Neutral Citation Number: [2012] EWHC 3286 (Ch)

Case No: HC12B03162

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2012

Before :

MR ANDREW SUTCLIFFE QC, SITTING AS A JUDGE OF THE HIGH COURT

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Between :

OJSC TNK-BP HOLDING — **Claimant**

- and –

(1) BEPPLER & JACOBSON LIMITED
(in provisional liquidation)
(2) IGOR LAZURENKO
(3) LEIBSON CORPORATION
(4) BELINDA CAPITAL LIMITED
(5) LAWSON TRADING LIMITED
(6) SERGEY SCHEKLANOV
(7) MARCEL TELSER
(8) SVETLANA LAZURENKO
(9) DELAILA INVESTMENT LIMITED
(10) ROYCHAMP TRADING LLC
(11) CENTELUX INC
(12) ADELAIDE ENTERPRISES LLC
(13) TROCKLEY INVESTMENT LIMITED — **Defendants**

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Mr Stephen Moverley Smith QC, Mr James Ramsden, Ms Lyndsey de Mestre and **Ms Sarah Bayliss** (instructed by **Bryan Cave**) for the Claimant
Mr Neil Kitchener QC, Mr Henry Forbes Smith and **Mr Owain Draper** (instructed by **Mishcon de Reya**) for the 2nd to 6th, 8th and 10th to 13th Defendants
Mr Richard Morgan QC (instructed by **Rooks Rider Solicitors LLP**) for the 7th Defendant

Hearing dates: 24-28 September 2012

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JUDGMENT

MR ANDREW SUTCLIFFE QC :

Introduction

1. On 14 August 2012, Mr Justice Sales ("**Sales J**") made a worldwide freezing injunction against seven of the defendants, restraining them from removing from England and Wales any of their assets up to the value of €39,000,000 or disposing of, dealing with or diminishing the value of any of their assets whether within or outside England and Wales up to the same value. Those defendants were also required to provide details of their assets as well as information regarding the directors and shareholders of five of the corporate defendants.

2. On the same date, Sales J gave the Claimant ("**Holding**") permission to serve out of the jurisdiction on the 2nd to 13th Defendants the various documents required to be served.

3. On 21 August 2012, on an application by the 2nd to 5th, 8th and 10th to 13th Defendants for a stay of the asset disclosure orders in the freezing injunction, Mr Justice Peter Smith adjourned the return date for Sales J's orders and gave directions, amongst other matters, for the filing of evidence and skeleton arguments for what was then anticipated to be a 2 day hearing.

4. On 3 September 2012, the 7th Defendant ("**Mr Telser**") issued an application seeking to set aside Sales J's order giving permission to Holding to serve the Claim Form and Particulars of Claim out of the jurisdiction upon him on the grounds that the court has no jurisdiction or alternatively should not exercise its jurisdiction against Mr Telser.

5. On 5 September 2012, the 2nd-6th, 8th and 10th-13th Defendants (referred to where appropriate in this judgment as the "**Applicants**") issued an application seeking (1) a declaration pursuant to CPR 11(1) that the court has no jurisdiction over the Applicants in relation to this claim, (2) an order setting aside Sales J's order of 14 August 2012 and (3) an order setting aside service of the Claim Form and Particulars of Claim on the Applicants. Three principal grounds are advanced by the Applicants: first, that Holding has no good arguable case in either Russian or English law; second, that England is not the appropriate forum for this claim; and third, that Holding failed to give full and frank disclosure at the without notice hearings before Sales J when the freezing injunctions were granted.

6. On 21 September 2012, Holding issued an application seeking (i) to continue until trial or further order the freezing injunctions granted without notice by Sales J on 14 August 2012 and (ii) an increase in the level of the assets covered by the freezing injunctions from €39,000,000 to €46,123,229.

7. As mentioned, the hearing of these applications was initially estimated to last 2 days. Given the volume of evidence presented to the court and the number of issues raised by the parties in their written submissions, when the applications were listed for hearing to commence on 24 September 2012, that estimate was

revised to 3-4 days. In the result, the hearing took 5 days and additional written submissions and further evidence were lodged after the hearing.

8. Holding was represented at the hearing by Mr Stephen Moverley Smith QC, Mr James Ramsden, Ms Lyndsey de Mestre and Ms Sarah Bayliss, instructed by Bryan Cave. The Applicants were represented by Mr Neil Kitchener QC, Mr Henry Forbes Smith and Mr Owain Draper, instructed by Mishcon de Reya. Mr Telser was represented by Mr Richard Morgan QC, instructed by Rooks Rider LLP.

9. I divide this judgment into the following sections:

9.1. A description of the parties.
9.2. An outline summary of relevant facts or alleged facts.
9.3. Whether service out of the jurisdiction should be granted. That in turn involves the consideration of three questions:
    9.3.1. First, whether Holding has satisfied the court that there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. This is the same test as for summary judgment, namely, whether there is a real (as opposed to fanciful) prospect of success;
    9.3.2. Second, whether Holding has satisfied the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out is given;
    9.3.3. Third, whether Holding has satisfied the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction on the Applicants and Mr Telser.
9.4. Whether the freezing injunctions granted without notice by Sales J should be continued (and if so on what terms) or alternatively set aside on the grounds of material non-disclosure.

The Parties

10. Holding is a Russian holding company within the TNK-BP Group ("**TNK-BP**") which holds the major assets of TNK-BP within the Russian Federation. TNK-BP is the second largest privately owned Russian crude oil production company. TNK-BP was formed in 2003 as a result of the merger of BP's oil and gas assets with the oil and gas assets of Alfa Access/Renova group ("**AAR**"). BP and AAR each own 50% of TNK-BP. In September 2010, TNK-BP held assets worth over US$33 billion, of which over US$1.8 billion was in cash.

11. The 1st Defendant ("**BJUK**") is an English registered company incorporated on 7 November 2001 which holds all of the shares in a Montenegrin company Beppler & Jacobson Montenegro D.O. ("**BJM**") that owns and operates two luxury hotels in Montenegro. BJUK is also the registered owner of land in Montenegro where the two hotels owned by BJM are situated. On 4 May 2012,

in circumstances I describe in more detail below, provisional liquidators were appointed over the assets of BJUK.

12. The 2nd Defendant ("**Mr Lazurenko**") is a Russian citizen, born in 1962. He served in the Russian army from 1984 to 1993. In 1993 he joined Alfa Eco Company ("**Alfa Eco**"), which at that time was primarily engaged in the business of exporting and trading crude oil and oil products. Alfa Eco later became part of AAR and in September 2003 Mr Lazurenko became employed by OJSC TNK-BP Management ("**Management**"), a company which provides management services to various companies within TNK-BP. He remained employed by Management until April 2012, when he resigned in circumstances described in more detail below.

13. The 3rd Defendant ("**Leibson**") is a BVI registered company which currently holds 70% less one share of the issued shares in BJUK. The 5th Defendant ("**Lawson**") is a Nevis registered company which claims to have entered into a series of agency agreements with BJUK whereby it is alleged that Lawson provided funding for the purchase of the hotels in Montenegro and that in so doing BJUK acted as agent for Lawson. Holding says that these agency agreements are shams. What is clear is that both Leibson and Lawson are Russian-owned either by the 6th Defendant ("**Mr Scheklanov**") (on the Applicants' case) or by Mr Lazurenko (on Holding's case).

14. The 4th Defendant ("**Belinda**") is a Nevis company which owns about 5% of the shares in BJUK. Belinda is beneficially owned by Mr Lazurenko.

15. Mr Scheklanov is a Russian businessman. His witness statement gives details of the companies and projects in which he has been involved over the years dealing with oil exploration and refining, gold mining and banking which ventures he says have been successful and caused him to build up very substantial assets. He says he is known to TNK-BP since his companies purchased large amounts of crude oil from AAR and then TNK-BP for a refinery in the Ukraine in which he has an interest and it was in this context that he met Mr Lazurenko in 2000. He claims to be the ultimate beneficial owner of Leibson, the company holding 70% less one share of the issued shares in BJUK. Holding does not accept this and alleges that Mr Scheklanov is a front for Mr Lazurenko.

16. Mr Telser is a Liechtenstein domiciled lawyer and fiduciary. In October 2010, he became sole director of BJUK. Holding alleges that he is a nominee director of BJUK, acting under the direction of Mr Lazurenko.

17. The 8th Defendant ("**Mrs Lazurenko**") is Mr Lazurenko's wife and a Russian citizen. They married in 1985 and have lived in Russia throughout their marriage.

18. The 9th and 11th Defendants ("**Delaila**" and "**Centelux**") are BVI registered companies which are the registered owners of land in Montenegro.

19. The 10th Defendant ("**Roychamp**") is a company incorporated in Arkansas and the 100% owner of Roychamp Trading Montenegro D.O.O. ("**Roychamp Montenegro**"), a Montenegrin company which is the registered owner of land in Montenegro. Mr Lazurenko and Mr Scheklanov say that Mr Scheklanov is the ultimate beneficial owner of Roychamp. Holding does not accept this and alleges that Mr Scheklanov is a front for Mr Lazurenko.

20. The 12th Defendant ("**Adelaide**") is a Nevis registered company which owns Adelaide Montenegro D.O.O. ("**Adelaide Montenegro**"), a Montenegrin company which is the registered owner of land in Montenegro. Mrs Lazurenko is a former director of Adelaide.

21. The 13th Defendant ("**Trockley**") is a BVI registered company which owns Trockley Montenegro D.O.O. ("**Trockley Montenegro**"), a Montenegrin company which is the registered owner of land in Montenegro. Mrs Lazurenko is a director of Trockley.

22. Thus, Delaila, Roychamp, Centelux, Adelaide and Trockley are all off-shore single-purpose companies that (directly or indirectly) hold investment land in Montenegro. Holding alleges that Mr Lazurenko is the ultimate beneficial owner and controlling mind of Leibson, Belinda, Lawson, Delaila, Roychamp, Centelux, Adelaide and Trockley as well as being a de facto director of each of these companies and also BJUK. Mr Lazurenko accepts that he is the beneficial owner of Belinda and thus ultimate beneficial owner of a small shareholding in BJUK but otherwise denies ownership or control of these companies, the assets in which (comprising land in Montenegro) he says are beneficially owned by Mr Scheklanov.

Outline summary of relevant facts and alleged facts

Mr Lazurenko's role

23. From September 2003 until February 2010, Mr Lazurenko was the Director of the Logistics Department of TNK-BP. The Logistics Department consisted of up to 30 staff and was part of the Sales, Trade and Logistics group, known as STL. The head of STL was Jonathan Kollek, to whom Mr Lazurenko reported. In his role as Director of the Logistics Department, Mr Lazurenko met regularly with and took instructions from Mr German Khan ("**Mr Khan**"), whom he had known and worked with at Alfa Eco. Mr Khan is the Executive Director of Management.

24. As Director of the Logistics Department, Mr Lazurenko was responsible for the negotiation of contracts for the transport of oil products produced by TNK-BP by rail and via pipelines from the production fields to refineries and other destinations primarily within the Russian Federation and elsewhere in the Commonwealth of Independent States ("**CIS**"). According to Boris Levin ("**Mr Levin**") (whose title is Vice-President Economic Security at Management), oil and oil products are transported through Russia mainly by two means of transportation: (a) oil pipe and (b) railroad. Until February 2010 Mr Lazurenko

was responsible for transportation by both methods. On 1 February 2010, his responsibilities were changed when he was appointed Head of Department for New Business Development and Processing at Management. This meant that he ceased to have involvement in transportation by railroad and was left with only oil pipe-related transportation and logistics (and transportation-related trading, resulting from so-called geographical swap of transported goods). This change of role is significant for reasons I explain when I come to analyse the allegations made against Mr Lazurenko.

The Montenegrin investments

25. Although not a party to these proceedings, a key figure in the story is Zoran Becirovic ("**Mr Becirovic**"), a Montenegrin businessman. Mr Lazurenko was introduced to Mr Becirovic in about late 2001 as someone who was interested in investing in Montenegro. In early 2002, Mr Becirovic discussed with Mr Lazurenko the possibility of participation in a state tender for the privatisation of a state-owned hotel, Avala Hotel in Budva, on the coast of Montenegro. According to Mr Becirovic, Mr Lazurenko told him that he had the backing of a serious investor, whose interests he was representing, and that the investor was Mr Khan whom Mr Becirovic knew to be a well-known Russian businessman and one of the owners of a large privately owned Russian oil company. Mr Lazurenko accepts he told Mr Becirovic that he was representing an investor but he says that he did not disclose the investor's name and denies that he ever told Mr Becirovic that the investor was Mr Khan. He says it would not have made any sense for him to do that if he had taken corrupt payments as it would have been obvious that this would be likely to result in Mr Becirovic taking any complaints about him to Mr Khan. This is just one of a number of disputes of fact that cannot be resolved at this interlocutory stage.

26. Mr Lazurenko and Mr Scheklanov say that they first got to know each other professionally in 2000 at a time when Mr Scheklanov was purchasing oil from the AAR group for a refinery in which he had an interest in the Ukraine. Mr Lazurenko says that he knew that Mr Scheklanov was a man of considerable wealth who was on the look-out for new investment opportunities. He first visited Montenegro at around the time that he got to know Mr Scheklanov (i.e. in 2000) and told Mr Scheklanov that the country was starting a process of development and privatisation, and therefore represented a good investment opportunity.

27. Mr Lazurenko says that in about 2002 he told Mr Scheklanov about the opportunity to invest in the Avala hotel, which was being privatised as part of a public tender, followed by another hotel in Montenegro called the Bianca. The investment model was to acquire the hotels at a low price, with the assistance of Mr Becirovic, renovate the hotels to a high standard and then manage them until an appropriate point at which to sell them at a significant profit. Mr Lazurenko says that he and Mr Scheklanov met in person several times to discuss the proposal and the structure to be used for his investment and that when he decided to proceed with his investment, Mr Scheklanov made clear to Mr Lazurenko that he wanted his investment to remain confidential and that he expected Mr Lazurenko to deal with the necessary arrangements

and the management of the projects. In return, they agreed that Mr Lazurenko would receive a 15% stake in BJUK, together with various sums of money, because it was not clear when the hotels would be sold and a profit realised. Mr Scheklanov says that this 15% stake in BJUK was later reduced to 10% and then 5% because of the problems with the Avala hotel (which included failure to win the public tender and the litigation which followed) as well as the delays and increased cost in the refurbishment of the two hotels.

28. Initially Mr Becirovic held 20% of the shares in BJUK which was then increased to 25%+1 share. On 4 April 2008, Mr Becirovic transferred his shareholding in BJUK to Caldero Trading Limited ("**Caldero**"), a company registered in Cyprus which is wholly owned by him. He was not involved in running BJUK. As far as he was concerned, it was only a holding entity and the financing party for the hotels in Montenegro.

29. The majority stake in BJUK (70% less 1 share) is held by Leibson. This is the company which Mr Scheklanov says is beneficially owned by him. Holding points out that in March 2002 Mr Lazurenko is shown in the register of shareholders as the owner of the shares in Leibson and the Applicants accept that Holding has an arguable case that Mr Lazurenko is the ultimate beneficial owner of Leibson.

30. According to Mr Lazurenko, he introduced Mr Scheklanov to other opportunities to invest in land and property in Montenegro. Both Mr Lazurenko and Mr Scheklanov say that from the point at which Mr Scheklanov decided to invest in Montenegro, they met regularly face to face (they both lived in Moscow) to go through developments in respect of the various projects so that Mr Lazurenko could update Mr Scheklanov and draw any matters of importance to his attention. Mr Lazurenko says that the purchase price of the Avala and Bianca hotels was €3.2 million and €1.56 million respectively and in addition Mr Scheklanov made the following further investments in land in Montenegro:

30.1. Land purchased by Roychamp Montenegro (a subsidiary of Roychamp) between 2004 and 2006 at a cost of approximately €7.4 million.

30.2. Land purchased by Delaila Montenegro (a subsidiary of Delaila) in 2005 at a cost of approximately €680,000.

30.3. Land purchased by Centelux Montenegro (a subsidiary of Centelux) in 2005 at a total cost of approximately €2.5 million.

30.4. Land purchased by Adelaide Montenegro (a subsidiary of Adelaide) in 2004 and 2005 at a cost of approximately €1.4 million.

30.5. Land purchased by Trockley Montenegro (a subsidiary of Trockley) between 2005 and 2010 at a cost of approximately €1.7 million.

31. Mr Scheklanov confirms that Mr Lazurenko introduced these investments to him and says that in return he paid Mr Lazurenko "various sums of money". He says that because he had invested large sums of money in Montenegro and wanted to remain a silent investor, it was important that he kept Mr Lazurenko content and rewarded for identifying and then managing the investments.

32. However, as with the ownership of Leibson, the Applicants accept that Holding has an arguable case that Mr Lazurenko, and not Mr Scheklanov, is the beneficial owner of all the Montenegrin assets.

Autumn 2011: Mr Becirovic's approach to Mr Khan

33. By September 2011, Mr Lazurenko's relationship with Mr Becirovic had broken down. Mr Becirovic made contact with Mr Khan by telephone in Autumn 2011. According to both Mr Becirovic and Mr Khan, Mr Becirovic told Mr Khan that Mr Lazurenko had said he represented Mr Khan in relation to the investment in Avala. Mr Becirovic also says that, under the impression he was entering into a business arrangement with Mr Khan, he had entered into a partnership using BJUK as a vehicle for bidding for Avala. Mr Khan says he did not meet with Mr Becirovic at that stage but decided to have him security checked. Mr Becirovic met with Mr Levin in about October 2011 and it was not until 11 April 2012 that Mr Becirovic flew from Montenegro to Moscow for a meeting with Mr Khan to which I refer below. It was only shortly before that meeting that Mr Lazurenko became aware of Mr Becirovic's approach to Mr Khan.

March 2012: the Nikolaev allegations

34. Holding's case, as pleaded in the Particulars of Claim, is that in March 2012, Mr Khan was approached by Mr Konstantin Nikolaev ("**Mr Nikolaev**"), the Head of N-trans, a large privately owned rail freight business operating within Russia and elsewhere within the CIS. Mr Khan's evidence is that at least until late 2011 Mr Nikolaev was also a minority beneficial owner of another large rail freight business "consisting of various companies operating within Russia and elsewhere within the CIS under the business name Transoil".

35. Mr Khan says he was told by Mr Nikolaev that Mr Lazurenko "had approached those with whom he was negotiating at companies related to Mr Nikolaev, claiming he was acting with [Mr Khan's] full consent and knowledge" and that he had solicited significant payments in order for Mr Nikolaev's companies to do rail transportation business with TNK-BP on profitable terms, such payments amounting to approximately US$4 million in cash and approximately US$4 million in wire transfers, a total of approximately US$8 million.

Mr Lazurenko's first meeting with Mr Khan

36. At about the end of March or beginning of April 2012, Mr Khan met with Mr Lazurenko and told him what Mr Nikolaev had said. Mr Lazurenko says he denied the allegations and made clear he had never taken any payments from Mr Nikolaev or his companies. He says that Mr Khan threatened what he described as "strong action" against him and his family, told him to go away and think about what he had said and come back and make an admission. Mr

Khan broadly agrees with Mr Lazurenko's account of this meeting in paragraph 17 of his statement.

37. It is Mr Lazurenko's case that, in the same period, his relationship with Mr Khan was breaking down over his refusal to participate in what are said to be corrupt arrangements evidenced in documents that he held. I shall refer to this dispute below in the context of what is known as "the Documents Claim".

Mr Lazurenko's meeting with Mr Khan and Mr Nikolaev

38. On a later date (but before the meeting with Mr Becirovic I describe below), Mr Lazurenko was called into Mr Khan's office again and found Mr Nikolaev present in Mr Khan's room. Mr Lazurenko's account of this meeting at paragraph 93 of his statement is as follows:

> "93. … Mr Khan repeated that Mr Nikolaev had told him that large sums of money had been wired to accounts associated with me. I again denied the allegations. Mr Nikolaev seemed very uncomfortable. He had a piece of paper in his hand, which he said was a schedule that his accounts team had produced for him of all wire transfers made by his companies to offshore companies. It appeared to be simply a schedule containing company names and sums of money. Mr Nikolaev said that his CFO was away and so he did not know to whom the sums had been paid. He said that a lot of them had nothing to do with anyone at TNK-BP, but that he thought some of them did. Mr Nikolaev said that he was not sure whether any of the payments had been made to me and that he would check with his CFO when he (the CFO) returned to work. Mr Khan told him to carry out his checks and report back. …"

39. Mr Khan's account of this meeting is at paragraph 18 of his statement:

> "18. Mr. Nikolaev attended a meeting as described by Mr. Lazurenko at ¶93 of his Statement. I did not make any threats against Mr. Nikolaev or apply any pressure. It seemed to me only fair that Mr. Lazurenko should have the chance to confront one of his accusers. Mr. Nikolaev did say at that meeting that he needed to check some information but my overall understanding was that Mr Nikolaev confirmed what he said before that companies related to him, including Transoil, made payments to Mr Lazurenko." (emphasis supplied)

40. Although Mr Khan refers to his "overall understanding" that Mr Nikolaev confirmed his previous allegations, his reference to Mr Nikolaev needing to "check some information" certainly lends some support to Mr Lazurenko's more detailed account of that meeting.

