three fans and six strip lights. Of note, was when the lights are on so are the fans. He points out that the UN Minimum Rules for the Treatment of Prisoners (Mandela Rules) set out at Rule 14(a) that the windows should be large enough for prisoners to be able to read or work by natural light and allow the entrance of fresh air. He contended that it would not be possible for the court to be satisfied as to sufficiency of light and ventilation from viewing the video.
435. The video which was timed 1045, shows artificial lights on in the corridor outside the cell. The lighting in the cell is poor until the ceiling strip lights are switched on. He was concerned that at night that the prisoners would not be able to have the fans on if the lights were off. He did not think ventilation could be assessed from the video. He also noted that the sanitary area was only partly partitioned.
436. He also reports that recent works have been carried out to the cell, according to the Mumbai Mirror. A contractor was quoted as having completed recently refurbishment works at Barrack No. 12 including painting the cell, tiling the floors, renovation of the toilet area and painting the exterior. A black wall was painted white to reflect the light more. An official was quoted as saying that the CBI was not happy when they came to film on 10th August 2018 and further works were carried out. Another prison works manager said it was part of a programme of refurbishment.
437. Dr Mitchell's opinion was that the National Human Rights Commission visit to the prison in May 2017 was too short, conducted by too few people (just two) and should have interacted with more than eight prisoners. This compared unfavourably to how the CPT would approach its work in a prison of the size of Arthur Road. It was hard to see how it could conclude that the prison authorities had good relations with the inmates and behaved towards them in a caring and compassionate manner.
438. He remained concerned about the ventilation and lack of air conditioning when the mean maximum temperature in the summer is 32 degrees and in the winter 30 degrees. Other concerns were the overcrowding and lack of staff. The 30 beds in the prison hospital and four doctors and four nurses he said were also insufficient for the number of prisoners. He was concerned about Dr Mallya's conditions of detention if even more high-profile prisoners were to be held in Barrack No. 12 (it is hard to imagine who they could be).

439. He concluded from the photographs and video recording that there was highly likely to be an “*insufficiency of natural light and ventilation*” in the cell. His overall view remained that a prison expert should visit the prison who could see the conditions at first hand. Without such a visit he did not think the court could be satisfied as to the conditions of detention and in particular whether they were likely to be in compliance with Article 3.

#### Findings - Assurances

440. The court must consider the Othman criteria (*Othman v UK* (2012) 55 EHRR 1) when looking at an assurance provided by a foreign state. In this case, I find that the assurances are clear, the prison Arthur Road in Mumbai has been identified and the cell Barrack No. 12 has been specified. Various other assurances have been made in relation to the RP’s living conditions in Barrack No. 12 if he is returned and his ability to obtain medical treatment. The assurances have been disclosed to the court and I find that the various representatives which have given the assurances will bind the GOI. The GOI will know that if the assurances are broken, they will be very publicly broken. VJM and his lawyers will announce any breach of faith in court and I would anticipate a perfect storm of publicity would follow this announcement. Extradition arrangements work on the basis of trust and any failure to abide by the assurances would doubtlessly affect the trust between this court and the GOI. I have no reason at all to think that the GOI would want to breach that trust.

441. Dr Mitchell relied on what happened to the Chennai Six. I am not required to make any findings but it would appear that these ex-soldiers who had been working as armed security guards on a ship, were imprisoned in awful conditions for a lengthy period of time. I heard too about their health needs which were not met. As appalling as the story is, I noted that this was in a state, Tamil Nadu, which is some distance away from the largest cities in India. I would not want to judge Mumbai on the conditions endured by these six men who had not been extradited to India, nor who were protected by an assurance given by the GOI.

442. I am also required to consider the length and strength of relations between the RS and this country which in the case of India are lengthy and strong. I find the conditions are objectively verifiable, whether it is by Dr Mallya’s complaining to his lawyers, to the prison authorities, to the courts or, as accepted by Dr Mitchell, to national or state Human Rights Commissions. In relation to the courts, Dr Mitchell described the judiciary as “fiercely independent”. I have no doubt that they would ensure these assurances are upheld. There is no history here of the GOI breaching any assurances given.

443. Having considered the Othman criteria, I reject Dr Mitchell’s rather weak reservations. I accept the assurances given by the GOI.

#### Article 3 - Conclusion

444. Having accepted the assurances in principle, I turn next to the prison conditions which in the light of the assurances will apply in this case. I find that Dr Mallya will be held in Barrack No. 12 of Arthur Road in Mumbai. I find that the video of the cell and the approach to the cell is an accurate portrayal of the conditions which will apply. The cell is large, far larger than the 3m square minimum set out in a number of authorities. The cell has been recently redecorated. It has a very high ceiling, some natural light from grilled windows, a couple of fans and strip lighting. I accept that the fans go off when the lights go off.

445. I find that the RP will be provided with a thick cotton mat, a pillow, sheet and blanket. He will be able to apply on medical grounds to have a bed. He will have access to “sufficient” water and I bear in mind that his doctor’s expectation is that he receive three litres a day. He will have access to the bathroom which is attached to the cell and appears to be clean and is newly decorated. It has a lavatory, shower and the basin has a constant supply of water. He will be able to wash each day and will receive adequate food. He may be allowed food from home if the court permits.
446. There is sufficient security, a prison officer and a guard are on duty 24 hours a day and the inmates of Barrack No. 12 do not mix with other prisoners. I accept that there has never been any violence in the cell because of the high-profile nature of the prisoners held there.
447. The major concerns the court had was in relation to the many medical conditions the RP suffers from; the RP is far from healthy. The doctors and nurses in a prison of the size of Arthur Road have a lot of work on their hands and the assurance given that Dr Mallya could consult his own private doctors seems to this court to be a necessary one in all the circumstances. It is an assurance which this court considers to be an important one in all the circumstances. I accept that there are hospitals very close to the prison were VJM to require hospitalisation.
448. I would expect that were the Indian court able to allow Dr Mallya a bed and home cooked food it would enable him to face the trials ahead in a more healthy state than otherwise. Certainly, his doctors will need to watch what he eats to help manage his diabetes and coronary artery disease. A spell in custody is likely to help him cut down on alcohol. A regular exercise routine will need to be worked out by his doctors to keep him healthy. I noted that he is taking a whole range of medications which the GOI will ensure he has access to.
449. The test for this court to apply is whether there are substantial grounds for believing that the RP, if extradited, would face a real risk of being subjected to treatment contrary to Article 3. Having accepted the assurances and considered the conditions proposed by the GOI, I find there are no grounds at all for believing that the RP would face a real risk of being subjected to treatment breaching Article 3. The argument fails.

## Article 6

450. The test I must apply is whether the RP can show there is a real risk that he will suffer a flagrant denial of justice in India. *Othman v United Kingdom* [2012] ECHR 56 suggests that the breach of the Article 6 principles has to amount to the nullification of the very essence of the right. It is said that this will occur in very exceptional circumstances.
451. Ms Montgomery and Mr Watson contend that Dr Mallya’s case has “*totemic significance*” in Indian political life. He is being attacked by politicians and the press. The Defence argues that the press is obsessed with the RP. I accept that Dr Mallya has courted publicity over the years and that judging the number of journalists from India who attend Westminster Magistrates’ Court whenever the case is listed there is great appetite for news about the case.
452. The Defence says that there is great political capital invested in the successful prosecution of the case and his discharge or acquittal will “*be viewed as a political failure*”.

The corollary of that is that his guilt has been prejudged by the press. The defence witness Professor Lau presented a number of prejudicial press reports which seemed to be based on comments made by the Indian Finance Minister.

453. The case would test any judiciary but would particularly test the Indian judiciary where any decision made in Dr Mallya's favour would be followed by accusations that the judge concerned had been bribed. There are suggestions of pressure already brought to bear on the judges involved in the RP's case. The Supreme Court itself is not immune from suggestions of corruption. In the case of the CBI court which will hear the case against Dr Mallya Professor Lau said there is a particular inherent risk of partiality given its close relationship with the CBI.
454. Ms Montgomery and Mr Watson submitted it is particularly vulnerable to abuse given the CBI's lack of independence. They rely on the evidence of Professor Lau that in the CBI court, the CBI framed parents for a murder they did not commit. The CBI was criticised by the High Court in India. The CBI was said to have failed to disclose exculpatory material, deliberately mislead experts and tutored a witness. The CBI court was not able to protect the defendants in that case.
455. The Defence relies too on the evidence of Professor Lau that the Supreme Court had given preferential treatment to the creditor banks in this case which made it appear less neutral and impartial. The Professor explained that the Supreme Court was heavily burdened but that the case against the RP and others proceeded at pace. The Professor said he had the highest respect for the Court but had some doubts about the patterns of its decisions in favour of the government. The Professor made it clear that he was not saying it was a corrupt institution. It was just that judge nearing retirement lean in favour of the government in the hope of later jobs.
456. The Professor relied too on research which said that there were concerns in India about media trials. There was an emergence of powerful television commentators and the media can affect all aspects of a criminal trial from the judge to witnesses and the police.
457. In cross examination the Professor agreed that there was an increased awareness of the effect of reporting on the fairness of the trial and that a mature case law had developed to deal with this problem although the Professor said that that was not quite the answer as contempt of court was not robust enough. The courts are concerned that they are not able to deal with this properly and the higher courts are actively considering what can be done about this problem. The witness agreed that it is a problem which affects almost all countries. The Professor agreed that the Indian courts were trying to establish ways and means of dealing with this problem.
458. The Professor agreed that it was not surprising that a free and animated press interested in this case where it was said state funds had gone missing. Importantly the witness accepted that Dr Mallya could raise it if he felt his prospects of a fair trial were endangered. Professor Lau agreed he would have legal remedies which include during the trial.
459. The Professor was specifically asked about the criticisms he had made of the Supreme Court. He said he still stood by his evidence that the proceedings in that court were quite fast in the light of other delays although he accepted that the GOI had had no knowledge of the petition presented by the banks. The Professor was taken through the chronology of the civil proceedings taken against VJM by the banks. The Professor