Mr Lazurenko's third meeting with Mr Khan

41. Mr Lazurenko says that a few days after his meeting with Mr Khan and Mr Nikolaev, Mr Khan called him to his office. His account of this meeting is at paragraphs 94 and 95 of his statement:

> "94 …When I went to his office, I noticed someone sitting outside who looked to me like he was from the Moscow police or Ministry of Internal Affairs. I find it hard to explain to the English court how and why I formed this impression, but I think it would be very obvious to a Russian

> judge. It relates to the way this individual looked and was dressed. When I entered the room, Mr Khan told me that he had received the information from Mr Nikolaev and that US$8 million had been wired to accounts belonging to me. Mr Nikolaev was not there. Mr Khan told me that he had close connections with senior law enforcement officials and that in fact he had someone outside his office who would arrest me unless I admitted that I had received this money and agreed to repay it. Mr Khan then asked me if I knew what AAR had done to Viktor Paliy, to which I responded that I did. The case of Viktor Paliy is very well known in Russia. Mr Paliy was the CEO of a company called Nizhnevartovskneftegaz before it was taken over by AAR, at which point AAR were involved in a struggle with him over control of the company. AAR made allegations of corruption against Mr Paliy, which after many years resulted in him being convicted and sentenced to a prison term. Many believe that Mr Paliy was framed.
> 95. Mr Khan told me to think about my family and how they would cope without me. He said that I needed to think quickly about how I would compensate the company, because if I did not he would cause serious problems for me. I was scared and knew that I could not continue to deny his allegations if I wanted to get out of his office and leave the building. Therefore, I admitted the allegation, even though I knew it to be untrue, and agreed to compensate TNK-BP. He asked me how I would compensate the company, and I said that I would use a couple of flats that my wife and son own in Moscow. This does not mean that I own those properties. It simply means that I thought that my wife and son would probably agree to sell them if the alternative was Mr Khan arranging for me to be sent to prison."

42. Mr Khan's account of this meeting is at paragraphs 19-21 of his statement:

> "19. Mr Lazurenko refers to a meeting at ¶94 of his Statement. No one from the Moscow Police or the Ministry of Internal Affairs was sitting outside my office. There may have been someone from internal security service; many of whom are former law enforcement officers. I did not tell Mr Lazurenko that I could have him arrested immediately. In matters such as this, the police do not arrest someone without first carrying out an investigation. Mr Paliy could have been mentioned as an example of our consistent pursuing of the people who commit fraud against the company. It has nothing to do with Mr Paliy being framed.
> 20. I did say that Mr Lazurenko should think about his family. I was becoming very frustrated by Mr Lazurenko's denials and evasion in the face of increasing evidence about his wrongdoing. I again pointed out it would be better if he confessed and compensated TNK-BP. I may well have said that if he did not make an admission it would cause serious problems for him. I did not say that he had to confess if he wanted to get out of my office freely and leave the building. As both Mr Lazurenko and I knew, there was no way legally I could have prevented him from leaving. Besides that, if that moment was most frightening for Mr Lazurenko, it is not entirely understandable why Mr Lazurenko still decided to meet with me again later on 11 and 16 April 2012. Simple logic would require that he would leave Russia immediately after the meeting.
> 21. Mr. Lazurenko did not appear frightened. In fact he was calm when he admitted he owed TNK-BP approximately US$8 million and offered two flats in Moscow by way of recompense. I should say that Mr. Lazurenko had a reputation within TNK-BP for being a very cold detached individual. The idea that he could have been panicked into making a false confession and offering property owned by his family to avoid immediate arrest and imprisonment is wholly ridiculous."

43. Mr Lazurenko says that at that meeting he admitted Mr Nikolaev's allegations that he had accepted some US$8 million, even though it was untrue, because he feared for his own safety and that of his family.

44. Whilst it is clearly not possible at this stage to make any definitive findings as to the circumstances in which Mr Lazurenko made his "confession", I agree with Mr Kitchener's submission that Mr Khan's own evidence provides some support for Mr Lazurenko's evidence that he was coerced into making this confession. Mr Khan is clearly a senior and powerful figure within TNK-BP. He accepts that he told Mr Lazurenko that he should think about his family and that he (Khan) was becoming "very frustrated by Mr Lazurenko's denials and evasion in the face of increasing evidence about his wrongdoing" and he "pointed out it would be better if he confessed and compensated TNK-BP". At paragraph 27 of his statement, Mr Khan elaborates further:

> "27. I told Mr Lazurenko on at least one occasion that he should think about his family. This was not a threat to harm either Mr Lazurenko or any member of his family. It was me pointing out the consequences for them if Mr Lazurenko was arrested and imprisoned. It is a well known fact that persons accused of economic crimes can spend years in prison even before being tried and risk having their assets frozen by the State pending trial. This has nothing to do with any special influence I might exert; it is a fact of life in today's Russia. I was offering Mr Lazurenko a sensible alternative. Pay back the money he had stolen from TNK-BP and thus avoid the risk of prison."

45. At paragraph 101 of his statement, Mr Lazurenko says he took Mr Khan's threats to him and his family seriously for three reasons:

> "101. … First, Mr Khan is notorious within Russia and more widely for being extremely ruthless. I exhibit to this witness statement a press articles [sic] that addresses his attitude to business and life generally. According to this article, he bases his life on the "Godfather" films and a BP executive is sadi [sic] to have contended that Mr Khan might be "*certifiably deranged*" he used to carry guns into board meetings until this was made illegal: [IL15/172-173]. Secondly, I knew that Mr Khan would be desperate to silence me in light of my knowledge of his wrongdoing, especially because this might put him in serious trouble. Thirdly, I am aware that Mr Khan is a powerful man and can rely on connections within all sorts of organisations."

46. Mr Khan's responds to this evidence as follows at paragraph 28 of his statement:

> "28. The description of me at ¶101 of Mr Lazurenko's Statement as having a reputation for being "extremely ruthless" is not unique amongst Russian businessmen. As is well known, doing business in Russia and in the oil business is not for the faint hearted. Despite a light hearted remark once made to a business colleague, I do not base my life on the "Godfather" films. As is also well known, there have been tensions between the Russian shareholders and BP in TNK-BP. Feelings have on occasions been very emotive on both sides. As for me taking guns to board meetings, the reference in the "Wikileaks" article exhibited at page 172 of "IL1" is to me having a pistol at my hunting lodge."

47. It appears to be common ground that (as pleaded in paragraph 28 of the Particulars of Claim), following this meeting between Mr Khan and Mr Lazurenko, on 16 April 2012 Management's Vice-President of Legal Affairs, Vladislav Egorov ("**Mr Egorov**") drew up a draft agreement designed to reflect Mr Lazurenko's admission of liability to TNK-BP in the sum of US$8 million but no document was ever signed. Holding says this was because it was not prepared to accept this "offer" in full and final settlement of Mr Lazurenko's potential liability whilst its enquiries continued. Mr Lazurenko says that he was not prepared to sign the document because the admission was forced out of him and the true position is that he had committed no wrong.

48. I consider the allegations made by Mr Nikolaev in more detail below.

Mr Lazurenko's fourth meeting with Mr Khan

49. Mr Lazurenko's evidence (paragraph 96 of his statement) is that, shortly after the meeting where he admitted the allegations made by Mr Nikolaev, he was called into a further meeting with Mr Khan during which Mr Khan said that he had received information that Mr Lazurenko had huge hotel assets in what he mistakenly described as Croatia (he meant the properties in Montenegro). He then said that the value of these assets was far higher than Mr Lazurenko's earnings and that he must have acquired the assets through money stolen from TNK-BP. Mr Khan demanded that these assets be handed over to TNK-BP. Mr Lazurenko denied having bought any such assets and explained that he had managed them but they belonged to an investor. He explained that he was assisting this investor and had received a small percentage interest in return for managing the investments, which did not conflict in any way with his role at TNK-BP. He denied that the assets were acquired using TNK-BP's money. Mr Khan demanded to know who the investor was. Mr Lazurenko said that he would need to seek approval before he could tell him, because the investor did not want information about his assets shared with other people. Mr Khan then told Mr Lazurenko to go away and that they would meet again in the next few days.

50. Mr Khan accepts that Mr Lazurenko's account of this meeting is broadly accurate.

Mr Lazurenko's meeting with Mr Khan and Mr Becirovic

51. The last meeting Mr Lazurenko had with Mr Khan was on 11 April 2012 when he was called to Mr Khan's office and met with Mr Khan and Mr Becirovic. According to Mr Becirovic, Mr Lazurenko said initially that he was doing the Montenegrin investment for a third party investor, a Mr Kolomoyskiy (a Ukrainian businessman), but then later in the conversation mentioned someone named "Sergey" (the first name of Mr Scheklanov).

52. According to Mr Lazurenko, after Mr Becirovic left the meeting, Mr Khan told him he had two options: either he returned all the assets he had acquired using

money "stolen from TNK-BP" in which case he could go free, or Mr Khan would have a criminal complaint filed against him and would spend "huge amounts of money" pursuing him through the courts, with the result that he would end up with nothing and in jail. Mr Khan makes no specific comment on this evidence, though he denies (at paragraph 29) that he or anyone else connected with TNK-BP have made any "physical threats" against Mr Lazurenko or any member of his family. He says he provided the information and documents received from Mr Nikolaev to "the internal security service" at TNK-BP who started a "formal internal investigation into the wrongdoings of Mr Lazurenko in accordance with the relevant corporate procedures" as described by Mr Levin.

53. Mr Lazurenko says that by this stage it was clear to him that he needed to leave Russia for a short while. He did not do so immediately. Towards the end of April 2012, he sent TNK-BP a letter of resignation and then left the country at the end of April 2012.

54. In paragraphs 148 and 149 of his statement, Mr Lazurenko says that he will return to Russia to fight Holding's allegations as well as the criminal allegations (referred to below) and that he feels it is safe to do so now that TNK-BP's allegations and his response are a matter of press interest in Russia.

The Ivanov allegations

55. Holding says that the allegations made by Mr Nikolaev caused it to review earlier allegations made against Mr Lazurenko by representatives of a freight company called Sovfracht. These allegations, made in 2008 by Sovfracht's chairman Alexander Ivanov ("**Mr Ivanov**"), were that Mr Lazurenko had solicited cash payments from Sovfracht totalling over US$5 million. The allegations had been denied by Mr Lazurenko when they were made and the matter had not been pursued by Holding.

56. Holding alleges that its review of the Sovfracht allegations (which was conducted by Mr Levin in May 2012 and appears to have consisted of speaking to Mr Ivanov and his employees) uncovered the fact that, in exchange for cash payments, Mr Lazurenko manipulated the tender process and procedures for the placing of transportation contracts. This was achieved at a series of meetings between Mr Lazurenko and representatives of Sovfracht and other transportation companies. It is alleged that Mr Lazurenko allocated contracts in specific regions to a particular company and instructed the companies how to bid so as to achieve the desired result. In return for cash payments from Sovfracht and other transportation companies to Mr Lazurenko, the successful bidder obtained a commercial price advantage and/or larger shipment volumes than would have been provided if the tender and negotiating process had not been manipulated.

57. Thus Holding alleges that Mr Ivanov has claimed that Sovfracht and other (unspecified) transportation companies were solicited by Mr Lazurenko to make cash payments to him over an extended period.

58. I consider the allegations made by Mr Ivanov in more detail below.

The Caldero claim

59. By about April 2012, TNK-BP had agreed to assist Mr Becirovic in bringing a petition for the voluntary winding up of BJUK and for relief for unfair prejudice (the "**Caldero claim**"). On 3 May 2012, the minority shareholder in BJUK, Caldero (the company beneficially owned by Mr Becirovic) obtained without notice injunctions against Mr Lazurenko, Leibson and Mr Telser preventing any dealing with the assets of BJUK as well as securing the appointment of provisional liquidators over the company. The provisional liquidators remain in place.

60. On 16 July 2012, the parties agreed a share purchase order and set a timetable for the trial of the single remaining issue, namely whether funds invested in BJUK were invested by way of loan or share capital. A three-day trial of the issue is listed for hearing from 12 November 2012. That issue obviously has an impact on the value of Caldero's shares. Other than that issue, the Caldero claim has now been resolved.

61. The only substantive connection between the present claim and the Caldero claim is that if Holding succeeds in its claim against BJUK, that is likely to have an effect on the value of Caldero's shareholding. Caldero and TNK-BP (both of whom are represented by the same solicitors, Bryan Cave) have come to an arrangement to deal with this conflict of interest. On 28 June 2012, Bryan Cave undertook to the court that (i) it would maintain separate legal teams for the Caldero claim and the investigations being made by TNK-BP and (ii) there would be no transmission of disclosed material between the respective teams. I am not concerned with the issues raised by the Caldero claim and I only consider evidence given in the context of the Caldero claim where it is relevant to the applications I have to consider.

The Documents claim

62. On 10 July 2012, TNK-BP brought a without notice application for an injunction to prevent Mr Lazurenko disclosing documents in his possession that he alleges evidence serious corruption within TNK-BP, involving the making of corrupt payments to senior officials within Transneft and the Russian Ministry of Energy (the Documents Claim). The injunction granted without notice on 10 July 2012 was varied by consent on 24 July 2012 to allow Mr Lazurenko to communicate the contents of the Documents in certain circumstances. On 16 October 2012, the Chancellor handed down a judgment ([2012] EWHC 2781 (Ch)) discharging the orders made on 10 and 24 July 2012 and dismissing the claims of TNK-BP. On 12 November 2012, Sir Robin Jacob adjourned Holding's application for permission to appeal to be heard by a two judge court. Again I am not concerned with the issues raised by the Documents Claim and I only consider evidence given in the context of the Documents Claim where it is relevant to the applications I have to consider.

The criminal complaint against Mr Lazurenko

63. On 23 July 2012, the Russian Department of Internal Affairs issued an 'order for initiation of a criminal case' ("**the criminal complaint**") which was sent to Mr Lazurenko. The criminal complaint appears to have resulted from allegations that TNK-BP has made to the Russian authorities which, it is to be noted, are very different from those raised in England. The allegations in the criminal complaint relate to contracts for the geographical swap of oil between a company called TK Transoil LLC ("**TK Transoil**") and TNK-BP, which the complaint says were entered into between March 2010 and February 2012. It appears to have been alleged by TNK-BP that Mr Lazurenko gave to TK Transoil, in return for corrupt payments, 50 per cent of the saving from the contracts entered into between TK Transoil and TNK-BP for the geographical swap of oil. The allegation in the criminal complaint is that TNK-BP overpaid TK Transoil the sum of 36,513,081 Rubles (the equivalent of approximately US$1.13million) in contracts for the geographical swap of oil, and that Mr Lazurenko received in excess of 1 million Rubles (the equivalent of approximately US$31,000) by way of corrupt payments.

The without notice hearings before Sales J

64. On Monday 13 August 2012, Holding made a without notice application to Sales J. The transcript of the hearing indicates that it started at 5pm and concluded at 7.15pm. Sales J granted Holding a without notice worldwide freezing injunction to the value of €64,000,000. This was the amount in respect of which he was persuaded that there was a good arguable case. He stated as follows:

> "At this late hour, I think it suffices to say that on the basis of the extensive evidence that has been put before me, I am satisfied that [Holding] has a good arguable case, in particular against [Mr Lazurenko], by involvement in what appears to be on a good arguable case basis involvement in a conspiracy with him and the other defendants, for diversion of funds of about 64 million euros from [Holding] to [Mr Lazurenko] and those acting with him."

65. The figure of €64,000,000 was taken from Mr Becirovic's affidavit dated 1 May 2012 in the Caldero claim and represents the amount said to have been invested by Mr Lazurenko in the hotels and other land in Montenegro. Sales J noted that the evidence before him was of the diversion of sums significantly less than €64,000,000 (that is, some US$13,000,000, being the total of the alleged Transoil and Sovfracht payments) but was persuaded by Holding's case that there must have been a much more substantial fraud, principally by reason of the fact that Mr Lazurenko's salary in the relevant period was not sufficient to fund that level of investment. Sales J also gave permission to serve the 2nd to 5th, 7th and 9th to 13th Defendants out of the jurisdiction and the 6th and 8th Defendants by alternative means at Mishcon de Reya's offices.

66. On the next day, 14 August 2012, Holding appeared again before Sales J and drew to his attention a letter from UBS dated 26 July 2002 (i.e. before Mr Lazurenko's employment by TNK-BP) in which it was stated that the

beneficial owner of BJUK had maintained an account relationship with UBS since 1996 and held with UBS more than €25 million. Sales J responded as follows to this piece of evidence:

> "…it seems to me that [the letter] very much calls into question the quite strong process of inference that you wished me to draw, leaping from $13 million plus an unknown quantity to even the 64 million euros that we were talking about…." (p. 3)
>
> "… you were inviting me to draw [the conclusion that the money invested in Montenegro was obtained through a fraud on Holding] on the basis of an inference that one could not see where else these monies might come from. I now can see where else 25 million euros might have come from and therefore, it seems to me that process of inference breaks down to that extent." (p.4**)**

67. Sales J therefore subtracted €25 million from the €64 million, leaving €39 million, which is the amount frozen under his order dated 14 August 2012.

Should service out of the jurisdiction be granted?

68. Mr Moverley Smith submitted that since permission to serve out of the jurisdiction had already been granted by Sales J, the proper approach was to consider whether the claim should be stayed and that the Applicants bear the burden of establishing their entitlement to a stay.

69. I do not accept this submission. This is a service out case. Neither the Applicants nor Mr Telser were in England at the time of service nor were they served as of right under the Brussels Convention. On a jurisdiction challenge in a service out case, the court's task is to conduct a full review of whether permission to serve out should have been granted on the basis of the true facts so far as they can be ascertained. The burden is on Holding to persuade the court to authorise service out.

The law on service out

70. In Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460 at 481C, Lord Goff approved the following statement of Pearson J in Societe Generale de Paris v. Dreyfus Brothers (1885) 29 Ch D 239 at 242-243:

> "it becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."

He then continued at 481D:

> "The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought in proceedings started as a matter of right."

71. The principles governing jurisdiction challenges in service out cases have been restated in two recent cases, namely, AK Investment CJSC v. Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2011] 1 CLC 205, [71] and VTB Capital plc v. Nutritek International Corp [2012] EWCA Civ 808, [99-100]. The claimant must establish three things:-

71.1. There must be a serious issue to be tried on the merits ("**the first requirement**").

71.2. There must be a good arguable case that the claim falls within one of the "gateways" to jurisdiction in Practice Direction 6B ("**the second requirement**").

71.3. England must clearly and distinctly be the appropriate forum, and it must be appropriate in all the circumstances to permit service out ("**the third requirement**").

The first requirement

72. In considering the first requirement, in order to obtain permission to serve proceedings out of the jurisdiction on foreign defendants, a claimant must satisfy the court that, in relation to those foreign defendants, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim.

The second requirement

73. In considering the second requirement, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. As discussed below, "good arguable case" in this context means that the claimant has a much better argument than the foreign defendant.

74. The gateways are now set out in paragraph 3.1 of Practice Direction 6B. The gateway relied on by Holding is paragraph 3.1(3) which provides:

> "(3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

75. Holding's case is that a trial in relation to the claims against BJUK will be held in England in any event and that BJUK is one of the principal corporate vehicles and co-conspirators with and through which the Applicants channelled funds misappropriated from Holding. Holding submits that BJUK

is the 'anchor defendant' and that the Applicants and Mr Telser are necessary or proper parties to the claim against BJUK.

76. In AK Investment, Lord Collins commented at [73] upon the fact that the necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts. He extracted a number of propositions from the authorities which have relevance to the present case.

77. First, he stated (at [79]) that the fact that the anchor defendant is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is 'properly brought' against the anchor defendant, provided that there is a viable claim against the anchor defendant.

78. Second, he stated (at [80] and [82]) that the action is not properly brought against the anchor defendant if it is bound to fail and that the question of the merits of the claims is relevant both to the question of whether the claim against the anchor defendant is 'bound to fail' and to the question of whether there is a 'serious issue to be tried' in relation to the claim against the foreign defendants. There is no practical difference between the two tests; they are the same as the test for summary judgment.

79. Third, he stated (at [87]) that the question whether the foreign defendant is a proper party is answered by asking: 'Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?' The foreign party will be a proper party if the claims against the anchor defendant and the foreign defendant involve one investigation.

80. In the context of a freezing injunction, in considering Holding's evidence, I bear in mind the threshold test which Holding is required to satisfy at this stage in the proceedings. An applicant for a freezing injunction must show at least a "good arguable case". As was stated by the Court of Appeal in Nimenia Maritime v Trave ("the Niedersachsen") [1983] WLR 1412, at 1417E-F:

> "A "good arguable case" is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the "threshold" for the exercise of the jurisdiction. But at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction."

81. Mustill J (at first instance in The Niedersachsen [1983] 2 Lloyd's Rep 600, at 605) described a "good arguable case" as being one that:

> "…is more than barely capable of serious argument, but not necessarily one that the judge considers would have a better than 50 per cent chance of success."

82. In Complete Retreats v Logue [2010] EWHC 1864 (Ch), in the context of a party seeking a freezing injunction, Roth J asked himself whether the party

seeking the injunction was able to show that it had much the better of the argument. He said this at [71-72]:

> "71. To justify the grant and continuation of a freezing order, the applicant must show a good arguable case on the merits. The meaning of a "good arguable case" was considered by Waller LJ (with whose judgment Nourse LJ agreed) in the Court of Appeal in *Canada Trust Co. v Stolzenberg (No. 2)* [1998] 1 WLR 547, 555:
>
> > "It is also right to remember that the "good arguable case" test, although obviously applicable to the ex parte stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a "trial." "Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."
>
> 72. That case concerned the test for service out of the jurisdiction, but there seems no basis not to apply that observation in the context of a freezing order, while recognising that this does not, as it were, import the ordinary civil standard of proof by the back door: see *Cherney v Deripaska* [2008] EWHC 1530 Comm, per Christopher Clarke J at [44]."

83. The result of the test as formulated in The Neidersachen is that a relatively low merits threshold applies to 'trigger' the jurisdiction to grant a freezing injunction. However, the court will, in determining whether or not to exercise or continue the exercise of that jurisdiction, have regard to the strength of the case more generally when exercising its discretion. I respectfully agree with Roth J that there is no material difference between the tests to be applied for the grant or continuation of a freezing order on the one hand and for service out of the jurisdiction on the other. In each case I propose to consider the evidence as a whole in order to determine whether I am satisfied or as satisfied I can be at this stage that Holding has a much better argument than the Applicants and Mr Telser.

The third requirement

84. In considering the third requirement, as Arnold J said in VTB Capital v Nutritek International Corp [2011] EWHC 3107 at [185], this involves a two-stage inquiry. The claimant:

> "must… satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum, and that in all the circumstances the court ought to exercise its discretion to permit service out. Lord Goff's speech in Spiliada v Cansulex establishes that this question is to be approached in two stages. The first stage is to ask whether England is clearly and distinctly the natural forum, that is to say, the forum "with which the action has the most real and substantial connection". If England is not the natural forum, the second stage is to ask whether England is nevertheless the appropriate forum, in particular because there is a real

> risk that the claimant will not obtain substantial justice in the natural forum."

85. The natural forum is that with which the claim has its most real and substantial connection: The Abidin Daver [1984] AC 398, 415F and The Spiliada [1987] AC 460, 477F-478A. In The Spiliada, Lord Goff observed at 478A as follows:

> "So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction …, and the places where the parties respectively reside or carry on business."

86. Briggs and Rees identify five groups of factors as follows in Civil Jurisdiction and Judgments, 5th ed, page 433, para. 4.19: (1) the personal connection of the parties to the litigation; (2) the factual connections between the events and particular courts; (3) the law which will be applied to resolve the substantive dispute; (4) the possibility of there being a *lis alibi pendens*; and (5) the relevance of the other parties to, and overall shape of, the litigation.

87. If England is not the natural forum, the court will only assert jurisdiction if the claimant will not receive substantial justice in the natural forum. Most forensic or comparative differences between foreign courts and English courts are not considered to give rise to substantial injustice. In VTB Capital at [199], Arnold J gave the following examples of factors that are generally ignored:

87.1. the comparative level of disclosure: see The Spiliada at 482E-G;

87.2. different rules of evidence or provision for cross-examination: see Connelly v RTZ Corporation plc [1998] AC 854 at 873 and Ceskoslovenska Obchodni Banka AS v Nomura International plc [2003] ILPR 20 at [17] (Jonathan Sumption QC sitting as a Deputy High Court Judge);

87.3. the experience of the foreign court in trying particular types of case: see The Varna (No 2) [1994] 2 Lloyds Rep 41 at 48 (Clarke J, as he then was) and Ceskoslovenska v Nomura at [15];

87.4. the duration of proceedings in the natural forum unless the delay would be excessive: compare The Vishva Ajay [1989] 2 Lloyd's Rep 558 with Radhakrishna Hospitality Service Private Ltd v EIH Ltd [1999] 2 Lloyd's Rep 249 and Chellaram v Chellaram (No 2) [2002] EWHC 632 (Ch), [2002] 3 All ER 17;

87.5. the claimant's prospects of success: see Dicey, Morris & Collins on The Conflict of Laws (14th ed) at §12–033.

88. Accordingly, the English court will not assert jurisdiction simply because the claimant may be worse off in the natural forum due to forensic differences. Jurisdiction will be asserted where the claimant will not receive substantial justice in the natural forum because of bias or a failure of natural justice: Deripaska v. Cherney [2009] EWCA Civ 849. The burden can be satisfied by showing that there is a real risk that the claimant will not obtain substantial justice in the foreign forum, although this will weigh less heavily in the exercise of the court's discretion than evidence that justice "will not" be obtained: see AK Investments at [91]-[95] and Pacific International Sports Clubs Ltd v Surkis [2010] EWCA 753 at [31]-[35].

89. Nor will the English court grant permission to serve out simply in order to avoid parallel proceedings. In AK Investment, Lord Collins at [73] approved Lloyd LJ's observation in The Golden Mariner [1990] 2 Lloyds Rep 215, 222 that:

> "… caution must always be exercised in bringing foreign defendants within our jurisdiction under Ord 11 r 1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one jurisdiction".

90. The Applicants submit that the question of parallel proceedings should not arise in any event because if the claim proceeds in Russia they will be content for BJUK to be joined as a defendant (or alternatively to agree to be bound by the result). I can see force in this submission. The Applicants own 75% of the shares in BJUK. The other shareholder is Mr Becirovic who (i) has agreed to sell his shares to the Applicants, (ii) is funded by TNK-BP, (iii) is supporting TNK-BP in these proceedings, including by giving evidence and (iv) has an agreement with TNK-BP concerning the progress of litigation.

The first requirement: Has Holding established a serious issue to be tried on the merits?

91. I propose to approach this issue in two stages. The first stage is to consider whether the law to be applied to Holding's claims is Russian law or English law. The second stage is to consider whether on the basis of the applicable law Holding has established a serious issue to be tried on the merits against the Defendants or any of them.

Applicable law

92. No submissions were made to Sales J as to whether the law to be applied to Holding's claims is Russian law or English law.

93. The Particulars of Claim are an amalgam of Russian law and English law. In the section headed "Claims" beginning at paragraph 55, Holding refers to "the Civil Code of the Russian Federation and/or any other applicable Russian laws" in paragraphs 55, 62-71, 77, 81, 85, 89, 93, 97, 101, 108, 114, 118, 121, 125, 128, 132, 135, 139, 142, 146, 149 and in paragraphs 5 and 7 of the Prayer. The Prayer to the Particulars of Claim then seeks a declaration that all property received by the Defendants "in fraud of the Claimant" is held by them as resulting or constructive trustee as well as seeking damages for unlawful means conspiracy.

94. In its written submissions (paragraph 55 onwards), Holding addresses the three legal bases of its claim, namely (1) proprietary claims seeking declarations of constructive trusts, (2) unlawful means conspiracy claims and (3) personal claims seeking an account.

95. As to the proprietary claims, Holding submits that because Russian law recognises that the funds remain Holding's property at the point at which they leave Russia, when those funds are received by common law based recipients in the knowledge that those funds have been illegally obtained, those funds are impressed with a trust by common law jurisdictions.

96. As to conspiracy, Holding submits that the conspiracy in question is the collusion of the Defendants in preventing Holding from establishing what bribes were taken and where the proceeds of Mr Lazurenko's misappropriations are, and that the conspiracy has taken place wholly outside Russia.

97. As to the personal claims for accounts and damages, Holding submits that these arise out of Articles 1064 and 15 of the Russian Federation Civil Code ("**the Civil Code**").

98. It therefore appears that Holding seeks to keep its options open by switching between Russian and English law in order to rely on whichever law affords it the most convenient or advantageous remedy.

99. Both parties rely on expert witnesses as to Russian law. Holding's expert is Mikhail Rozenberg ("**Mr Rozenberg**") who has produced a report dated 18 September 2012. The Applicants' expert is Professor Peter Maggs ("**Professor Maggs**") who has produced three reports dated respectively 3, 21 and 23 September 2012. There is no doubt that both men are well qualified to opine on issues of Russian law.

100. Before I consider the expert evidence, I first need to decide the applicable law governing these claims. The Applicants say that any issues concerning their liability to Holding are governed by Russian law which they contend would in various ways be less favourable to Holding than English law.

101. *Transoil allegations*: Where the events giving rise to damage occur after 11 January 2009, the Rome II Regulation applies: Homawoo v. GMF Assurances SA [2012] ILPr 2, Case C-412/10, [37], Alliance Bank JSC v. Aquanta Corporation [2011] EWHC 3281, [37]. Since the Transoil payments were allegedly made from January 2010 onwards, non-contractual claims regarding those payments are governed by the Rome II Regulation.

102. Articles 4 and 10 of the Rome II Regulation provide as follows regarding tort claims and unjust enrichment claims respectively:

> **"Chapter II**
> **Torts/delicts**
> Article 4
> General rule.
> 1. Unless otherwise provided in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question."

…

Chapter III

Unjust enrichment, negotiorum gestio and culpa in contrahendo

Article 10

Unjust enrichment.

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 or 3, the law of that other country shall apply."

103. Applying these rules, in my view it is clear that Russian law, and not English law, governs the proposed tort and unjust enrichment claims against the Applicants in respect of the Transoil allegations:

103.1. Russian law governs the tort and unjust enrichment claims against Mr and Mrs Lazurenko under Articles 4(2) and 10(2) because each of Holding and Mr and Mrs Lazurenko was habitually resident in Russia when both the damage and the events giving rise to the unjust enrichment occurred.

103.2. Russian law governs the tort claims against the other Applicants under Article 4(1) because the damage occurred in Russia. This was where Holding claims that it overpaid suppliers by reason of bribery.

103.3. Russian law governs the unjust enrichment claims against the other Applicants because it is clear that those claims are manifestly more closely connected with Russia (Article 10.4) than with whichever country these Defendants received whatever constituted their alleged unjust enrichment (Article 10.3).

104. As to the last of these conclusions, I accept Mr Kitchener's submission that the location at which companies allegedly controlled by a Russian domiciliary receive property has no substantial effect on the choice of law. In Fiona Trust & Holding Corp v. Privalov [2010] EWHC 3199, Andrew Smith J held at [179] that:

> "179. … when, as it is alleged here, payments were made into accounts in a Swiss branch of a Swiss bank in the name of a BVI company owned or said to be owned through bearer shares by a Russian or Russians, I do not find it easy to determine where the payment was received in any meaningful or substantial sense, and I am unable to accept that this question plays any significant part in deciding which law is most really and closely connected with the claim."

105. All of the corporate Defendants are said by Holding to have been fixed with Mr Lazurenko's knowledge and to be liable as a result. If that is correct, then these Defendants were aware that the scheme in which they were allegedly participating was based in Russia and centred on the breach by Mr Lazurenko of his duties to Management. They were each also aware that those duties were governed by Russian law and contained an exclusive jurisdiction clause in favour of Russia.

106. The Fiona Trust case involved four actions. In the two Fiona actions Sovcomflot, a Russian ship-owning and ship-operating company, and subsidiaries of Sovcomflot alleged that Dmitri Skarga, a former Director-General of Sovcomflot, and Yuri Nikitin embarked on a course of dishonest conduct between about the end of 2000 and 2004, whereby companies in the Sovcomflot group entered into transactions which benefited Mr Nikitin and companies associated with him and were against the interests of the Sovcomflot group. They said that among those who were engaged with Mr Nikitin and Mr Skarga in this conduct were Yuri Privalov, the Managing Director of FML, an English company which was the second claimant in the Fiona action, and from some time in 2002 Mr Igor Borisenko, then the Executive Vice-President and Chief Financial Officer of Sovcomflot. Sovcomflot contended that the defendants had engaged in a number of schemes each of which constituted a conspiracy by unlawful means.

107. As Andrew Smith J explained at [163]:

> "163. … The defendants first submitted that the thrust of the allegation against them is that the transactions in the various schemes were all undertaken pursuant to a single overarching conspiracy by which bribes were paid or promised by or on behalf of Mr. Nikitin in order to bring about uncommercial transactions which would benefit him and his companies at the expense of the Sovcomflot group. The claims in conspiracy, and the other claims, should all be regarded as manifestations of this single scheme, and they are governed by the law of Russia, where the events most significant to the scheme occurred. It was a conspiracy which originated in Russia, which was targeted at a group controlled by a Russian company, which was for the benefit of a Russian businessman and which depended on and was characterised by the corruption of the Director-General of Sovcomflot, who worked from the group's headquarters in Moscow."

108. At [165] Andrew Smith J accepted the claimants' submission that issues arising from the various claims in conspiracy in respect of the wrongful acts done to it might be governed by different laws, and that the proper approach

was to consider the claims in respect of each of the claims separately, but continued at [167]:

> "167. As I have said, in my view it is right to consider separately the elements of the tort of conspiracy in relation to each scheme. However, the defendants are able to identify elements relating to the agreement or collusion which are common to all the parts of the claimants' conspiracy claims in so far as they allege that Mr. Skarga was party to the collusion against Sovcomflot. … The central thrust of the claimants' allegations in relation to each scheme is that Mr. Nikitin was dishonestly working with Sovcomflot's Director-General, Mr. Skarga, and their Chief Financial Officer, Mr. Borisenko, to secure the group's agreement to transactions and arrangements which favoured him. I conclude that generally Mr. Nikitin would have had any discussions with Mr. Skarga and Mr. Borisenko in Russia, although I accept that on occasions there will have been some discussions outside Russia, such as when Mr. Nikitin and Mr. Skarga were on holiday together in September 2004. Further, in so far as Mr. Skarga or indeed Mr. Borisenko implemented an agreed scheme by ensuring that Sovcomflot or one of the companies in the group entered into the transactions, they generally did so when they were in Russia. For example, all the meetings of the Sovcomflot Executive Board which decided upon, approved or ratified transactions took place in Russia, and minutes of meetings of the Fiona board were signed in Russia by Mr. Skarga, Mr. Borisenko and others. Mr. Privalov, as the claimants allege, was party to the schemes (other than the Sovcomflot time charters scheme), and, working from London, provided important assistance to implement them, but the defendants pointed out that, according to Mr. Privalov's own evidence, his discussions with Mr. Nikitin, Mr. Skarga and Mr. Borisenko took place sometimes in Russia and on other occasions in London or elsewhere. In any event, it seems to me that, if, as the claimants allege, Mr. Skarga was party to the schemes, Mr. Nikitin's collusion with him as Sovcomflot's most senior executive is of greater significance than Mr. Privalov's relatively junior participation in them, and Mr. Skarga's role in implementing them by way of ensuring that Sovcomflot agreed to transactions designed to benefit Mr. Nikitin and his companies at Sovcomflot's expense was, in terms of identifying the wrongful acts that caused Sovcomflot damage, of greater significance than the arrangements that Mr. Privalov made in the London market in order to implement the transactions. In substance the impact of the financial damage was suffered by Sovcomflot in Russia."

109. At [168] Andrew Smith J set out a series of eight factors which the claimants relied on as showing that the most significant elements of the torts occurred in England, and hence English law was the applicable law under section 11(2)(c) of the Private International Law (Miscellaneous Provisions) Act 1995 ("**the 1995 Act**"). Andrew Smith J held, however, that the most significant elements of the torts occurred in Russia, and therefore Russian law was the applicable law, for the following reasons:

> "170. I consider that some of the matters upon which the claimants relied are not elements of the events that constitute a conspiracy relating to the scheme in question or to a transaction under it, and the conspiracies are the focus of the claimants' allegations. Although lawyers' documentation was required in order to carry out the schemes, I do not regard the drafting work of Lawrence Graham and Mr. Wettern as an event constituting the tort of conspiracy. In the case of the newbuildings scheme, the Supplemental Agreement was drawn up after any tort had been completed. In any event, I would not consider these

> matters to be significant events for the purpose of deciding where the tort is to be regarded as having occurred. I have explained why I consider the part played in London by Mr. Privalov in carrying out the schemes to be less significant than the events in Russia. The same applies to the part played in Switzerland by Sovchart in carrying out the Sovcomflot time charters scheme and the 'Romea Champion' commission scheme.
>
> 171. The claimants' arguments are strongest, as it seems to me, in relation to the other commissions schemes, because of the role played by the brokers in London and because Clarkson were engaged to act for Sovcomflot and the Clarkson arrangements with Mr. Gale were made in London. But here too, on balance, I accept the defendants' submission that, if Mr. Skarga was a participant in the schemes, the most significant elements of the conspiracy in relation to them occurred in Russia. It was there that the crucial arrangements in relation to the schemes would have been made between Mr. Nikitin and the senior conspirator in the Sovcomflot organisation, the originating steps to carry them out were taken in Russia, and the events in London flowed from what occurred in Russia. In my judgment, therefore, if the general rule under the 1995 Act is applied to the claims of conspiracy in relation to the various Sovcomflot schemes, the applicable law is Russian."

110. Although Andrew Smith J was considering the question of the applicable law in the context of the 1995 Act (to which I refer below in the context of the Sovfracht allegations), I do not believe his conclusion would have been any different had he been considering the relevant provisions of the Rome II Regulation.

111. In my view the facts relating to the Transoil allegations are even more closely connected with Russia than the facts in the Fiona Trust case. On Holding's case, to the extent that Mr Lazurenko colluded with others in order to commit the alleged fraud, he did so primarily with Mr Nikolaev (or his associates), Mr Scheklanov and Mrs Lazurenko and the evidence is clear that such collusion took place predominantly if not exclusively in Russia. The corrupt payments are alleged to have been paid by a Russian company (Transoil) to Mr Lazurenko in Russia. It is then alleged that Mr Lazurenko invested those payments either in a complex corporate structure which holds assets in Montenegro or in Russian properties. The connections to Russia are of far greater significance than the arrangements Mr Lazurenko is alleged to have made to conceal the proceeds of the conspiracy in other jurisdictions (whether it be England in the case of BJUK, Arkansas in the case of Roychamp, BVI in the case of Leibson, Delaila and Centelux, Nevis in the case of Belinda and Lawson, Montenegro in the case of Roychamp Montenegro, Adelaide Montenegro and Trockley Montenegro or Liechtenstein in the case of Mr Telser).

112. I therefore conclude that Russian law governs the claims made by Holding against all the Defendants with regard to the Transoil allegations.

113. *Sovfracht and Transportation Payment allegations*: The Sovfracht payments are alleged by Mr Ivanov to have been paid for several years prior to 2008. Although no proper particulars have been given of when the payments by other transportation companies are alleged to have been made, I can properly infer

from the fact that Mr Ivanov made this allegation in 2008, and has had no dealings with Holding since then, that such payments, if made, were made at or about the same time as the Sovfracht payments.

114. Accordingly, the choice of law rules governing non-contractual claims in respect of the alleged Sovfracht and Transportation Payments are found, not in the Rome II Regulation, but in the 1995 Act as regards tort, and at common law as regards unjust enrichment.

115. Under the 1995 Act, claims characterised as torts are governed by (i) the law of the country in which the events constituting the tort occurred, but (ii) where those events occurred in more than one country, the law of the country where the damage to property (or the most significant element of the tort) occurred, but (iii) the laws of some other country if on the facts of the case it is significantly more appropriate for some other system of law to apply: sections 12(1) and (2) of the 1995 Act.

116. At common law, obligations arising in unjust enrichment are governed by (i) the law governing the contract if the obligation arises in connection with a contract, (ii) the *lex situs* if the obligation arises in connection with immovable property, (iii) otherwise the law of the country in which the enrichment occurs (as stated in Dicey, Morris and Collins, 34-R-001) but (iv) the law of another country if the claim is much more closely connected to it: Fiona Trust at [161].

117. In my judgment, the result of the analysis is the same as under Rome II, namely that Russian law applies.

118. In Fiona Trust, the claims arose prior to 11 January 2009 in respect of the bribery of Russian directors of Russian companies. Claims were advanced against the corrupt directors for breach of fiduciary duty, and against other participants for tortious unlawful conspiracy and knowing receipt. Andrew Smith J determined the applicable law as follows:

118.1. The claims against the dishonest directors for breach of fiduciary duty were governed by Russian law, which governed the relationship between them and the company they represented: [142].

118.2. The claims for unlawful conspiracy were governed by Russian law under the 1995 Act. Most of the relevant events occurred there, and so far as any events occurred anywhere else, the Russian events were more significant: [167, 171]. In particular, "[t]he collusion was based in Russia although the schemes were played out elsewhere": [174]. The fact that the bribes were paid, *inter alia*, in the form of holidays outside Russia or payments to Swiss accounts did not change the fact that the bribery was centred on Russia: [178-179].

118.3. The knowing receipt claims "should all be regarded as manifestations of this single scheme, and they are governed by the law of Russia, where the events most significant to the scheme occurred": [163].

119. A similar analysis is appropriate here. All the tort and unjust enrichment claims are said to arise out of a scheme the most significant part of which occurred in Russia. Russian law therefore governs the tort and unjust enrichment claims in respect of the Sovfracht and any other payments.

120. The constructive trust claims, whether made in respect of the Transoil allegations or the Sovfracht and Transportation Payment allegations, are also governed by Russian law for the reasons given by Andrew Smith J in Fiona Trust at [155-158] with which I respectfully agree:

> "155. The claimants argued, however, that, even if the defendants' liability is governed, as the defendants submitted, by Russian law or by another law other than English, nevertheless English law as the law of the forum governs what remedies are available if liability is established, and therefore, in particular, it determines whether the claimants are entitled to an account of profits if the defendants are liable for what English law would regard as liability for dishonest assistance or bribery. In support of this contention they relied upon the general principle stated in Dicey, Morris & Collins (loc cit) at para 7-006: "The nature of the remedy is to be determined by the lex fori. Thus if the claimant is by the lex causae entitled only to damages but is by English law entitled to specific relief, the latter type of remedy is available in England". The principle was considered by the House of Lords in Harding v Wealands, [2007] 2 AC 1, in which case damages were claimed for personal injuries by a claimant who had been injured in the road accident in New South Wales, Australia, and a preliminary question arose as to whether the assessment of damages was governed by the law of England as lex fori or by the law of New South Wales as lex causae. Lord Hoffmann said (at para 24) that, while the question of whether there was actionable damage so as to determine whether there was an actionable injury is for the lex causae, "whether the claimant is awarded money damages (and if so how much) or, for example, restitution in kind, is a question of remedy".
>
> 156. I reject the claimants' submission for two reasons. First, the basis of the principles stated in Dicey, Morris & Collins is the distinction between questions of substantive law which are governed by the lex causae, and questions of procedure, which are governed by the lex fori. This is not affected by the 1995 Act: section 14 provides that section 10 does not affect "any rules of law", and specifically that it did not affect "any rules of evidence, pleading or practice or authorise questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum". The well-established rule of English law is that questions about what heads of damage are recoverable are questions of substantive law. This was clearly stated in Boys v Chaplin, [1971] AC 356, at p. 379 per Lord Hodson, p. 393 per Lord Wilberforce and pp. 394-5 per Lord Pearson.
>
> 157. Harding v Wealands was concerned with the effect of a New South Wales statute, which imposed restrictions on the amount of compensatory damages that could be recovered for injury in a road traffic accident, and held that the effect of the statute upon the quantum of recoverable damages was governed as a procedural issue by the lex fori. I cannot accept that the House of Lords intended to qualify the established distinction between questions about whether a type or head of damages is recoverable, which are categorised as questions of substantive law, and questions of the quantification of damages in respect of a recoverable type of damage. It was recognised by Lord Hoffmann (at [2007] 2 AC para 24) that:
>
> "… it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for

> are inseparable from the rules which determine the conduct which gives rise to liability".
>
> 158. Secondly, if English law as the lex fori does determine whether a remedy of an account or other remedy is available for a wrong established under a foreign law as the lex causae, this does not mean that, having established liability against a defendant, the court will then determine what remedies would be available on the particular facts under English law. The questions would be what is the nature of the liability under the foreign law, and what remedy or remedies would English law provide for English law liability similar or analogous to the kind of liability established under the foreign law. On the facts of this case, this would require in particular consideration of the nature of liability under article 1064 of the Russian Civil Code, which, as I have said, provides that, "Harm caused to the person or property of a citizen and also harm caused to the property of a legal person shall be subject to compensation in full by the person who has caused the harm …". The nature of this liability is similar to or analogous to English tortious liability giving rise to a claim for compensatory damages. It is nothing to the point that, on the particular facts that gave rise to a liability under article 1064, English law would recognise a cause of action which affords the remedy of an account. Nor is it relevant that the English court came to apply Russian law and so to recognise a liability under article 1064 because questions about that cause of action relate to tort within the meaning of the 1995 Act. The question is what remedy English law provides for liability of the kind that article 1064 defines, and the answer is that in those circumstances English law provides a remedy of compensatory damages and not an account. The remedy of an account reflects the nature of a fiduciary's obligation, and is characteristic of liability associated with breach of fiduciary duty, which is not a feature of liability under article 1064."