maintained that the proceedings were taken “*rather swiftly*” but accepted the Supreme Court was not a corrupt institution.

### Conclusion

460. The criticism made of the possible effect of the considerable media attention which would attend a prosecution of Dr Mallya, is not significant enough for this court to find he would not have an Article 6 compliant trial. There is insufficient evidence for this court to find that he will not be tried by a competent and fair court.
461. Any suggestion that CBI courts are too pliable when it comes to CBI cases is not borne out by reliable evidence. It would be like saying because Southwark Crown Court hears the majority of SFO cases that means it would lack independence in some way or because Westminster Magistrates’ Court deals with all extraditions at first instance it lacks independence from the Crown Prosecution Service extradition unit which brings these specialised cases.
462. I accept the GOI’s contention that because Dr Mallya has such a high profile that his trial will be under great scrutiny. I find that Dr Mallya will be able to raise with the court any overly prejudicial publicity. I accept the criticisms that there has been much political commentary made about his prosecution and the lending that was sanctioned by the banks, nevertheless it will not be a trial by politicians. Courts are used to dealing with high profile cases which are accompanied by often ill-advised political commentary.
463. I do not accept that the courts in India are there to do what the politicians tell them to do. As I have already said, the court will be under great scrutiny. I do not find any international consensus which would enable me to find that the judges in India are corrupt. The most the Professor could do was give me a handful of individual examples where the process appeared to be defective in one way or another. Such defective processes came to light and were corrected by the senior courts.
464. Professor Lau’s criticised the Supreme Court for dealing with the civil case against Dr Mallya too quickly. I found this is not a relevant criticism as it was clear that the proceedings were an *ex parte* application for an interim injunction. The Professor made it clear that he had the highest respect for the Indian Supreme Court.
465. There was no evidence which allowed me to find that if extradited Dr Mallya was at real risk of suffering a flagrant denial of justice. The argument in relation to Article 6 fails.

### **Abuse of process**

466. The defence argues abuse of process. Bearing in mind the findings I have made above, that there is a *prima facie* case, that there is no evidence that the prosecution is politically motivated as defined in both limbs of section 81, that the RP will receive a fair trial, I find no grounds for finding an abuse of process.

### **Procedural requirements of Part 2 of the Extradition Act 2003**

467. I find the procedural requirements of Part 2 in section 78 are met. The documents include the request, the certificate issued by the Secretary of State, particulars of the person whose extradition is requested, particulars of the offences alleged in the Request and a warrant for Dr Mallya’s arrest issued by the court.

468. I find that the allegations set out in the Request are extradition offences within the meaning of section 137(3) of the Extradition Act 2003. The conduct occurred in the category 2 territory of India. If the conduct occurred in this jurisdiction, the conduct would constitute the offences of making false representations to make a gain for himself, conspiracy to defraud and money laundering. The conduct is punishable in India by imprisonment for longer than 12 months.

469. India is not designated under section 84(7) of the 2003 Act, so that I have to decide whether there is a case to answer. I have considered this above and I have found a prima facie case in relation to three possible charges.

470. I have rejected the arguments raised under section 87 and do not find abuse of process.

### **Conclusion**

471. In the light of the decisions outlined above I am sending Dr Mallya's case to the Home Secretary of State for a decision to be taken on whether to order his extradition.

Senior District Judge (the Chief Magistrate) Emma Arbuthnot  
10th December 2018