121. Accordingly, Andrew Smith J rejected the argument that even if Russian law governed the underlying claims, English law governs what remedies are available. He held that Russian law governs the heads of liability, and remedies such as an account of profits are available only so far as permitted by Russian law.

122. In OJSC Oil Company Yugraneft v. Abramovich [2008] EWHC 2613, Christopher Clarke J held at [217] that although dishonest assistance is an equitable claim, nonetheless, it is governed not by the *lex fori* but by the *lex causae*, in that case Russian law. To the extent that Holding makes a claim in dishonest assistance against Mr Telser or any of the other Defendants, I consider that that claim is also governed by (and only available if recognised by) Russian law.

Proper approach to the conflicting views of the experts

123. There are some areas of common ground between the two experts but also substantial areas of disagreement. Mr Moverley Smith submits that I cannot resolve the conflicts of evidence between the experts without cross-examination because these are questions of fact that need to be proved at trial. I accept that, unless I am satisfied that Holding has no real prospect of success of establishing that its expert's evidence will be accepted at trial, I should not seek to resolve disputes as to foreign law between the experts at this stage.

124. Nevertheless, on an application such as the present, where the issue of foreign law is disputed by two experts, it is appropriate to consider the quality of the evidence, taking into account factors such as the experience of the experts, the cogency of their reasoning and the materials relied on to support it. Arnold J has twice said the court is obliged to review foreign law evidence in this way in considering *forum conveniens:* VTB Capital [2011] EWHC 3107, [201] and Innovia Films Ltd v. Frito-Lay North America Inc [2012] EWHC 790, [125].

125. I accept Mr Kitchener's submission that where the proposed claim turns on questions of foreign law and the defendant submits expert evidence that the claims are bound to fail under that foreign law, it is not enough for the claimant, or its expert, simply to deny that evidence in their response to the jurisdiction challenge. The court has to look at the authorities cited by the competing experts in the jurisdiction hearing, and assess the merits of the claim on the basis of those authorities. If it is clear on the basis of those authorities that the claim will fail, and it is impossible (on the basis of the evidence) to see how the claim will succeed at trial, permission to serve out should not be granted. As Gross LJ said in Al Sanea v. Saad Investments Co Ltd [2012] EWCA Civ 313, at [30]:

> "Where the merits test is properly in issue, the mere hope that additional evidence may materialise is unlikely to prove sufficient for the party seeking to uphold service out of the jurisdiction."

The expert evidence

126. The issues arising and decided in the Fiona Trust case are in material respects identical or at least very similar to issues arising in this case. In my view, it is regrettable that Holding did not show or mention Fiona Trust to Sales J at the without notice hearing on 13 August 2012 in view of the extensive consideration given by Andrew Smith J in that case to Russian domestic and private international law [78-181].

127. It is necessary to consider the claims made in Fiona Trust in more detail. The claimants were Fiona Trust, its subsidiaries and Sovcomflot. They sued Mr Skarga, Mr Nikitin and the Standard Maritime defendants in tort, unjust enrichment, dishonest assistance and knowing receipt. Mr Skarga had an employment contract with Sovcomflot and was its general director. He was also a director of Fiona Trust, which was the principal operating subsidiary of Sovcomflot, as well as a director of two subsidiaries of Fiona Trust. He was alleged to have been bribed by Mr Nikitin and his companies (the Standard Maritime companies) to cause companies in the Sovcomflot group to enter into transactions that benefited Mr Nikitin and his companies at the expense of Sovcomflot.

128. The allegations in Fiona Trust were therefore very similar to the allegations in the present case. Mr Lazurenko is a former employee of one TNK-BP group company (Management) who is alleged to have been bribed to cause another TNK-BP group company (Holding) to enter into unfavourable contracts. The

only material differences between the allegations in this case and Fiona Trust are that:

128.1. In Fiona Trust, the bribe-taker (Mr Skarga) was sued both by his employer (Sovcomflot) and by the group companies he was said to have harmed (Fiona Trust), whereas in this case, Mr Lazurenko is sued only by the group company that he is said to have harmed (Holding) and not by his employer (Management), which has agreed (under his employment contract) not to sue him outside Russia.

128.2. In Fiona Trust, the bribe-taker was a director of the harmed companies, whereas Mr Lazurenko was only ever an employee.

129. While Andrew Smith J's findings on Russian law are not binding on me, they are cogent and persuasive and I see no reason not to follow them insofar as they are directly applicable to the facts of this case. I accept Mr Kitchener's submission that prior decisions on Russian law should be followed unless the court is convinced they are wrong, for example because new Russian law authorities have come to light, or because the earlier decisions have been convincingly criticised by commentators. Holding would have to persuade me that Andrew Smith J's analysis of Russian law in Fiona Trust is either clearly wrong or inapplicable to this case and it has not sought to do either of those things.

130. In Fiona Trust, Andrew Smith J dismissed the claims [1563] because they were governed by Russian law [163] and failed under Russian law [78]. He broadly accepted the evidence of Professor Maggs (who was the defendants' expert) and held that Russian law differs in important respects from English law in relation to the civil consequences of bribery. His analysis of Russian law at [78-139] is compelling. He summarised the defendants' arguments (which he accepted) at [78]:

> "**Russian domestic law**
> 78. The defendants argued, as I have said, that any issues concerning their liability to the claimants are governed by Russian law. As I shall explain, Russian law would in various ways be less favourable to the claimants than English law. In particular, the defendants are able to argue that under Russian law:
>
> (i) Mr. Skarga could be liable only to Sovcomflot as his employer and only in contract and under the Russian Labour Code. He could not be liable in tort and could not be liable in the circumstances of this case to any other claimant.
> …
> (iii) None of the defendants could be liable to give an account or in unjust enrichment.
>
> (iv) In order for Mr. Nikitin or any of the Standard Maritime defendants to be liable in tort, harm would have to be directly caused by the defendant's unlawful fault.
>
> (v) There is no presumption that, if a bribe was paid, it influenced the recipient, and the claimants cannot succeed in a claim either against a person paying a bribe or a recipient without proving that the bribe influenced the recipient or otherwise caused loss.

> (vi) The defendants would be protected by different limitation periods, which appear generally to be more favourable to them than those available under English law."

131. Professor Maggs' evidence is that where an employee has taken a bribe, the employer (i.e. Sovcomflot or Management) can only sue the bribe-taker for breach of his employment contract under the Labour Code. The employer cannot sue the bribe-taker in tort or unjust enrichment. This is because of the principle of "competition for claims", which resembles the French principle of non-cumul (by which a tort claim is excluded where there is a contract claim) and excludes an unjust enrichment claim if there is a contract claim.

132. At paragraph 82 of his first report, Professor Maggs confirms the priority of contract over tort and unjust enrichment, as he did in his evidence to Andrew Smith J, who accepted it at [86, 120]. Mr Rozenberg does not disagree with this analysis. It follows that Management may not sue Mr Lazurenko in tort or unjust enrichment; it may only sue him for breach of his employment contract, and then only in a Russian court in accordance with the jurisdiction clause in Mr Lazurenko's employment contract which provides that disputes will be addressed in Russian courts in accordance with Russian law.

133. Of course, the principle against competition for claims only prevents Management from suing Mr Lazurenko in tort or unjust enrichment. It does not prevent Holding from suing Mr Lazurenko in tort or unjust enrichment, since Holding is not party to the employment contract. However, as Andrew Smith J said at [87], a person in the position of Mr Lazurenko has a different answer to the claims by Holding which I address below.

134. *Proof of harm/Article 1064*: It is common ground between the experts that there is no presumption of harm in cases of bribery under Russian law. Holding must assert and prove harm. This was accepted by Andrew Smith J in Fiona Trust at [98]. Professor Maggs states at paragraphs 43 and 44 of his first report:

> 43 Article 1064 of the Civil Code requires proof that the defendant has caused harm to the claimant as a prerequisite to liability:
>
> **Article 1064. General Bases of Liability for the Causing of Harm**
>
> 1. Harm caused to the person or property of a citizen and also harm caused to the property of a legal person shall be subject to compensation in full by the person who has caused the harm.
>
> A statute may place a duty for compensation for harm on a person who is not the person that caused the harm.
>
> A statute or contract may establish a duty for the person who has caused the harm to pay the victim compensation in addition to compensation for the harm.
>
> 2. The person who has caused the harm is freed from compensation for the harm if he proves that the harm was caused not by his fault. A statute may provide for compensation for the harm even in the absence of fault of the person who caused the harm.

> 3. Harm caused by lawful actions shall be subject to compensation in the cases provided by a statute.
>
> Compensation for harm may be refused if the harm was caused at the request, or with the consent, of the victim, and the actions of the person who caused the harm do not violate the moral principles of society.

> 44. If Holding did not overpay for the bribed contracts, the bribery would not have caused it any harm. In order to succeed with a tort claim, the burden is on Holding to prove that it paid more under the bribed contracts than it would have paid but for the bribe. Otherwise, it will have no tort claim against anyone. Russian law does not presume loss or harm where a bribe is paid. It must be proved. In the *Fiona Trust* case, the Judge accepted this at paragraph 98 of the judgment.

135. *Employer's liability for employee's tort/Article 1068*: Professor Maggs' evidence (paragraph 45 of his first report) is that where an employee causes harm to a third party in the course of his employment, the third party may not recover directly against the employee who caused the harm. Rather the third party may only recover against the employer. This evidence was accepted by Andrew Smith J in Fiona Trust at [106]. This is so even if the harm was caused by the employee's criminal conduct because, as Professor Maggs emphasised, the Russian law concept of an employee acting in the performance of his labour duties is a very broad one (this was accepted by Andrew Smith J at [107]). To this extent Russian law insulates the employee from liability to third parties to a greater degree than does English law. Andrew Smith J therefore found that Fiona Trust (the subsidiary of Sovcomflot) could not sue Mr Skarga.

136. In the same way, so submits Mr Kitchener, Holding cannot sue Mr Lazurenko in tort even if all its factual allegations against him are correct. He refers me to the authorities cited by Professor Maggs in support of the rule that an employee is not liable to a third party for harm caused in the course of employment:

136.1. In Shorokhova v. Timkiv (2003), Maggs 1, exhibit 13, an on-duty soldier, Mr Timkiv, kicked and sexually abused one fellow soldier, murdered another soldier, and took hostages before he was eventually disarmed. The victims sued Mr Timkiv for compensation. The Supreme Court (Russia's highest civil court) held that the proper defendant was not Mr Timkiv but the Army, his employer. Andrew Smith J held at [106], "the three judges of the Supreme Court of Russia considered that, because the employer was liable, the employee is not."

136.2. In Sh v M (2001), Maggs 1, exhibit 6, the claimant, Sh, was the director of Priazovets and the defendant, M, was an employee of Yuzhny. They signed a transfer contract in the respective names of those organisations. Sh sued M personally in tort for harm caused by the transfer. The Supreme Court held that the claim should be dismissed, stating that:

> "if the actions (inaction) of M at the time of the performance of the contract on the transfer of property caused harm to Priazovets Agro-Industrial Enterprise, liability to Priazovets Agro-Industrial Enterprise for such harm is borne by Yuzhny Neftyanik CJSC, where he was employed. If the harm to the property of the legal entity was caused by M not in connection with the performance of his labour (or employment, or official) duties, he is

> liable for the harm directly to Priazovets Agro-Industrial Enterprise, and not to its director."

136.3. In K v Ust-Karsk Village Hospital and E (1998), Maggs 1, exhibit 7, E crashed his car into K while driving in the course of his employment by the Hospital. K sued the Hospital in tort, and the lower court directed that E should be brought in as second defendant. The Supreme Court overruled this, stating that:

> "E, who was employed by the village hospital and was driving the vehicle belonging to the hospital at the time of the accident, was wrongly brought into the proceedings as the defendant".

136.4. In D v B (2010), Maggs 1, exhibit 8, D, the claimant, missed a court hearing because he did not receive a telegram. B, an employee of the Post Office, had left the telegram in a post box and had herself signed in D's name an acknowledgment that the telegram had been received. B was reprimanded for her illegal actions. The St Petersburg City Court said that she was not liable to D in tort for her actions. The court held that her employer (the Federal State Unitary Enterprise Russian Post, rather than the local department) was the correct defendant.

137. The employer's liability for harm done to third parties by its employees in the course of their employment arises under Article 1068, which provides that: "A legal person or a citizen shall compensate for harm caused by its employee in the performance of labor (or employment, or official) duties": Maggs 1/45. According to Professor Maggs, the Russian courts have consistently held that even criminal conduct may fall within the scope of this provision:

137.1. In Shorokhova v Timkiv (the Supreme Court solider case referred to above), murder was held to be within the course of employment, even when committed quite contrary to the Army's instructions.

137.2. In Abdullin v. Kooperator CS (2010), Maggs 1, exhibit 12, Mr Gumerov was convicted of a crime in causing a traffic accident. This did not stop the Supreme Court from holding his employer liable in tort to the victim.

137.3. In Republic of Buryatia v Meliorator LLC (2011), Maggs 1, exhibit 11, theft from ancient burial mounds was held to fall within the course of employment. Meliorator had instructed its employee, Mr Khoroshykh, to prepare stones on a construction site. Unable to find stones on the site, Mr Khoroshykh stole stones from neighbouring burial grounds, a protected archaeological monument. Meliorator was liable for its employee's illegal actions.

137.4. In Zagrebina v. Penza Provincial Bank (2011), Maggs 2, exhibit 3, Mr Pogosyan sent a money transfer of some 479,000 rubles to the Penza Provincial Bank for deposit to the account of Ms. Zagrebina. The Bank's employee Ms Volchova stole the money: she took it from the account and used it for her own purposes. Ms Volchova was convicted of a crime of abusing her powers under Article 201 of the Criminal Code. The High Arbitrazh Court (which is of equal status to the Supreme Court) upheld Ms Zagrebina's tort claim against the Penza Provincial Bank under Article 1068 on the ground that Ms Volchova caused the harm in the performance of her employment duties, even though she abused those duties.

138. In Fiona Trust, Andrew Smith J held at [107-109] that if the instructions to enter into the contracts induced by the bribe were of a kind that the employee had authority to make (corruption aside), then the harm was caused in the course of employment. He said at [107]:

> "107. … Thus, for example, [Professor Maggs] considered that, if Mr. Skarga gave instruction for a subsidiary of Sovcomflot to enter into a charterparty with a Standard Maritime defendant, the instruction would still be of a kind that Mr. Skarga was expected to give in the performance of his duties as an employee of Sovcomflot. This would be so even if the rate of hire or the terms of the charter were uncommercial and the instruction was given in order to benefit the charterer. I found his evidence about the application of article 1068 convincing."

139. In my view, the same reasoning applies on the alleged facts of this case. Mr Lazurenko is alleged to have had authority in the course of his employment by Management to cause Holding to enter into contracts with suppliers. He is alleged to have misused that authority by causing Holding to enter into unfavourable contracts for the wrongful gain of the counterparty (and himself). As a matter of Russian law, the allegation is thus that Mr Lazurenko caused harm in the course of his employment. Consequently, if these allegations are proved, Management, but not Mr Lazurenko, is liable to Holding in tort. As Professor Maggs says in paragraph 10(2) of his first report:

> "10(2) The tort claim is brought against the wrong party. Mr. Lazurenko was employed by Management, and the alleged harm was, as a matter of Russian law, caused in the course of his employment. The tort claims offend the basic principle that a victim of a tort committed by an employee in the course of employment can only sue the employer (Management) and not the employee (Mr. Lazurenko). Moreover, the allegations against the secondary defendants are insufficient to hold them liable as joint tortfeasors."

140. If Management is required to compensate Holding for harm caused by Mr Lazurenko's bribery, Mr Lazurenko will in turn be liable to reimburse Management for the compensation it has had to pay Holding. But, as Professor Maggs says in paragraph 58 of his first report, that liability would arise under the Labour Code in respect of his employment contract, and could only be enforced in a Russian court.

141. Mr Rozenberg disagrees with Professor Maggs' analysis. His view is that Holding can sue Mr Lazurenko directly in tort because his conduct was "entirely independent of his role or of any instruction received from Management, and contrary to the interests of its parent company…. He used his employment position at Management as a tool for committing a crime which inflicted damage to [Holding]": paragraph 23 of his report. He expresses the point in various ways in his report. He asks, variously: is the harm caused, "during performance of [the employee's] labour duties" [66]; is the harm caused "in line of his labour duties" [67]; is the harm done, "in performance of his employment obligations"? [76].

142. I am unable to conclude at this stage that Mr Rozenberg's view that Holding is entitled to sue Mr Lazurenko directly in tort has no real prospect of success. Mr Rozenberg is clearly an experienced and well respected Russian lawyer. He gave evidence (effectively on the same side as Professor Maggs) in the Berezovsky v Abramovich case [2012] EWHC 2463 (Comm) and Gloster J concluded at [526] that he was a careful and objective witness whose written

and oral evidence was clear and focused. It would not be right for me to reject his evidence at this stage unless I am satisfied that it is clearly wrong.

143. Although I am unable to reach a definitive view at this stage, I confess to being concerned that Mr Rozenberg's approach to the facts appears to reveal a misunderstanding of Holding's claim. Holding's complaint is precisely that Mr Lazurenko caused harm in performing his employment functions. He was employed by Management and in that capacity he performed services for Holding and, it is alleged, negotiated contracts for Holding. The suggestion is that he caused Holding harm by carrying out these duties in a way that harmed Holding. This is how the case is pleaded in paragraphs 16 to 19 of the Particulars of Claim and it is how the case was presented in Holding's Outline Submissions to Sales J at paragraphs 11 and 12. It is also how the facts are explained in paragraph 6 of Mr Deuchrass' first affidavit.

144. So although I am unable to determine the dispute between Professor Maggs and Mr Rozenberg at this stage, I consider that the Applicants have the better argument that, as a matter of Russian law, Holding must bring its claim against Management and must assert and prove that it has suffered harm as a result of Mr Lazurenko's actions and that, if Management chooses to bring a claim against Mr Lazurenko, it must do so in the Russian courts in accordance with the terms of his employment contract.

145. *Joint liability/Article 1080*: Professor Maggs' evidence is that secondary defendants may only be liable in tort if they jointly participate in the causing of harm. This requires that they must themselves cause harm (jointly with others). On the facts of this case, it would not be enough that the other Defendants received the proceeds of or otherwise concealed the bribery. This would not make them jointly liable in tort. At paragraphs 59-62 of his first report, Professor Maggs says this:

> 59. The common law concept of the tort of "conspiracy" has no direct parallel in Russian law. Article 1080 of the Civil Code requires joint participation in the causing of particular harm to make defendants jointly liable:
>
> > **Article 1080. Liability for Jointly Caused Harm**
> > Persons who have jointly caused harm shall be liable jointly and severally to the victim.
> > On petition of the victim and in his interests, the court shall have the right to impose upon persons who have jointly caused harm liability in shares, defining them according to the rules provided by Paragraph 2 of Article 1081 of the present Code.
>
> 60. As I understand the question, the harm had already been caused by the time the secondary defendants allegedly made investments or told lies. They could not have met the test of Article 1080 that they "caused harm".
>
> 61. So, for example, the allegation in paragraph 58 of the Particulars of Claim is insufficient to found a claim in tort under Russian law. The receipt of money said to be the proceeds of bribes is not sufficient to make the recipient liable as a joint participant in tort under Article 1080, even if the recipient knows of the bribe. Similarly, the receipt and investment of

> money said to be the proceeds of a bribe is not sufficient to make the recipient liable. None of this conduct has caused the alleged harm, which is the alleged overpayment. Participation after the harm has been caused does not make one liable for jointly causing that harm.
>
> 62. Some of the Defendants are alleged to have assisted in the concealment of the true source of monies said to have been the product of bribes. Such a claim in particular is made against Mr. Scheklanov: see paragraphs 50 and 102 of the Particulars of Claim. Suppose for the sake of argument that Mr. Scheklanov lied in April 2012 by claiming to be the ultimate beneficial owner of some of the investments so as conceal Mr. Lazurenko's wrongdoing. In those circumstances, Mr. Scheklanov might have committed some wrong and be responsible for any harm suffered as a consequence. But this does not make him a participant in the original tort or liable for any harm suffered as a result of Mr. Lazurenko's wrongdoing.

146. Mr Rozenberg does not appear to take issue with this part of Professor Maggs' evidence. Holding certainly cannot and does not allege that the other Defendants jointly participated in the acts which are said to constitute the making of corrupt payments. Those allegations are made against Mr Lazurenko alone. What is alleged in paragraph 58 of the Particulars of Claim is that "… BJUK and the other Defendants participated in a corporate structure which was used as a conduit for fraud. The structure concealed and continues to conceal the facts and matters set out in these Particulars of Claim and the whereabouts of the proceeds of Mr Lazurenko's misappropriation from Holding".

147. So for the reasons given by Professor Maggs, which I accept, the allegation against the Defendants other than Mr Lazurenko - of participation in a corporate structure used as a conduit for a fraud that has already been committed - does not give rise to liability in Russian law under Article 1080.

148. *Unjust enrichment/Article 1102*: The Applicants further submit that as a matter of Russian law Holding could not sue any of the Defendants to recover the alleged bribes or their proceeds in unjust enrichment. Professor Maggs states in paragraphs 35 and 36 of his first report that it is the State, rather than the victim of the bribe, that can recover the actual bribes from Mr Lazurenko. This is without prejudice to Holding's right to sue Management for the loss and Management's right then to seek a contractual indemnity from Mr Lazurenko.

149. The Applicants submit that, regardless of the State's confiscation right, Holding still would not have a claim in unjust enrichment because such a claim requires that the defendant has received property at the claimant's expense under Article 1102 of the Civil Code. At paragraph 65 of his first report, Professor Maggs quotes from a book written by Professor Sukhanov, one of the authors of the Civil Code, as follows:

> "65. Article 1102 requires that the defendant must have received (or saved) property at the expense of the claimant. As a leading textbook explains, an unjust enrichment claim generally requires a two-party transfer: the property must have been transferred by the claimant to the defendant:
>
> > Obtaining property by one person at the expense of another signifies the increase of the volume of property for one person and the simultaneous reduction of its volume for

> another. Obtaining signifies a quantitative increase of the property, increasing its value without making the corresponding expenditures by the obtained. For instance, when a citizen, acting on delegation by another mistakenly pays a debt of the delegating party not to the lender but to a third party; when an organization pays twice for goods received in its name, etc."

150. In Fiona Trust, Andrew Smith J agreed with this analysis at [119]. He observed that the other Russian law expert in that case, Professor Sergeev, had accepted that:

> "119. …as Russian law presently stands, a claim under article 1102 is available only against the actual recipient of a claimant's property. I conclude that this is indeed a requirement of article 1102: it seems to me required by the natural meaning of the article."

151. In the present case, the alleged payment chain is accurately described by Mr Rozenberg in paragraph 88 of his report: Holding paid money to suppliers, and suppliers paid money to Mr Lazurenko. When Holding paid the suppliers, ownership in that money passed from Holding to the suppliers, regardless of whether the supply contracts were corruptly induced. When the suppliers paid the alleged monetary bribes to Mr Lazurenko, they may have paid him by money transfer or in cash. Either way, it is likely that ownership of that money began with the supplier and passed from the supplier to Mr Lazurenko. If the money was paid into his bank account, the bank was entitled to treat Mr Lazurenko as the owner of the money. Professor Maggs says this at paragraph 67 of his first report:

> "67. There are some instances in which Russian law recognizes "indirect enrichment", in which the transfer of property from A to B may enrich C, for instance where A by mistake transfers funds to the B bank for credit to the account of C. However, no provision in the unjust enrichment chapter of the Civil Code allows A, if he has unjustly enriched B by transferring funds to recover from C funds that B has transferred to C. The *vindicatio* (recovery of a specific thing) claim is the only way A can recover something A owns from C, but this requires that A must still be the lawful owner or possessor of a thing in C's hands. Nothing of value and no physical thing was transferred by Holding directly or on Holding's instructions to Mr. Lazurenko. Accordingly, Holding cannot sue Mr. Lazurenko (or any of the other Defendants) in unjust enrichment under Article 1102 regardless of whether the Russian state can confiscate the bribe. In the *Fiona Trust* case, the Judge accepted that a claim under Article 1102 is available only against the actual recipient of the claimant's property: see paragraph 119 of the judgment."

152. Andrew Smith J also accepted in Fiona Trust that an unjust enrichment claim is excluded by the principle of "competition for claims". He said this at [120]:

> "120. The defendants also submitted that the application of article 1102 is subject to further restrictions, which they said reflect the principle of Russian law that there should not be competition between claims. In particular, they said that no claim under article 1102 can be made in relation to property that has been transferred or saved as a result of a contractual relationship because that would introduce competition with

> the regime governing obligations arising from transactions, and no claim can be made where article 1064 applies because it would compete with the regime governing obligations arising as a result of causing harm. I accept this submission, and the evidence of Professor Maggs to that effect."

153. The Applicants submit that since Holding would have a contract claim against the supplier (for return of the sum overpaid) and a tort claim against Management (in respect of the bribe), and Management would have a contract claim against Mr Lazurenko, any claim for unjust enrichment by Holding would be prevented by the prohibition on competition between claims. Professor Maggs summarises the position in this way at paragraph 58 of his first report:

> "58. In summary, therefore, the position is that Holding should sue first the suppliers and then Management for compensation, and if and when Management is required to pay Holding compensation, Mr. Lazurenko will be required to compensate Management for that out-of-pocket expense, but only in a Russian court in accordance with the Employment Contract and the Labor Code. Management cannot sue Mr. Lazurenko in tort because the priority of the Labor Code over the Civil Code with respect to employment-related matters and the prohibition on competition between claims."

154. Mr Rozenberg disagrees with this analysis. He says this at paragraph 94 of his report:

> "94. Professor Maggs' view appears to be based in part on a misunderstanding that the Claimant's case is a 'classic' bribe case …, whereas in fact the Claimant's position is that the corruption in question in this case took the form of overpayments of the Claimant's own funds on inflated contract prices arranged by Mr Lazurenko, which Mr Lazurenko benefitted from. The Claimant's case is, therefore, that the Claimant's own funds were misappropriated by Mr Lazurenko through his corrupt "schemes" with the effect that he ultimately gained unjustified personal benefits at the expense of the Claimant. Because Russian law does not allow ownership of a property without any legal basis for its acquisition and the criminal activity clearly may not form a legal basis for ownership of property (either in natural or monetary form), the corrupt activity of Mr Lazurenko at the expense of the Claimant did not give rise to the ownership rights to his unjustified benefits (be they in form of money, other property or property rights). As a result, such benefits/property unjustly acquired by Mr Lazurenko at the expense of the Claimant should be returned/compensated to the Claimant under the concept of unjust enrichment. Hence, the Claimant's unjust enrichment case is based on recovery of its own property, rather than seeking recovery of bribe funds provided by a bribe-giver."

155. Mr Rozenberg's first proposition is that this is not a "classic bribe" case but is rather a case in which Holding made overpayments to third parties as a result of the corrupt arrangements. I do not follow this reasoning. Under Russian law, every case of bribery must involve either an overpayment or an "under-receipt"; if not, there will be no actual harm and no claim. The facts alleged by Holding in relation to the payments allegedly received by Mr Lazurenko from Transoil, Sovfracht and the other transportation companies seem to me to have all the hallmarks of a "classic bribe" case.

156. Furthermore, part of Mr Rozenberg's analysis seems to rely upon the suggestion that Holding is seeking to "recover its own property", which seems to indicate a proprietary 'vindicatio'. However, as Professor Maggs points out, Holding cannot recover its own property from Mr Lazurenko because it did not retain ownership of the money it paid to the suppliers and it is very likely that Mr Lazurenko did not receive from the suppliers the same money which Holding paid to the suppliers. This is a hurdle that could be surmounted by relying on tracing principles. However, Russian law does not have a law of "tracing" into substitute assets received by the defendant; it has only a law of "following" (the vindication claim) which is available for specifically identifiable physical property and specific shares of corporate stock. If the property is still owned by the claimant, the correct remedy is not an unjust enrichment claim but a "vindication" claim under Article 301 of the Civil Code. However, since the correct analysis would appear to be that Mr Lazurenko did not receive any property owned by Holding, he cannot be sued by Holding in a vindication claim under Article 301. Moreover, Holding expressly accepted that it has not asserted any vindication claim.

157. It is common ground between Professor Maggs and Mr Rozenberg that there is no such thing as a trust in Russian law. At paragraph 160 of his report, Mr Rozenberg states:

> "160. Russian law does not recognize the English concept of a trust which permits the separation of legal and beneficial ownership and there is no such legal concept as the "beneficial ownership". The right of ownership is a single right comprising of three powers (possession, use and disposal) and though the owner may transfer the right to exercise certain of these powers to third parties, he will remain the only owner of the property. Once the ownership title to the property is disposed of, the ownership title to this property of the previous owner will cease to exist and a new ownership title of a new owner will arise."

158. In Fiona Trust, Andrew Smith J held at [84] that:

> "84. … Russian law does not have principles equivalent to those of the English law about beneficial ownership, constructive trust or equitable remedies, and it has no concept of shadow (or de facto) directors."

159. It was also common ground between the experts in the Berezovsky litigation that Russian law does not recognise the concept of a trust as known to English law. Nor does it recognise a constructive trust. If Mr Lazurenko took bribes, the bribe-money would belong to him, not to Holding. Accordingly, Holding cannot argue as a matter of Russian law that it retained title to the "overpayments" it allegedly made to suppliers and that were allegedly shared with Mr Lazurenko nor can it assert a proprietary claim over the alleged bribe money paid to Mr Lazurenko by the suppliers.

160. In his second report dated 21 September 2012, Professor Maggs referred to the evidence of Mr Rozenberg in OJSC Oil Company Yugraneft v. Abramovich [2008] EWHC 2613 in support of his proposition (in paragraph 67 of his first report) that Russian law generally does not recognise "indirect" or "ultimate" enrichment, but is restricted to two-party cases in which the defendant has the

actual property transferred by the claimant. In his second report dated 15 May 2008 in the Yugraneft case, Mr Rozenberg stated as follows:

> "79. Secondly, Russian law does not recognise the concept of "indirect" or "ultimate" unfounded enrichment. Under Russian law, in an unfounded enrichment dispute, there are always two parties: (a) the aggrieved party and (b) the unjustly enriched party. The latter must always hold title to the property which should belong to the aggrieved party and the subject-matter of such dispute is the demand of the aggrieved party addressed to the unjustly enriched holder of the property to return such property-in-kind, and only if specific performance is not feasible for any reason, seek payment of an adequate compensation."

As corroboration for this view, Professor Maggs also refers to the following commentary by Dr. Novak in his book Unjust Enrichment in Civil Law:

> "In respect of unjust enrichment, this implies that it may as a personal, binding claim, be brought only against the person that came into possession of the property determined by fungible characteristics directly from the claimant, and does not follow on the property, in the event of the subsequent dispossession from the acquirer, and may not be brought against a third party."

161. Mr Moverley Smith nonetheless maintains that Holding has an arguable case under Article 1102 and submits that Mr Rozenberg's views in this case are consistent with the position accepted by Professor Maggs as recorded by Andrew Smith J in paragraph 117 of Fiona Trust:

> "117. Professor Maggs considered that these remedies are available only against a person who has himself acquired property or has "economised" property, that is to say has been saved an expense by another person. He explained the notion of an expense being "economised" by a textbook example of A paying B's telephone bill by mistake with the result that B is not liable to pay it, or has "economised" - or saved - the amount of the bill. Thus, in Professor Maggs' view, if a corporate Standard Maritime defendant received property, no claim would lie against Mr Nikitin on the basis that he was thereby enriched, although he accepted that, if Mr Nikitin himself received the property belonging to a claimant through a company that he controlled (or indeed indirectly through an independent third party), the claimant might have a claim against him under article 1102."

162. Mr Kitchener submits that it would be wrong to rely on what Professor Maggs is said to have accepted in Fiona Trust, namely, that the claimant in that case "might" have a claim if the defendant receives money through a third party. He points out that there is no record of what Professor Maggs stated would be the conditions under which such a claim would be available and refers me to paragraphs 63 to 68 of Professor Maggs' first report and to paragraphs 19 to 41 of his second report where his views on the facts of the present case and on Mr Rozenberg's analysis are set out in detail. I have set out above paragraph 67 of Professor Maggs' first report where he gives an example of circumstances in which an indirect recipient of money can face a claim of unjust enrichment. That situation does not arise on the facts of the present case.

163. There is certainly considerable force in the Applicants' submission that Professor Maggs and Mr Rozenberg appear to be in agreement that the indirect receipt of benefits cannot give rise to a claim in unjust enrichment and that the only suggested basis for such a claim is Mr Rozenberg's proprietary analysis which I consider to be flawed on the facts of this case. However, in view of the uncertainty created by Professor Maggs' apparent concession recorded by Andrew Smith J in paragraph 117 of Fiona Trust and the fact that Mr Rozenberg's evidence in paragraph 94 of his report has not been tested in cross-examination, it is not appropriate to reach a concluded view on the issue of whether Holding has a claim under Article 1102 against Mr Lazurenko and the corporate Defendants in unjust enrichment. Nevertheless I can indicate at this stage that I consider the Applicants have the better argument that, as a matter of Russian law, Holding has no such claim.

164. The position of Mrs Lazurenko, Mr Scheklanov and Mr Telser is different. For reasons I give below when considering the case against each of these Defendants, I do not consider that Holding is able to assert a restitutionary claim against them under Article 1102.

165. There are two other aspects of Russian law dealt with by Professor Maggs in his evidence which are less favourable to Holding than English law. I did not understand Mr Rozenberg to take issue with this evidence.

166. *Fruits of investments/Article 15*: Article 15 of the Civil Code applies to the measure of compensation in cases of contractual liability as well as liability under Article 1064. It provides as follows:

> "1. A person whose right has been violated may demand full compensation for the losses caused to him unless a statute or a contract provides for compensation for losses in a lesser amount.
>
> 2. Losses means the expenses that the person whose right was violated made or must make to reinstate the right that was violated, the loss of or injury to his property (actual damage), and also income not received that this person would have received under the usual conditions of civil commerce if his right had had not been violated (forgone benefit).
>
> If the person who has violated a right has received income thereby, the person whose right has been violated has the right to demand – along with other losses - compensation for forgone benefit in a measure not less than such income."

167. Having considered the conflicting views of the experts in Fiona Trust (Professor Maggs and Professor Sergeev), Andrew Smith J concluded at [114]:

> "114. … The question … is whether, but for the violation of his rights, the claimant would under the usual conditions of civil commerce have received income corresponding in kind to that which the wrongdoer received, and I conclude that, if he would have done, he is entitled to recover by way of lost income no less than the corresponding income that the defendant in fact received".

168. In other words, a tort claim to profits made by reinvesting corrupt money is not available under Russian law where the investment is not of a kind the claimant would have made. Holding has not sought to argue that it would have made the investments that it contends Mr Lazurenko or the corporate Defendants have made. The profits on investments in Montenegrin hotels are not profits "corresponding in kind" to the profits Holding would have made "under the usual conditions of civil commerce". In any event, the tort complained of against the corporate Defendants who have made the profits relates solely to concealment of the claim, not to the original wrongdoing itself.

169. Whilst not taking issue with Andrew Smith J's analysis at [114] of Fiona Trust, Mr Moverley Smith submitted that the position might be different under the Russian law of unjust enrichment. However, Professor Maggs considered this issue in some detail in paragraphs 69 to 73 of his first report and concluded that the only available claim in unjust enrichment is return of the money plus interest. Thus, where an unjust enrichment claim is established in respect of the receipt of money (i.e. cash payments, as alleged here), it is Professor Maggs' evidence that liability is limited to the amount of the bribe plus interest. It does not extend to profits made from reinvesting the corrupt money. Mr Rozenberg does not disagree with this analysis in his report.

170. Accordingly, as a matter of Russian law, I accept the Applicants' submission that Holding's claim would be limited to the amount allegedly paid to Mr Lazurenko by the suppliers plus interest.

171. The consequences of this finding are significant on the facts of this case. As stated above in paragraph 65, the evidence before Sales J was of the diversion of sums significantly less than €64 million (that is, some US$13 million, being the total of the alleged Transoil and Sovfracht payments). Holding's claim, if proven, would be limited to that amount plus interest.

172. In his affidavit sworn on 2 May 2012 (at paragraph 110), Mr Becirovic stated: "The overall investment by Mr Lazurenko (through BJUK or otherwise) to our joint Montenegro hospitality business amounts in total to substantially in excess of EUR 64,000,000." It would therefore appear that the level of the freezing order (set at €64 million by Sales J on 13 August 2012 and reduced to €39 million the following day) included the amount invested in BJUK. In view of the fact that BJUK's assets (said to be worth €320 million) have been secure since 4 May 2012 when provisional liquidators were appointed, Holding would already appear to have more than adequate security for its claim and it had no proper justification for applying for worldwide freezing relief against seven of the Defendants (including Mr and Mrs Lazurenko) in August 2012.

173. *Limitation/Articles 196 and 200*: Any claim Holding might have against the Defendants would be subject in Russian law to a three year limitation period running from the time when it knew or should have known of the substance of the allegations.

174. Mr. Rozenberg accepts (at paragraph 115 of his report) that the general limitation period is three years running from the day the claimant knew or

should have known of the violation of his right. However, he suggests in paragraph 122 that where the conduct complained of is a crime there is an exception by which time will run from the date of conviction. That argument was rejected in Yugraneft, where Christopher Clarke J held at [310] that the practice by which time runs from the date of a conviction does not apply in a civil claim where there is no conviction. In any event, as explained earlier in this judgment, the only criminal allegations made against Mr Lazurenko relate to alleged corruption unrelated to the Transoil, Sovfracht and Transportation Payment allegations made in this case.

175. Accordingly, the claims arising out of the Sovfracht and Transportation Payment allegations would be time-barred if Holding knew of those claims before August 2009. Holding's case before Sales J, contained in the Particulars of Claim (paragraph 33) and Mr Egorov's affidavit (paragraph 17), indicated that the initial allegations made by Mr Ivanov were made in 2010. Mr Deuchrass stated in paragraph 99 of his affidavit sworn on 10 August 2012, under a section headed "Full and Frank Disclosure":

> "99. Insofar as Holding's claims are based on Russian law, I have taken Russian law advice and understand that it is open to Mr Lazurenko to argue that some at least are time barred by reason of the three year limitation period under Russian law. Holding says that time starts to run from when an injured party knew or ought reasonably to have known of the wrongdoing on which a claim is based. Mr Lazurenko's elaborate schemes and structures successfully hid his wrongdoing until very recently. In summary, this is a matter of fact to be determined at the trial of Holding's claims and cannot be determined at this stage."

176. Mr Deuchrass does not make clear which of Holding's claims Mr Lazurenko might be able to argue are time barred. At paragraph 49 of his first witness statement dated 6 September 2012 Mr Lazurenko states as follows:

> "49. It is true that [Mr Ivanov] made certain allegations against me in late 2008 or early 2009. As I explain below, these allegations were rightly dismissed at the time. If it had been thought that there was or might be any substance to the allegations, proper steps would have been taken to report them internally and to have them fully investigated by the appropriate departments and committees."

177. It only became clear following service of Mr Khan's first witness statement dated 18 September 2012 (where he stated in paragraph 15 that Mr Ivanov first approached TNK-BP in respect of the Sovfracht and Transportation Payment allegations "in 2008") that Holding accepted Mr Ivanov's allegations were first made in 2008 not 2010. Even though (as both Mr Lazurenko and Mr Khan say) Holding dismissed Mr Ivanov's allegations at the time they were first made in 2008, I am satisfied that Holding had sufficient knowledge of the alleged violation of its rights before August 2009 because it has not been able to identify any information that was not available to it before August 2009.

178. In my view Sales J should have been told in clearer terms of the basis on which Mr Lazurenko might have a limitation defence under Russian law to any claims made by Holding in reliance on the Sovfracht and Transportation Payment allegations. Now that further evidence has been provided by Holding

in relation to this issue, I am able to go further than stating that the Defendants might have an arguable limitation defence. I consider that both the Sovfracht and Transportation Payment claims are time-barred under Russian law.

Holding's claims on the merits

179. In the Particulars of Claim that were put before Sales J (and have not so far been amended), Holding relied (and continues to rely) on three sets of allegations:

179.1. the "**Transoil allegations**", namely that (according to Mr Nikolaev) Mr Lazurenko took corrupt payments totalling US$8 million from a company called Transoil in relation to rail transportation contracts between January 2010 and December 2010 (paragraph 21);

179.2. the "**Sovfracht allegations**", namely that (according to Mr Ivanov) Mr Lazurenko took corrupt payments in cash totalling "more than US$5 million" from Sovfracht over "several years prior to 2010" in relation to tenders for transportation contracts (paragraphs 33-34);

179.3. the "**Transportation Payment allegations**", namely that (again according to Mr Ivanov) Mr Lazurenko also accepted corrupt payments in unidentified amounts from unidentified transportation companies "over an extended period of time" (paragraph 33).

180. It is plain that Holding placed considerably more reliance on the Transoil allegations than the Sovfracht and Transportation Payment allegations. Indeed, it is fair to say the Transoil allegations form the cornerstone of Holding's case. Holding's pleaded case (paragraph 38 of the Particulars of Claim) is that it can be inferred that the Sovfracht and Transportation Payment allegations are true because the Transoil allegations are true. It is therefore necessary to analyse the genesis and development of the Transoil allegations in some detail.

The Transoil allegations

181. In paragraph 20 of the Particulars of Claim, it is alleged that in about March 2012, Mr Khan was approached by Mr Nikolaev, the Head of N-trans which owned a company called "OOO TK TransOil". It is now accepted by Holding that this was an error and that Mr Nikolaev has no connection with a company called TK Transoil. According to Mr Levin (in paragraph 31 of a statement made since the hearing before Sales J), more than 25 companies with Transoil as their full name or part of the name, registered both in Moscow and in other cities of the Russian Federation, have had contractual relations with TNK-BP over last few years, including a large well known group of companies in which Mr Nikolaev had a minority shareholding. It is this company (or group of companies), and not TK Transoil, to which I will refer as "**Transoil**" or if appropriate "**Nikolaev Transoil**".

182. Holding's confusion as to the identity of the Transoil company with which Mr Nikolaev is connected is compounded by the evidence of Mr Egorov in the Documents Claim where he said (in paragraph 20 of his witness statement dated 16 July 2012), referring to what Mr Khan had been told by "the senior management at Transoil", that "these payments [i.e. payments

amounting to approximately US$8 million] were made in connection with contracts facilitating the so-called geographical swap of oil". The criminal complaint against Mr Lazurenko alleges corruption in relation to identified oil swap contracts with "TK Transoil". However, there is no evidence relating to those oil swap transactions in these proceedings. TK Transoil has denied (in a letter to Mr Lazurenko's Russian lawyer) paying any bribes to Mr Lazurenko and he denies receiving any such bribes. The total value to Mr Lazurenko of the alleged benefit from these oil swap transactions is said in the criminal complaint to be "in excess of 1 million Rubles" which is the equivalent of approximately US$31,000. But quite apart from the discrepancy between the alleged amount of the corrupt payments which form the subject of the criminal complaint (circa US$31,000) and the alleged amount of the corrupt payments involving Mr Nikolaev's companies (circa US$8 million), what is clear is that the subject matter of the criminal complaint (oil swap transactions with TK Transoil) has nothing to do with the oil transportation payments said to have been made by Nikolaev Transoil which are relied on by Holding in these proceedings. Moreover, TK Transoil is not involved in the oil transportation business.

183. It is pleaded in paragraph 21 of the Particulars of Claim that Mr Nikolaev informed Mr Khan of the following matters:

183.1. that in early 2010 Mr Lazurenko had approached those with whom he was negotiating at Transoil, claiming he was acting with the consent and knowledge of Mr Khan;

183.2. that Mr Lazurenko had solicited significant payments to be made in order for Transoil to do business with TNK-BP;

183.3. that in the period from January 2010 to December 2010 (the Particulars of Claim state "December 2011" but this was accepted by Mr Moverley Smith in the course of the hearing before me to be an error), at Mr Lazurenko's direction, Transoil made wire transfers of funds amounting to US$3,941,193 to the accounts of the following foreign companies:

183.3.1. US$1,369,881 transferred to the account of Macanudo Union Inc, held at Komercbanka Baltikums, Riga, Latvia;

183.3.2. US$1,548,009 transferred to the account of Luwes Trade LLP held at Trust Commercial Bank, Riga, Latvia;

183.3.3. US$560,229 transferred to the account of Anabella Ltd, held at TrstaKomercbanca Nicosia, Cyprus;

183.3.4. US$463,074 transferred to the account of Venturex Limited, held at Privatbank, Riga, Latvia;

183.4. that in addition to these payments sent by wire transfer to bank accounts in Latvia and Cyprus, Mr Nikolaev is said to have informed Mr Khan that during this period Mr Lazurenko received not less than US$4 million in cash payments from Transoil.

184. In his affidavit that was before Sales J in unsworn form on 13 August 2012 (and subsequently sworn on 14 September 2012), Mr Egorov did not condescend to the level of detail contained in paragraph 21 of the Particulars of Claim. He simply referred to Mr Khan and Mr Levin being informed by "the senior management of the parent company of OOO TK TransOil" (which it is to be assumed was a reference to Mr Nikolaev) that Mr Lazurenko had

solicited payments to be made to him in order for Transoil to do business with TNK-BP and that payments amounting to approximately US$8 million were made to Mr Lazurenko before senior management (again presumably a reference to Mr Nikolaev) became aware of the payments and approached Mr Khan.

185. The affidavit of Craig Deuchrass, a solicitor at Bryan Cave, sworn on 10 August 2012 in support of Holding's application for injunctive relief, simply refers to Mr Egorov's evidence and to the Particulars of Claim, repeating the reference to "the senior management of the parent company of OOO TK TransOil" (again presumably a reference to Mr Nikolaev). It does not elaborate further on Holding's claim in relation to Transoil.

186. Following service of Sales J's order, Mr Lazurenko made a witness statement dated 6 September 2012. In paragraph 18 of that statement, he referred to the fact that, in 2010/2011, reviews of logistics strategy and efficiency were conducted for TNK-BP by an international consultancy and to the consultancy's conclusion that the prices paid by TNK-BP for rail transportation were highly competitive. He asked Holding to disclose a copy of this report which he believed should have been disclosed at the without notice hearing.

187. Between paragraphs 73 and 85 of his statement, Mr Lazurenko addressed the Transoil allegations in detail. He drew attention in paragraph 78 to the fact that Mr Egorov had given different evidence in the Documents Claim in two respects. First, by stating in the Documents Claim that the allegedly corrupt contracts with Transoil related to the geographical swaps of oil whereas in the present claim he says the contracts with Transoil related to oil transportation by rail which is entirely different. Contracts for the geographical swap of oil are implemented through Transneft (i.e. by pipeline) and do not involve rail transportation. Furthermore, TK Transoil is not involved in rail transportation, but is an oil production company. Second, in the Documents Claim, Mr Egorov claimed that Mr Lazurenko approached Transoil "*in 2011*" whereas in the present claim, Mr Egorov claims that he approached Transoil "*in early 2010*". Mr Lazurenko also pointed out in paragraph 79 that the period over which Transoil was alleged to have made wire transfers from January 2010 to December 2011 (referred to in paragraph 21(c) of the Particulars of Claim) was a period during which he was no longer Director of the Logistics Department and had moved to his new role as Director of the New Business Development Department, where he had no responsibility for rail transportation and so it should have been clear to TNK-BP that these payments (if they were made) had nothing to do with him.

188. At paragraphs 83 to 85 of his statement, Mr Lazurenko summarised the position in relation to Transoil and Mr Nikolaev as follows:

> 83. I am not aware of any railway transportation contracts entered into with Transoil, as Transoil is not involved in the business of rail transportation. TNK-BP did enter into contracts for the geographical swap of oil with Transoil, but (i) Holding no longer claims that I did anything wrong in

> relation to such contracts, and (ii) Mr Nikolaev has no connection to Transoil as far as I am aware. …
> 84. It is right that there were oil transportation contracts between TNK-BP and a company connected to Mr Nikolaev, but these were with a company called Baltransservis (BTS). In fact, BTS has been one of the largest suppliers of railway transportation to TNK-BP for the past 8 or 9 years; its annual revenue from contracts for the supply of services to TNK-BP amount to, I believe, approximately US$500 million. I was first introduced to Mr Nikolaev by Mr Khan and met with him on a number of occasions during my employment with Management.
> 85. I never solicited or took any corrupt payments from Transoil or BTS or any other supplier of TNK-BP.

189. Following service of Mr Lazurenko's statement, Mr Levin made a witness statement dated 19 September 2012 in which he provided more information about the Transoil claim. He said that after Mr Khan was approached by Mr Nikolaev in or around March 2012 he (Mr Levin) was asked on 26 March 2012 to supervise an internal investigation and in the course of that investigation he and his colleagues in the security department "interviewed large numbers of Management's employees and representatives of contracting parties" as well as collecting "documents from various external sources" (in accordance with Management's Procedure for Fraud Investigation then in force). The investigation went through certain stages and the preliminary investigation established indications of "certain substantial wrongdoings" of Mr Lazurenko in relation to contracts with TK Transoil which later formed the basis of the criminal complaint.

190. At paragraphs 26 to 30 of his statement, Mr Levin addressed the allegations against Mr Lazurenko made by Mr Nikolaev and produced two documents said to evidence payments made by Nikolaev Transoil for the benefit of Mr Lazurenko. These documents [E6/40/3023-4] are said to evidence the Latvian and Cypriot wire transfer transactions referred to in paragraph 21(c) of the Particulars of Claim.

191. The document at [E6/40/3023] comprises a list of 22 payments purportedly made between 19 January 2010 and 19 December 2011. It appears to be Holding's case that Mr Nikolaev was alleging that Mr Lazurenko was the recipient of the first 8 payments on the list. Three of these 8 payments are said to have been made to a beneficiary called Macanudo Union Inc on 19 January 2010, 7 April 2010 and 30 June 2010 respectively. A further three payments are said to have been made to Luwes Trade LLP on 11 June 2010, 13 September 2010 and 20 September 2010 respectively. A payment is said to have been made to a beneficiary called Annabella Ltd on 12 November 2010 (although Annabella Ltd's name has been struck through in manuscript on the document and a question mark inserted beside it). Finally, a payment is said to have been made to a beneficiary called Venturex Limited on 21 December 2010. According to Mr Levin, the second document alleged to have been produced by Mr Nikolaev [E6/40/3024] refers to payment into the account of Macanudo Union Inc for the supply of equipment in accordance with a contract dated 8 June 2009 and relating to "invoice 2306 from 23.06.2010". He says that Macanudo Union Inc is a 'mediator company' which is a company

owned by financial institutions in Cyprus for the benefit of individuals who do not wish funds to be traced.

192. Mr Lazurenko denies any knowledge of these transfers. Significantly, there is nothing in either document to link Mr Lazurenko or any bank account connected with him to any of the transfers or to any of the entities to which those transfers were purportedly made. Equally significantly, all the payments except the first (that to Macanudo Union Inc dated 19 January 2010) were made after 1 February 2010 when Mr Lazurenko had ceased to be responsible for rail transportation.

193. Mr Levin accepts (in paragraph 30 of his statement) that the two documents which he exhibits provide "limited information" but says that his team's search and analysis of information is continuing. This statement by Mr Levin is made almost 6 months after his internal investigation commenced during which he and his colleagues in the security department are said to have interviewed large numbers of Management's employees and representatives of contracting parties as well as collecting documents from various external sources. Other than Mr Levin's general description of the investigation, the court has not been provided with any further detail as to the steps that were taken by Mr Levin and his colleagues. However, it is surprising to say the least that over this lengthy period the considerable resources of TNK-BP were unable to produce evidence to link Mr Lazurenko to these 8 alleged payments or otherwise to back up Mr Nikolaev's allegations.

194. Mr Khan made a witness statement dated 18 September 2012. In paragraph 6 of that statement, he gave a brief account of what he said he had been told by Mr Nikolaev, namely, that Mr Lazurenko had "approached those with whom he was negotiating at companies related to Mr Nikolaev", claiming that he was acting with Mr Khan's consent and full knowledge and had "solicited significant payments" to be made in order for Mr Nikolaev's companies to do business with TNK-BP on profitable terms amounting to approximately US$8 million in cash and wire transfer payments (approximately US$4 million in wire transfers and approximately US$4 million in cash). Mr Khan then refers to the two documents exhibited by Mr Levin which were said to evidence the wire transfers and continues: "Mr Nikolaev did not clarify which particular companies and contracts were affected by Mr Lazurenko's demands, he mentioned that the problem concerned companies related to him, including Transoil".

195. In paragraph 7 of his statement, Mr Khan says as follows: "I understand that Mr Nikolaev now regrets having made these disclosures to me, because they have been used in part as the basis for the claims by TNK-BP against Mr Lazurenko and led to the criminal investigation by the Russian law enforcement authorities. … I wished to discuss this with Mr Nikolaev, but he avoids discussing any possible assistance for us in the situation with payments to Mr Lazurenko".

196. It therefore seems from Mr Khan's evidence that Mr Nikolaev is no longer prepared to cooperate with TNK-BP. It is not clear when Holding became

aware that Mr Nikolaev was no longer prepared to cooperate. Nor is it clear how or in what respect (as Mr Khan asserts) Mr Nikolaev's allegations "have been used in part as the basis for the claims by TNK-BP against Mr. Lazurenko and led to the criminal investigation by the Russian law enforcement authorities". As mentioned above, neither Mr Egorov nor Mr Deuchrass provides any detail of the Transoil allegations in the evidence placed before Sales J. They do not even mention Mr Nikolaev by name, merely referring to "the senior management of the parent company of OOO TK TransOil". The only reference to Mr Nikolaev is in paragraphs 20, 21 and 23 of the Particulars of Claim where he is identified as "Head of N-Trans" and N-Trans is incorrectly said to own TK Transoil.

197. It is apparent that there was an unexplained but discernible shift in Holding's case from that put before Sales J and clearly pleaded in the Particulars of Claim, which focused on payments Mr Lazurenko was alleged to have received from Transoil (i.e. Nikolaev Transoil), to the way the case was put in the evidence filed in response to Mr Lazurenko's statement where it was alleged that the payments came from unidentified companies related to Mr Nikolaev, including Transoil. This shift is no doubt due to the fact that once Holding received Mr Lazurenko's detailed evidence dealing with the Transoil allegations, it appreciated that its Transoil case as pleaded faced substantial problems. However, Holding's failure to identify any other companies related to Mr Nikolaev that might have made the alleged payments means that its case remains confused and unclear.

198. On 19 September 2012, Holding's solicitor, Richard Stewart, a partner at Bryan Cave, made a third witness statement to which he exhibited the consultancy report referred to and requested by Mr Lazurenko in paragraph 18 of his first witness statement. The report was by KPMG and is dated 26 July 2010 (the "**KPMG report**"). The KPMG report contains [starting at E5/38/2555] a detailed and thorough analysis of TNK-BP's rail transportation arrangements. It makes no criticisms of TNK-BP's contracts or prices and importantly it confirms Mr Lazurenko's evidence that TNK-BP did not deal with Transoil or Nikolaev Transoil at the relevant time.

199. The significance of the date of the KPMG report (July 2010) is that it falls in the middle of the period (January to December 2010) during which, according to Holding, Mr Lazurenko is alleged to have received payments from Transoil. In a table entitled "Positioning of key operators and TNK-BP's contractors", KPMG state that TNK-BP had contracts at that time with 4 of the 6 "optimal operators" identified. Transoil appears in the table, shown as having higher rates than the rates of the operators used by TNK-BP, and, importantly, not shown as one of TNK-BP's operators. KPMG refer to the fact that Transoil "fulfils the obligations of UTS to Rosneft" and to the fact that "affiliation with the oil companies and other operators reduce the desire of operators to participate in TNK-BP's tenders", giving as an example the fact that Mr Timchenko, the co-owner of Transoil, is also an owner of the oil trader Gunvor. KPMG's conclusion is that "TNK-BP is already using the optimal operators from the market perspective, i.e. NTS, BTS, TTK-Trans and Eurotrans".

200. The KPMG report is significant for three reasons. First, it contained an analysis of TNK-BP's rail transportation arrangements at the material time (i.e. midway through the period when Mr Nikolaev alleges that Mr Lazurenko is supposed to have received corrupt payments from Nikolaev Transoil). Second, it supported Mr Lazurenko's evidence that TNK-BP did not have rail transportation arrangements with Transoil/Nikolaev Transoil at that time. Third, it concluded that TNK-BP was using the optimal operators in the rail transportation market and therefore cast doubt upon the allegations made by Mr Nikolaev.

201. On the final day of the hearing (Friday 28 September 2012), I was told by Mr Moverley Smith that Holding had found two contracts between TNK-BP and Nikolaev Transoil, one from June 2010 and the other from October 2010. Both are standard form framework agreements. Mr Moverley Smith said on instructions that US$2 million of business had been done under the June 2010 contract but no business had been done (so far as TNK-BP could tell) under the October 2010 contract: [Transcript Day 5, page 4, lines 1-9]. Later that day, Holding produced a second witness statement of Mr Egorov dated 28 September 2012. Since this witness statement was produced right at the end of the hearing, I allowed Mr Kitchener to supplement his oral submissions about this evidence with written submissions filed after the hearing and also gave permission to Mr Lazurenko to respond to Mr Egorov's statement.

202. In this further statement, Mr Egorov clarified that the reference to "senior management of the parent company of OOO TK Transoil" in his affidavit before Sales J was a reference to Mr Nikolaev and that it was most unlikely TK Transoil was the company to which Mr Nikolaev was referring in his meetings with Mr Khan. He sought to explain the error on the basis that by mid May 2012 Mr Levin's internal investigation had found 25 agreements between Holding and TK Transoil which appeared to show wrongdoing by Mr Lazurenko (alleged wrongdoing which is said to have formed the basis of the criminal complaint) and that Mr Levin and his colleagues within the security department "erroneously assumed" that TK Transoil was the Transoil referred to by Mr Nikolaev. This explanation by Mr Egorov is wholly unsatisfactory. No details are given of the contracts between Holding and TK Transoil or how these could have been thought to be connected to Mr Nikolaev. Nor has any evidence been produced to show that these contracts show wrongdoing by Mr Lazurenko, whether in the rail transportation field or at all.

203. In paragraphs 103 to 110 of his first witness statement dated 6 September 2012, Mr Lazurenko gave detailed evidence about the criminal complaint and pointed out that the allegations which it appears TNK-BP has made to the Russian authorities are different from those raised in England, although this was not explained to Sales J. As mentioned above, the allegations in the criminal complaint relate to contracts for the geographical swap of oil between Transoil and TNK-BP which the complaint says were entered into between March 2010 and March 2012. The Transoil allegations in these proceedings relate to contracts for the transportation of oil by rail. This discrepancy between the Transoil allegations which form the basis of the criminal

complaint and the Transoil allegations made in these proceedings is nowhere explained by Holding.

204. Mr Lazurenko's evidence (which has not been challenged by Holding) is that the criminal complaint alleges that he gave TK Transoil, in return for corrupt payments, 50 per cent of the saving from the contracts entered into between TK Transoil and TNK-BP for the geographical swap of oil. Mr Lazurenko makes the point that this allegation is hard to follow because, as Mr Egorov has explained (in paragraphs 20 to 22 of his witness statement in the Documents Claim), it is usual in contracts for the geographical swap of oil for the two companies to split the saving 50/50. This has also been confirmed in a letter from TK Transoil to Mr Lazurenko's Russian lawyer which Mr Lazurenko has exhibited. Moreover, Mr Lazurenko points out that the total amount of allegedly corrupt payments referred to in the criminal complaint (equivalent to approximately US$31,000) is obviously a very small amount of money compared to the sum of US$8 million which TNK-BP alleges in these proceedings is what Mr Lazurenko received from Nikolaev Transoil.

205. In paragraph 11 of his second statement served on the last day of the hearing, Mr Egorov refers to Mr Levin and his colleagues having "reviewed contracts with various companies called Transoil trying to identify possible defects with contracts and also to see whether Mr Nikolaev had any involvement with such companies" and says that as a result of those enquiries, "two contracts with Nikolaev Transoil have been uncovered" dated respectively 22 June 2010 and 1 October 2010. Mr Egorov does not make clear when this review was undertaken, in other words whether it was before or after the without notice hearing before Sales J. However I gained the impression from what I was told by Mr Moverley Smith that this review was undertaken after the hearing before Sales J, quite possibly in the course of the week commencing 24 September 2012 when the hearing before me was taking place.

206. In paragraph 12, Mr Egorov says that he had spoken to Mr Levin and his colleague Mr Sergei Mikheev in Moscow that day (i.e. 28 September 2012) by telephone and Mr Mikheev had informed him that "two further contracts with Mr Nikolaev's Transoil both dated 21 December 2007 have also been reviewed by him in May 2012". So it is at least clear that Holding was aware of the 2007 contracts in May 2012 and (it can properly be inferred) had identified no wrongdoing on the part of Mr Lazurenko in relation to those 2007 contracts prior to drafting the Particulars of Claim and making its application to Sales J in August 2012.

207. In paragraph 13 Mr Egorov says as follows:

> "I must apologise for having inadvertently provided incorrect information in my affidavit. However, it is now clear that [Holding] did enter into contracts with [Nikolaev Transoil]. It is also clear that the contracts with [TK Transoil] also reveal wrongdoings by Mr Lazurenko in addition to those alleged by Mr Nikolaev."

208. Quite apart from the fact that no proper explanation has been given by Mr Egorov as to how his affidavit came to include incorrect information, his

apology is unsatisfactory in two further respects. First, he refers to it now being "clear" that Holding entered into contracts with Nikolaev Transoil but he does not say that those contracts reveal any wrongdoing on the part of Mr Lazurenko and I infer from this omission that no such wrongdoing is apparent from either contract. Second, he refers to the contracts with TK Transoil as revealing alleged wrongdoings by Mr Lazurenko when those contracts (which, as explained, form the basis of the criminal complaint) are not the subject of the pleaded allegations against Mr Lazurenko in the present proceedings and there is no proper evidence before the court as to the basis of these allegations.

209. Although Mr Moverley Smith told the court on the morning of the last day of the hearing that US$2 million of business had been done under the June 2010 contract, Mr Egorov's statement served later that day says nothing about whether any business has been done under either contract. All that Mr Egorov says is that the two contracts have been "uncovered" and that they were dated respectively 22 June 2010 and 1 October 2010. At that stage therefore (28 September 2012), it still remained the position that there was no evidence before the court of any actual business done between TNK-BP and Nikolaev Transoil, whether in 2010 or earlier. Like the 2010 contracts, the 2007 contracts are standard term framework agreements and there was no evidence that any business was actually transacted under them. There was no evidence to contradict the KPMG report which shows not only that TNK-BP did not do any rail transportation business with any Transoil company but also that the rail transportation contracts TNK-BP had concluded were with four out of the six "optimal operators". Furthermore, there was no evidence to show that Mr Lazurenko had any dealings with or relating to Nikolaev Transoil. On 1 February 2010 Mr Lazurenko ceased to have responsibility for rail transportation contracts. It is therefore likely that he had no involvement with the 2010 contracts, both of which were entered into after his change of role on 1 February 2010.

210. Following the hearing, in accordance with the permission I had given on 28 September 2012, Mr Lazurenko made a second witness statement dated 3 October 2012 in which he commented on the 2007 and 2010 contracts exhibited to Mr Egorov's second witness statement. He explained that all four contracts were framework contracts between Holding and Nikolaev Transoil in the sense that they set out the framework pursuant to which business could be done between the two companies. He said that for business actually to be done, Nikolaev Transoil would need to take part in the TNK-BP tender process and, if successful in any tender, Holding and Nikolaev Transoil would sign a short addendum to those contracts setting out the cargo to be transported, the volume, the route, the price and other key contractual terms to be agreed between the parties. Further addenda would be signed each time business was done. Mr Lazurenko said that if such addenda existed, they would be easy for TNK-BP to find but since he was not involved, he could not assist with whether Nikolaev Transoil ever actually tendered to provide rail transportation to TNK-BP pursuant to these framework contracts. His evidence is that he had not previously seen the 2010 contracts. He was not involved in their negotiation and was not aware that they had been signed. The 22 June 2010 contract was signed by Alexander Kharchenko who took over responsibility

for rail transportation when Mr Lazurenko assumed his new role on 1 February 2010. The 1 October 2010 contract was signed by Mr Kollek, head of the STL group, to whom Mr Lazurenko reported. Mr Lazurenko states that he had not seen this contract before and was not aware of it having been negotiated or signed. As far as the December 2007 contracts were concerned, Mr Lazurenko confirmed that they were signed by him and that they were also framework contracts. He could not recall whether Nikolaev Transoil had tendered to provide rail transportation to TNK-BP pursuant to these contracts and stated that to the best of his recollection no business was in fact done. He said that whilst Nikolaev Transoil (i.e. the "Transoil" referred to in the KPMG report) was one of the largest rail transportation companies, TNK-BP did not do business with it because its prices were very high when compared with its competitors. This evidence is supported by the table in the KPMG report which showed that in July 2010 Nikolaev Transoil was not one of TNK-BP's operators.

211. Although I did not give permission for Holding to file any further evidence, Holding has sought to rely on a third witness statement made by Mr Egorov dated 9 October 2012. This statement exhibits what are said to be "payment documents" in relation to the 2007 contracts and the 2010 contracts which it is said show that business was conducted between TNK-BP and Nikolaev Transoil worth about US$2.9 million in relation to the 2007 contracts and about US$1.7 million in relation to the 2010 contracts.

212. In my judgment, this evidence provides no assistance to Holding's case for a number of reasons:

212.1. It is clear that Mr Egorov did not know about these contracts at the time he made his affidavit before Sales J. The existence of these contracts and the amount of business conducted under them provides no real support for the Transoil allegations as pleaded against Mr Lazurenko.

212.2. The 2010 contracts both post-date 1 February 2010 which is the date on which Mr Lazurenko ceased to be involved in rail transportation contracts and Holding has produced no evidence to show that Mr Lazurenko had any involvement in the business conducted under these contracts, let alone that he was guilty of any wrongdoing in relation to that business. Given that he had ceased to be involved in rail transportation contracts on 1 February 2010, it is most unlikely that he had any such involvement.

212.3. Nor has Holding been able to establish any connection between the business conducted under these 2010 contracts and the wire transfers and cash payments alleged by Mr Nikolaev to have been made to Mr Lazurenko in the period from January 2010 to December 2010.

212.4. The position is even less satisfactory in relation to the 2007 contracts. There is no pleaded case against Mr Lazurenko nor evidence of any wrongdoing on the part of Mr Lazurenko in relation to the 2007 contracts. Mr Nikolaev made no allegation against Mr Lazurenko in relation to business transacted in 2007.

212.5. Finally, it is plain from the volumes of business identified in the KPMG report that the business conducted with Nikolaev Transoil under both the 2007 and 2010 contracts was extremely small by comparison to the amount of business conducted by TNK-BP with, for example, BTS, which was about US$500

million. In that context, it is not surprising that Mr Lazurenko had no recollection of TNK-BP conducting business with Nikolaev Transoil in 2007.

213. In summary, I do not regard the two statements of Mr Egorov served late as adding any support to Holding's case. On the contrary, they only serve to demonstrate the weakness of the Transoil allegations made against Mr Lazurenko.

214. So it is necessary to consider what Holding is left with in terms of evidence said to support the Transoil allegations.

215. First, there is Mr Khan's evidence that Mr Nikolaev made allegations to Mr Khan regarding Mr Lazurenko having solicited payments amounting to approximately US$8 million. As to that, Mr Lazurenko's evidence (paragraph 93 of his witness statement) is that during his meeting with Mr Khan at which Mr Nikolaev was present, Mr Nikolaev was very unclear in what he was saying and did not support these allegations. In paragraph 18 of his statement, Mr Khan says: "Mr Nikolaev did say at [the meeting with Mr Lazurenko] that he needed to check some information but my overall understanding was that Mr Nikolaev confirmed what he had said before that companies related to him, including Transoil, made payments to Mr Lazurenko". Mr Khan does not give the impression that Mr Nikolaev was precise or certain in what he was alleging. Indeed Mr Khan's reference to Mr Nikolaev needing to "check some information" only supports Mr Lazurenko's evidence that Mr Nikolaev was unclear in what he was saying. Moreover, it is clear from Mr Khan's evidence that Mr Nikolaev is no longer prepared to give any assistance to Holding.

216. The fundamental problem with this part of Holding's case is that despite several months in which Mr Levin and his colleagues within the security department investigated the position in an attempt to uncover evidence that would corroborate Mr Nikolaev's allegations, Holding has come up with nothing. It has been entirely unable to produce evidence that Mr Lazurenko did business with any of Mr Nikolaev's companies – whether Nikolaev Transoil or some other company – such as would have enabled him to receive payments of the sort alleged by Mr Nikolaev to Mr Khan. The fact that Holding has belatedly shown that Mr Lazurenko was or may have been involved in conducting a small amount of business with Nikolaev Transoil in 2007 is nothing to the point. There is no reason to believe that this business involved any wrongdoing and it was in any event conducted some 3 years before the period covered by Mr Nikolaev's allegations. The business conducted by Holding with Nikolaev Transoil in 2010 was all conducted after Mr Lazurenko had ceased to be involved in rail transportation and there is no evidence to show that he had any involvement in that business.

217. This leaves Holding with a very weak and insubstantial basis on which to put forward a case in fraud against Mr Lazurenko with regard to the Transoil allegations. Holding is left with the fact that (1) in March 2012 Mr Nikolaev made unclear and imprecise allegations regarding Mr Lazurenko and handed over two documents which reveal no connection to Mr Lazurenko and (2)

according to Mr Khan, Mr Nikolaev now regrets having "made these disclosures" and is not prepared to provide any further assistance to Holding.

218. Second, Holding relies on Mr Lazurenko's alleged confession. As to that, Mr Lazurenko gives detailed evidence (paragraphs 92-95 of his witness statement) stating that the "confession" was extracted from him through the use of threats made against him and his family by Mr Khan. Although Mr Khan denies making threats against Mr Lazurenko, his evidence confirms to a considerable extent Mr Lazurenko's account of their discussions. Mr Lazurenko's account of the "confession" is made more credible by virtue of the fact that Holding has been unable to produce any evidence to show he was guilty of having taken bribes from Nikolaev Transoil, which is the allegation to which he confessed.

219. The result of the above analysis is that Holding's case in relation to the Transoil allegations has been substantially undermined. The case concerning TK Transoil is no longer maintained and Holding has given wholly insufficient details of any alternative case. There is no proper evidence of Mr Lazurenko having received payments from Mr Nikolaev or companies connected to Mr Nikolaev over the period alleged, namely January to December 2010. The two documents produced by Mr Nikolaev evidence no wrongdoing on the part of Mr Lazurenko. Nor has Holding made any attempt to match the payments alleged to be evidenced by these documents to transactions carried out with Nikolaev Transoil under either of 2010 contracts. All but one of those payments was made after the date on which Mr Lazurenko ceased to have responsibility for rail transportation contracts and the one payment made before Mr Lazurenko took up his new role (on 19 January 2010) cannot be linked to either of the 2010 contracts which were entered into over 5 and 8 months respectively after that payment was allegedly made. I also bear in mind the compelling evidence provided by the KPMG report which shows that at the relevant time TNK-BP did not do any rail transportation business with any Transoil company and that the rail transportation contracts TNK-BP had were with four of the six "optimal operators".

220. In summary, Holding's evidence in relation to the cornerstone of its case, the Transoil allegations, is extremely weak. Its evidence filed in response to Mr Lazurenko's evidence (including Mr Egorov's statements served on the last day of and subsequent to the hearing) has done nothing to advance its case. Indeed, this evidence only serves to highlight the unsatisfactory nature of the evidence placed before Sales J. There is no proper evidence before the court as to which companies connected to Mr Nikolaev are now said to have paid bribes to Mr Lazurenko, in respect of what contracts and in what amounts and how such amounts were calculated and in return for what benefits.

The Sovfracht allegations

221. Holding's case in relation to the Sovfracht allegations is even weaker than its case in relation to the Transoil allegations.

222. In his first witness statement (paragraphs 62 to 69), Mr Lazurenko provides a convincingly detailed account of the history of TNK-BP's relationship with Sovfracht with which Holding did not take substantial issue in its witness statements in reply:

> "62 TNK-BP first awarded contracts to Sovfracht in I believe around 2006. TNK-BP should have all the documentation. Sovfracht was a small supplier of rail transportation services to TNK-BP, but TNK-BP was probably its largest customer. Sovfracht did not have many of its own railcars, but instead rented them from Gazpromtrans. This caused problems for TNK-BP, because despite assuring TNK-BP that they had access to sufficient rented railcars from Gazpromtrans, every so often Sovfracht would fail to load TNK-BP's crude oil at the relevant loading station. This caused significant problems in that TNK-BP would have to arrange on short notice alternative railcars (at extra cost) to load the crude oil or lose the capacity.
>
> 63 Initially, Sovfracht's railway business was carefully managed by Alexander Ivanov senior, who was the ultimate owner of Sovfracht with his business partner, Mr Purim. I was not personally responsible for the operational management of the contracts with Sovfracht. Mr Ivanov senior died, I believe sometime in 2007. His son, who was in his mid-20s, took over from his father in running the rail transportation business. From then on, I recall that the above problems with failing to load oil began to multiply. Mr Ivanov junior was a young man who had grown up in a wealthy family and he did not appear to have much interest in managing the business.
>
> 64 I recall the frustration of members of my department in dealing with Mr Ivanov junior. When problems arose, they would often tell me that they had tried to call Mr Ivanov junior, but that his mobile phone was switched off. When they called Sovfracht's office, Mr Ivanov junior's secretary would often say he was away from the office or abroad.
>
> 65 There were also lots of complaints from the Refinery Department and the Crude Oil Department in relation to Sovfracht. My department therefore warned Mr Ivanov junior on numerous occasions that if the problems persisted, Sovfracht's contracts would be reduced and Sovfracht might even, in accordance with TNK-BP's tender policies, be removed from the Compliance Department's tender invitation list. These warnings were repeated in official letters to Mr Ivanov. TNK-BP should have copies of these letters.
>
> 66 Alexander Kharchenko, who was responsible for rail transport in my department, suggested reducing the capacity of oil and oil products being transported by Sovfracht. When the position did not improve, he drafted a memo which he sent to the Compliance Department setting out details of all the breaches committed by Sovfracht and the consequences/loss caused to TNK-BP. He recommended that Sovfracht be removed from the tender invitation list. This step was in compliance with TNK-BP's policies and procedures. Again, this document will be in the possession of TNK-BP and I would ask them to produce it.
>
> 67 When Mr Ivanov junior learned that Sovfracht had been removed from the Compliance Department's tender invitation list, he complained vigorously and aggressively. It was explained to him that we had given him every opportunity to resolve the problems, but that he had failed to do so and that any company that regularly breaches contracts with TNK-BP is, as a matter of policy, required to be removed from tender invitation lists. It

> seemed to me that Mr Ivanov was very angry with me personally, especially as TNK-BP was probably Sovfracht's largest customer.
>
> 68 Sometime after Sovfracht was removed from the tender invitation list, Mr Khan mentioned to me that Mr Ivanov junior had alleged to Mikhail Fridman, who was then head of the AAR group, that Sovfracht had made corrupt payments to me. Mr Khan said that Mr Ivanov junior had not provided any evidence in support of his allegation and was unable to do so. Mr Khan said that he did not believe Mr Ivanov junior and told me not to worry about it. Mr Khan also confirmed to me that he was aware that Sovfracht had been removed from the tender invitation list because of all the damage it had caused to TNK-BP.
>
> 69 At no point did anyone from TNK-BP other than Mr Khan raise this allegation with me, and he raised it just on that single occasion. This allegation was never raised with me by the Legal Department, the Human Resources Department, the Security/Fraud Department or any of the committees in TNK-BP responsible for dealing with allegations of bribery and corruption. At no time was I ever told that the matter was being investigated, and I do not believe that the allegation was investigated when it was first made. I believe that this was because Mr Ivanov junior's motives in making the allegation were so clear. It seems obvious to me that he was seeking revenge for being removed from the Compliance Department's tender invitation list and that he hoped that he might be able to have me removed from my position so that (with me out of the way) he might be able to negotiate his way back onto the tender invitation list."

223. Importantly, Mr Khan's witness statement (paragraph 15) broadly accepts Mr Lazurenko's account of the allegations made by Mr Ivanov. He says as follows:

> "15. … I was supporting Mr. Lazurenko by not involving the internal security service in the allegations made by Mr. Ivanov at the time. Mr. Lazurenko's comments about TNK-BP's difficulties with companies of Mr. Ivanov are generally accurate. I should also say that I called a meeting with Mr. Lazurenko and Mr. Ivanov to allow Mr. Lazurenko to confront his accuser. Mr. Ivanov's performance at the meeting was not impressive. His story was confused and he had no documents to support his allegations." (emphasis supplied)

224. In paragraph 16 of his statement, Mr Khan confirms that Mr Lazurenko was "extremely confident and outraged at the allegations which he said were done with malice because of the bad relations he describes between himself and Sovfracht … at [paragraph] 67 of his witness statement". It therefore appears that Mr Khan accepts Mr Lazurenko's explanation for the bad relations between himself and Mr Ivanov. Although Sales J was told that Mr Ivanov's allegations were not pursued when originally made in 2008 (paragraph 37 of the Particulars of Claim), it was not explained to him that the allegations were made (as Mr Khan accepts) in the context of Sovfracht being removed from TNK-BP's tender list and Mr Ivanov being extremely upset with Mr Lazurenko as a result. I consider that Sales J may well have viewed these historic allegations (relating as they did to 2008 and earlier) in a different light had the context of the Sovfracht allegations been fully and fairly presented to him.

225. Mr Khan said that the Sovfracht allegations made in 2008 "came to mind" when Mr Nikolaev made his allegations in March 2012. Mr Levin says that the remit of his investigation was extended in May 2012 to review the Sovfracht allegations made four years earlier.

226. The evidence before Sales J with regard to the Sovfracht allegations was the affidavit of Mr Egorov, who reported the apparent conclusion of Mr Levin's internal investigations in paragraphs 19 and 20:

> "19. Mr Levin's investigations have so far uncovered that Mr Lazurenko had entered into several small contracts on behalf of Holding and then informed the management of Sovfracht that larger deals would be done if additional informal payments were made to TNK-BP's shareholders. The deal was that for each extra ton shipped, Mr. Lazurenko had to be paid a cash sum. Sovfracht agreed to this to conclude the contracts.
>
> 20. Mr. Levin's investigations showed that these payments were made in cash, and were physically handed to Mr. Lazurenko after contracts had been concluded. The sums were six figure amounts and were paid several months a year over a period of several years. Sovfracht assumed that these sums were made for the benefit of TNK-BP's shareholders. The internal investigation with regard to the other allegations made by Sovfracht are continuing and so far nothing has come to light to suggest that they are untrue." (emphasis supplied)

227. Accordingly Mr Egorov is asserting in his affidavit that Mr Levin's investigations have shown that "six figure amounts" were paid in cash to Mr Lazurenko "several months a year over a period of several years". However, the certainty of Mr Egorov's evidence to Sales J finds no echo in Mr Levin's witness statement served on 19 September 2012. In paragraphs 50 and 51, Mr Levin says this:

> "50. However, in the light of the additional data regarding Mr Lazurenko's wrongdoings set out in the present statement Mr Ivanov's allegations were reconsidered, as it became much more likely that Mr Ivanov's story is true and the Sovfracht Payments and the Transportation Payments had been solicited by Mr Lazurenko.
>
> 51. Accordingly, in April 2012 I got in touch with Mr Ivanov and his employees again. Mr Ivanov confirmed the above mentioned story he gave earlier and continue [sic] to cooperate in identifying the relevant contracts and payments. However, I understand there are no self-apparent defects on the face of contracts to easily identify the wrongdoings. I also talked to a subordinate of Mr Ivanov who said he personally delivered bags of cash to Mr Lazurenko on few [sic] occasions (at the instruction of Mr Lazurenko they met at Shatush restaurant in Moscow for this task). Mr Ivanov and the second witness are reluctant to sign witness statements these [sic] could be used against them by Russian authorities. They are only prepared to sign it, if compelled by a court or some form of immunity is given to them."

228. So, according to Mr Levin, all that happened in April 2012 is that Mr Levin "got in touch with" Mr Ivanov who confirmed his earlier story. Mr Levin has not disclosed any notes of his conversations with Mr Ivanov. He refers to Mr Ivanov cooperating with him in identifying "the relevant contracts and payments", but he produces no documents and provides no specific

information in relation to those contracts or payments. All he says is that "there are no self-apparent defects on the face of the contracts to easily identify the wrongdoings". Presumably this is because the prices of the contracts have been checked and are consistent with market prices. The only further information given by Mr Levin is that he has talked to an unnamed "subordinate of Mr Ivanov" who, like Mr Ivanov, refused to sign a witness statement and says that "on [a] few occasions" he delivered "bags of cash" to Mr Lazurenko.

229. This evidence of Mr Levin is difficult to reconcile with Mr Egorov's evidence before Sales J and also with Mr Egorov's statement in the Documents Claim, where he said that the investigations had revealed that payments from Sovfracht had "ranged from US$100,000 to US$300,000, and were paid every 1-3 months". No such detail is provided by Mr Levin. It can properly be inferred that Mr Levin was unable to substantiate Mr Egorov's allegations. All in effect that Mr Levin says is that Mr Ivanov confirmed his earlier story. This is unconvincing, given that Mr Khan describes that earlier story as having been "not impressive" and "confused".

230. Mr Lazurenko explains in convincing detail in paragraphs 54 to 56 of his first witness statement why the Sovfracht allegations are difficult to understand and make no sense. His evidence (which Holding did not challenge) was that Sovfracht only entered into small contracts with TNK-BP and made little profit from them. He did not believe that Sovfracht made the sort of profit that would have made it commercial to make payments to him (or anyone else) of the amounts alleged. Profit margins for rail transportation companies were very low. He points out in order to manipulate the tender process in the way Holding suggests, he would have had to involve every potential bidder in this collusion. He says that Holding could be assumed to have examined the tender process in detail but no evidence has been given by any of Holding's witnesses indicating that anything improper took place. It ought to have been easy to see whether all of these companies had made suspicious bids so that each one bid the lowest in specific areas. Again, either there have been no investigations or the allegations have not been supported by the results of the investigations.

231. Mr Lazurenko also explained how TNK-BP's tender policies and procedures were aimed at preventing corruption. Every quarter, the Security Department sent invitations to tender to the companies on the list of approved rail companies held by the Compliance Department. The Compliance Department was controlled by the Chief Financial Officer. To be recommended for inclusion in the Compliance Department's tender list, rail transport companies had to comply with certain TNK-BP policies/requirements (which included, amongst other things, (i) owning no less than 1,000 railcars or renting on a long term basis the same minimum number of railcars, and (ii) not working for TNK-BP's competitors). Mr Lazurenko recalled that at any time there were roughly 10 to 12 rail companies on the Compliance Department list. The invitation to tender would give details of the many required 'directions' (or "routes") and invite tenders to be sent, by the cut off time and date, to a special fax number and email address controlled solely by the Security Department. The Security Department would receive the tenders, make sure they were in

order and received by the cut off time and date. The Security Department would then forward the tenders to the Logistics Department who would analyse the tenders and work out the cheapest offers. That information would then be used to finalise the arrangements. The telephone lines of the Logistics Department were recorded and monitored. Before any contracts could be signed, they had to be approved by the Compliance Department, the Commercial Department and the Legal Department who would check the tender documentation to ensure that the tender had been conducted in accordance with the company's policies and procedures. Mr Lazurenko stated that it was impossible for him to instruct companies "how to bid so as to achieve the desired result", when the tenders went only to the Security Department who (only once the time for receipt of tenders had ended) would hand all the tenders to the Logistics Department. He denied that he had ever caused TNK-BP to overpay suppliers.

232. Holding does not suggest that this explanation of the tender process is wrong. Mr Egorov suggests in paragraph 75 of his first witness statement (dated 19 September 2012) that the process could have been manipulated by Mr Lazurenko involving all actual and potential bidders before the bidding process began. But for the reasons given by Mr Lazurenko, he is exceedingly unlikely to have done this or to have been able to do this. No doubt this is why, when Mr Ivanov first made the Sovfracht allegations in 2008, Mr Khan considered them to be unimpressive and confused. Nothing has emerged in the subsequent four years to make Mr Ivanov's allegations any more convincing. Moreover, for the reasons explained by Mr Lazurenko in paragraphs 62 to 69 of his first witness statement, Mr Ivanov had a motive for making these allegations against Mr Lazurenko, namely that Sovfracht had been removed from TNK-BP's tender invitation list. Mr Khan does not take issue with any of this evidence. On the contrary, he specifically agrees that Mr Ivanov's account of Mr Lazurenko's alleged fraud, when first made in 2008, was rejected because it was unimpressive, confused and unsupported by any documents. This fact, combined with (1) Mr Levin and his team's inability to discover any evidence of wrongdoing on the part of Mr Lazurenko despite carrying out an investigation into the Sovfracht contracts and payments identified by Mr Ivanov and (2) Holding's inability to provide a plausible explanation of how the Sovfracht fraud is alleged to have been committed in the context of Mr Lazurenko's detailed explanation of the tender process, provides Holding's case on the Sovfracht allegations with an extremely weak and insubstantial foundation.

The Transportation Payment allegations

233. The Particulars of Claim allege:

> "It was further alleged by Sovfracht that other transportation companies had also been solicited by Mr Lazurenko to make similar payments over an extended period of time. [33]
>
> … in the light of the Transoil Payments, it is to be inferred that Mr Ivanov's allegations were true and that the Sovfracht Payments and the Transportation Payments had been solicited by Mr Lazurenko [38]"

234. So the Transoil allegations are relied on as the basis for an inference that the allegations regarding the Sovfracht Payments and Transportation Payments are true. In paragraph 23 of his witness statement in the Documents Claim, Mr Egorov referred to Sovfracht's allegations about the Sovfracht payments but not to the suggestion that Sovfracht made allegations in respect of payments to other companies. The allegations in respect of the Transportation Payments were made for the first time in the vaguest terms in Mr Egorov's affidavit in support of the freezing order. All he said in relation to those allegations (at paragraph 20) was that: "The internal investigations with regard to the other allegations made by Sovfracht are continuing and so far nothing has come to light to suggest that they are untrue." It is not at all clear what Mr Egorov means by this statement. He provides no detail whatever to support the allegations. Not surprisingly Mr Lazurenko is unable to respond to them other than by way of bare denial.

235. Mr Deuchrass' affidavit that was before Sales J is even less clear in relation to the Transportation Payment allegations. At paragraph 13, he says this:

> "As set out at paragraphs 32 to 40 of the Particulars of Claim, the allegations concerning the Transoil Payments reminded Mr Khan of earlier allegations of Mr Lazurenko's wrongdoing involving other transportation companies including Sovfracht. The payments received by Mr Lazurenko in this context are referred to in the Particulars of Claim as the "Sovfracht Payments". I refer to paragraphs 17 to 20 of Mr Egorov's witness statement in this regard."

236. So with his passing reference to "other transportation companies" and cross-reference to the Particulars of Claim and paragraph 20 of Mr Egorov's affidavit, Mr Deuchrass' evidence adds nothing.

237. Mr Levin's evidence in relation to the Transportation Payments is equally unsatisfactory. In paragraph 45 of his first statement, he refers erroneously to Mr Ivanov having alleged that "for several years prior to 2010" (when Holding accepts that Sovfracht were removed from TNK-BP's tender list in 2008) cash payments were made to Mr Lazurenko totalling more than US$5 million and then states: "It was further alleged by Sovfracht that other transportation companies had also been solicited by Mr Lazurenko to make similar payments over an extended period of time." This is identical to the text of paragraph 33 of the Particulars of Claim. Mr Levin does not identify the individual who provided the source of the information or give any basis for it. He does not say whether he asked Mr Ivanov or anyone else for any details and, if so, what details he asked for and whether they were provided. This is all the more surprising given that Mr Levin claims in paragraph 14 of his statement to have conducted a large scale investigation into these allegations over several months before the proceedings were issued (from May 2012 onwards). Mr Levin says nothing about what he did or what he found out. In my judgment, it can properly be inferred that the investigations produced nothing to support Holding's case because had there been any evidence of wrongdoing it is obvious that Holding would have wanted to include it in the evidence.

238. This being so, I accept Mr Kitchener's submission that the case presented to Sales J in relation to the Transportation Payment allegations was misleading. If extensive investigations revealed nothing to support Holding's case, then Sales J ought to have been told this in terms. Instead, at p.8 lines 9-14 and p.10 line 23 – p.11 line 14 [C/16/169-170], Sales J was referred by Mr Moverley Smith to paragraphs 34 and 35 of the Particulars of Claim which gave Mr Ivanov's version of how the tender process had been manipulated by Mr Lazurenko (allegations subsequently addressed in detail by Mr Lazurenko and not rebutted by Holding) and was told that

> "an investigation was carried out by TNK-BP to try and understand what had happened. … They have not yet established the manipulation of the tender price exactly in the terms described by Mr Ivanov" … "so far that has not been established by Mr Levin in those terms… What Mr Ivanov alleges in paragraph 34 and 35 [of the Particulars of Claim] is that there was a manipulation of the tender process, replacing [sic] a transportation contract not only with Sovfracht, but also with other transportation companies. Therefore, that the fraud was on a much wider basis." (emphasis supplied)

239. Sales J then asked whether the "much wider" fraud (i.e. including the other transportation companies) had been valued and was told it had not but that Holding was working from the other end because of the assets held in Mr Lazurenko's name. The suggestion being made to Sales J was therefore that the "much wider" fraud involving other transportation companies, although as yet unquantified, provided an explanation for the discrepancy between the total alleged value of the Transoil and Sovfracht payments (namely US$13 million) and the level of the freezing order at that stage being sought by Holding (€69 million). Sales J was unaware that Holding (through Mr Levin) had had ample opportunity to investigate Mr Ivanov's allegations in relation to other unidentified transportation companies and had failed to produce any evidence to support it. I agree with Mr Kitchener's submission that Holding's failure in these circumstances to find any evidence corroborating its case strongly indicates that its case is wrong and that its presentation of the case to Sales J with regard to the Transportation Payment allegations was misleading.

240. For completeness, I should add that on the fourth day of the hearing, 27 September 2012, I asked Mr Moverley Smith whether there had been an investigation by an external body such as KPMG to see whether or not it is possible that inflated prices were paid. I was told that no such investigation had yet taken place but that the scope of an investigation being conducted under the direction of Lord Robertson of Port Ellen (one of the four BP-nominated directors of TNK-BP Limited) as Chairman of TNK-BP Limited's Audit Committee was being widened in order to address not only the allegations made by Mr Lazurenko against Mr Khan but also the Sovfracht allegations. On 1 October 2012 (after the hearing had concluded) I received a letter from Linklaters who act for BP Russian Investments Limited ("**BP**"), a 50% shareholder in TNK-BP Limited (the ultimate parent company of the TNK-BP Group), informing me that the correct position as regards the investigation is that there is as yet no ongoing investigation being conducted under the direction of Lord Robertson because the terms of reference for the investigation (including the extent to which Holding's previous investigation

into the allegations against Mr Lazurenko would be reviewed and verified as part of the investigation under the direction of the Audit Committee) had yet to be agreed. Linklaters further stated that the delay had principally been caused by the continued insistence of the nominated directors of AAR (the other 50% owner of TNK-BP Limited) on the Audit Committee as to the appointment of particular law firms to conduct the investigation which BP did not consider to be appropriately independent. As a result of being copied into Linklater's letter, further correspondence followed from both Bryan Cave and Mishcon de Reya. I do not consider that these exchanges advance matters. They merely confirm what I had previously understood to be the case, namely that Mr Levin's investigations into the allegations made by Mr Ivanov have not been reviewed at a higher level within TNK-BP.

The inference from Mr Lazurenko's alleged ownership of assets

241. Holding seeks to shift the focus away from the unsatisfactory results of its internal investigations and to focus instead on Mr Lazurenko's failure to provide evidence to show that he does not own the Montenegrin assets. Holding's case is based on inference. It is said that because Holding has an arguable case that Mr Lazurenko is the beneficial owner of the Montenegrin properties, and because Mr Lazurenko's income from his employment by Management was insufficient to enable him to purchase those properties and certain Russian properties, it must also have an arguable case that he defrauded Holding.

242. The strength of this argument depends on my evaluation of the evidence as a whole. If Holding has failed to establish a properly arguable case in relation to the Transoil, Sovfracht and Transportation Payment allegations, this gives more credibility to Mr Lazurenko's case that Mr Scheklanov is the beneficial owner of the Montenegrin properties. The mere fact that (as Mr Kitchener has accepted) Mr Lazurenko is arguably the beneficial owner of the Montenegrin properties, and that his family owns certain Russian properties, does not establish that the source of the monies used to purchase those properties is some wrong committed against Holding. So far as the Montenegrin properties are concerned, this is illustrated by the fact that the ultimate beneficial owner of BJUK had more than €25 million prior to Mr Lazurenko's employment by Management (as is evidenced by the letter from UBS dated 26 July 2002). Someone with at least that amount of wealth in 2002 might be in a position to generate returns that allow an investment over 10 years or so of €64 million. This is particularly the case in the light of Holding's evidence that the €50 million odd invested in the Montenegrin hotels is now worth €320 million.

243. Moreover, even though Mr Kitchener is right to accept that Holding has an arguable case that Mr Lazurenko is the beneficial owner of the Montenegrin properties, I cannot ignore the fact that Mr Scheklanov has signed a detailed witness statement supporting Mr Lazurenko's case that he (Scheklanov) is the beneficial owner of those properties. In paragraphs 7 and 8 of his statement, Mr Scheklanov gives reasons for wanting to keep his affairs private. In paragraphs 10 to 16, he gives a detailed account of his business interests which he believes to be in the public domain from which it is apparent that he has

considerable wealth. If Mr Scheklanov was falsely claiming to be extremely wealthy, Holding would be expected to be able to show this. I therefore see no reason not to accept at this stage that Mr Scheklanov was sufficiently wealthy to be able to invest substantial sums in the Montenegrin properties.

244. In paragraph 20 of his statement, Mr Scheklanov gives details of the business his companies have done with TNK-BP and how he is known to Holding. In paragraph 21, he explains that he and Mr Khan were involved in a significant dispute in 2010 in England and Russia. This dispute concerned Mr Scheklanov's interest in Specialised Seaport Vitino (a company specialising in storage and transhipment of petroleum). According to Mr Scheklanov, A1 group (in which Mr Khan is one of the shareholders) sought unsuccessfully to claim an interest in Specialised Seaport Vitino through allegedly secret agreements entered into with one Mukhtar Ablyazov.

245. Mr Khan has served no evidence to contradict Mr Scheklanov's account of his prior dealings with TNK-BP or of Mr Scheklanov's personal dispute with him. He merely says (in paragraph 23) that whilst he has no recollection of Mr Lazurenko making any reference to a "Sergey" (ie Mr Scheklanov) at their meeting with Mr Becirovic on 11 April 2012, he may have done so.

246. Holding relies on the fact that Mr and Mrs Lazurenko appear to have been involved with various of the off-shore companies that now own the Montenegrin assets before Mr Scheklanov was introduced to the projects in 2002. I do not regard this as particularly significant. According to both Mr Lazurenko and Mr Scheklanov, Mr Lazurenko brought the opportunities to Mr Scheklanov and was responsible for setting up the schemes and running them. It would not be surprising if Mr Lazurenko used off-shore companies with which he was already associated as vehicles for the projects.

247. Mr Scheklanov's evidence is that in April 2012, as soon as he became aware of the breakdown of the relationship between Mr Lazurenko and Mr Becirovic (which is about the time that Mr Lazurenko became aware that Mr Becirovic had spoken to Mr Khan, even though Mr Becirovic had approached Mr Khan in September 2011, some six months earlier), he became actively involved and telephoned Mr Becirovic to explain that he was the investor to whom Mr Lazurenko had referred when he spoke about a silent investor. He subsequently contacted Mr Khan, Mr Egorov and Mr Maydannik (Chief Legal Officer at Management) and had without prejudice conversations with them as part of efforts to resolve the dispute.

248. Mr Moverley Smith points to the absence of any documents produced by Mr Scheklanov to support his contentions and to the curious fact that (on Mr Scheklanov's own case: paragraph 26 of his statement) he and Mr Lazurenko did not correspond with one another or exchange emails but instead met regularly face to face in Moscow. Nevertheless, Mr Egorov acknowledges (in paragraph 63 of his first witness statement) that Mr Scheklanov's desire for anonymity described in paragraphs 7 and 8 of his witness statement "may be true". In the context of the cut-throat business environment described by Mr Scheklanov and Mr Khan in their statements, it is perhaps understandable that Mr Scheklanov is wary of disclosing details of his assets or of giving more

information in the context of court proceedings than he is obliged to do. Mr Egorov accepts (in paragraph 66 of his first statement) that "there are a number of individuals in Russia who offer their services as 'front men' for a fee. People who wish to hide their ownership of assets or earnings make use of these individuals". That is precisely the relationship which Mr Lazurenko and Mr Scheklanov say they had with each other. Mr Becirovic was not in the least troubled by the idea that he was dealing with Mr Lazurenko as a representative of an investor who wished to remain entirely "silent". Nor is there any suggestion by Holding that there is anything unusual or untoward about Mr Scheklanov using someone to manage certain of his property investments.

249. For the above reasons, I regard the fact that Holding has an arguable case that Mr Lazurenko is the beneficial owner of the Montenegrin properties as an insufficient basis on its own for establishing an arguable case of wrongdoing against Mr Lazurenko.

250. As to the six Russian properties, Mr Lazurenko has given a detailed account of the circumstances in which these properties were acquired in paragraphs 125 to 130 of his first witness statement (which is corroborated by Mrs Lazurenko in paragraphs 14 to 16 of her witness statement). Holding has not been able to contradict the evidence of Mr and Mrs Lazurenko which is that these properties are owned by members of the Lazurenko family and were purchased at various times between 1997 and 2008 for sums provided by either Mr Lazurenko or his mother in law or his brother in law. In paragraph 25 of his statement, Mr Levin states that the Russian properties owned by Mr Lazurenko's wife, son and mother in law are now worth approximately US$25 million and continues: "According to our data all the above-mentioned members of Lazurenko's family are and have been his dependants and during the whole relevant period did not have any material income." Presumably Mr Levin's "data" would have also disclosed the dates on which the properties were acquired, and for what amounts, with the result that I can infer no issue is taken by Holding with the dates and amounts detailed in Mr Lazurenko's statement.

251. In paragraph 22 of his statement, Mr Lazurenko states that over his nine years of employment at Management, he was very highly paid and, other than the board of directors, he was probably in the top 15 highest earners in the company. He gives details of his annual earnings over the years 2009, 2010 and 2011 as being approximately US$1.7 million, US$1.45 million and US$2 million respectively. This is accepted as correct by Mr Levin whose only qualification is that this is income before tax. Mr Levin also states that during his period of employment with Management between 2003 and 2012, Mr Lazurenko received income, including bonuses, in the total amount of approximately US$10 million. Accordingly I do not have any difficulty accepting Mr Lazurenko's evidence that he was well paid and was in a position to assist in the purchase of some of these Russian properties. Equally, Mr Lazurenko's evidence that he thought he might be permitted by his wife and son to sell two of the properties as an alternative to his being sent to prison (which is what Mr Khan accepts he had told Mr Lazurenko was in prospect) does not mean that he is the true owner of those properties and, even if he

were, it does not demonstrate that the properties were purchased with monies that had been corruptly obtained by him.

252. Holding's evidence on its without notice application to Sales J relied to a considerable extent on the inference that Mr Lazurenko's substantial property empire could not be explained by reference to his legitimate income. Holding did not disclose information (which was clearly available to it) that would have interfered with that picture, such as the amount of Mr Lazurenko's income from Management, the dates on which the Russian properties were acquired and for what amounts. Thus, Mr Deuchrass (in paragraph 22.7 of his affidavit) refers to the "current value" of the Russian properties as being approximately US$25 million. The evidence filed by Holding since the without notice hearing is in the same vein. As mentioned above, Mr Levin repeats the US$25 million figure in his statement signed on 19 September 2012. Two days later, on 21 September 2012 (being the Friday before the hearing started on the Monday 24 September), Mr Stewart of Bryan Cave produced a fifth witness statement to which was exhibited a valuer's report which purported to justify Holding's estimated valuation of the Russian properties.

253. This valuation evidence is unsatisfactory for a number of reasons. The valuer has not visited or measured any of the properties. He relies upon "data provided directly by [Holding]" but does not say what that data is. The report says that its values "may differ substantially from the results of a full and formal valuation report". The aggregate acquisition cost is given as between US$24 million and US$33 million. However, the properties were purchased in 1997, 2003, 2006, 2007 and 2008 and Mr Deuchrass' and Mr Levin's evidence is that they are all worth approximately US$25 million as at today's date. If the properties are worth US$25 million now, then it cannot be correct that they were bought for between US$24 million and US$33 million between 1997 and 2008. Nor does the valuer comment on Mr Lazurenko's evidence that it is generally known that the Russian property prices have increased dramatically over the past 10 years or so. So, for example, Mr Lazurenko refers to an article in The Telegraph dated 2 November 2011 which talks of a 6 fold increase in value from 2003 to August 2011 and a 27.5% increase in value from January 2010 to August 2011. Accordingly, if (which Mr Lazurenko does not accept) the properties are worth US$25 million now, they would have been bought for considerably less than that sum between 1997 and 2008.

254. Whilst this valuation evidence only has very marginal relevance in the context of the matters I have to consider in this judgment, it is an illustration of the extremely weak evidence that Holding now relies upon (and, in the case of Mr Deuchrass' affidavit, relied upon in front of Sales J) in order to justify the grant of draconian interlocutory relief.

The claim against Mrs Lazurenko

255. It is Mr Lazurenko's evidence (paragraphs 92, 94 and 95) that at meetings in Mr Khan's room at the end of March or beginning of April 2012, Mr Khan threatened what he described as "strong action" against him and his family and also asked him if he knew what AAR had done to Viktor Paliy. Mr Khan

accepts (paragraph 20) that he told Mr Lazurenko he should think about his family and that Mr Paliy could have been mentioned as an example of TNK-BP's "consistent pursuing of the people who commit fraud against the company". He says (paragraph 27) that he was pointing out the consequences for the family if Mr Lazurenko was arrested and imprisoned.

256. I bear this evidence in mind when considering the circumstances in which Mrs Lazurenko has been joined into these proceedings and made the subject of a worldwide freezing order.

257. For Mrs Lazurenko to be liable to Holding in tort in Russian law she must herself have caused harm to Holding. The Particulars of Claim do not contain any properly particularised plea that Mrs Lazurenko personally received any proceeds of bribes. Even if she had done so, there is unlikely to be any claim against her in unjust enrichment for the reasons given by Professor Maggs in his first report at paragraph 67 and supported by the decision of Andrew Smith J in Fiona Trust at [119]. The suggestion that she holds (unidentified) property on constructive trust is not properly particularised. In any event, as stated above, the experts are agreed that Russian law does not recognise the concept of a constructive trust: Maggs 1/39-42 and Rozenberg 1/160 (and found by Andrew Smith J in Fiona Trust at [84]).

258. What is pleaded against Mrs Lazurenko in paragraphs 112-115 of the Particulars of Claim is a claim in conspiracy, namely, that she was knowingly involved in a fraudulent scheme and that this is to be "inferred from the level and nature of [her] involvement in the corporate structure designed as a conduit for her husband's fraudulent misappropriation from Holding".

259. Whilst it is not possible to reach any firm conclusions on the evidence at this stage, I am bound to say that Holding's evidence as to the "level and nature" of Mrs Lazurenko's involvement in the creation of a corporate structure designed as a conduit for her husband's fraud is unimpressive. Mrs Lazurenko is a director of Trockley and a former director of Adelaide. She says she was asked by her husband to be a nominal director of those companies and her role was in being available to sign documents. She suggests that it is inherently unlikely that Mr Lazurenko would have taken the risk of having his wife's name on publicly accessible registers of directors if he was using the companies to commit a fraud.

260. Apart from the fact that she is a director of Trockley and former director of Adelaide, Holding relies on paragraph 39 of Mr Becirovic's statement where he says that Mrs Lazurenko attended a meeting with her husband about the architectural design of the Avala hotel. Mrs Lazurenko's evidence is that she met with Mr Becirovic socially in the company of her husband and visited the hotels in Montenegro with him. She confirms that she offered her views on the interior design of the hotels on the occasions that she visited them. This is hardly strong evidence that Mrs Lazurenko was heavily involved in "the corporate structure designed as a conduit for her husband's fraudulent misappropriation from Holding".

261. The factual allegations against Mrs Lazurenko are therefore extremely weak. However, the major problem with Holding's case against Mrs Lazurenko is that I do not consider there is any averment in the pleading (or any evidence) that would establish any proper claim against her in Russian law. There is no properly pleaded claim against her in unjust enrichment under Article 1102 of the Civil Code. Nor is there any viable claim against her for joint liability under Article 1080 (see paragraphs 145-147 above). Nor does Mr Rozenberg say that there is any arguable case against her.

The claim against Mr Scheklanov

262. The principles of Russian law applicable to the case against Mrs Lazurenko apply with as much force to Mr Scheklanov. Mr Rozenberg does not suggest that there is any arguable case against him as a matter of Russian law.

263. Holding's main claim as set out in the Claim Form is that all the Defendants, including Mr Scheklanov, participated in a single conspiracy under which Mr Lazurenko took corrupt payments. In paragraph 103 of the Particulars of Claim it is alleged that Mr Scheklanov and the other Defendants participated in a "corporate structure which was used as conduit for fraud". However, Holding's case is that the structure was established entirely for Mr Lazurenko's benefit and that Mr Scheklanov has nothing to do with that structure and nothing to do with the underlying Montenegrin investments.

264. Paragraph 103 of the Particulars of Claim also alleges that Mr Scheklanov participated in the structure dishonestly "in the knowledge that the Transoil Payments, the Sovfracht Payments and the Transportation Payments" had been paid in breach of Russian Criminal and Civil Codes. Yet Holding has produced no evidence to show that Mr Scheklanov knew anything about these payments. He is not alleged by Holding to have become involved in any wrongdoing until April 2012 when he contacted Mr Becirovic and Mr Khan to identify himself as the silent investor.

265. It was apparent from Mr Moverley Smith's submissions in the hearing that the case now made against Mr Scheklanov is that he has kept Holding out of its property and caused Holding to incur costs. This is not easy to understand as a claim against Mr Scheklanov. To the extent that Mr Scheklanov is the true owner of any of the properties, there can obviously be no allegation that the properties are in any way connected to any wrongdoing committed against Holding. The inference of wrongdoing against Mr Lazurenko is based on the allegation that Mr Scheklanov is not the true owner of any of the assets.

266. It is therefore difficult to see how Holding's claim against Mr Scheklanov can succeed on the facts, even if it were able to establish (which in my view it cannot) that it had a claim against him in Russian law.

The claim against Mr Telser

267. The above principles of Russian law apply equally to the claim against Mr Telser. Mr Rozenberg does not suggest that there is any arguable case against Mr Telser as a matter of Russian law.

268. Paragraphs 108 and 109 of the Particulars of Claim make unparticularised allegations that Mr Telser acted dishonestly and with knowledge that payments had been obtained in breach of the Russian Civil and Criminal Codes and dishonestly conspired to defraud Holding, notwithstanding that his earliest alleged involvement was 15 October 2010 (paragraph 107 of the Particulars of Claim). It is alleged that Mr Telser and the other Defendants participated in a "corporate structure which was used as conduit for fraud" and that Mr Telser participated in the structure dishonestly "in the knowledge that the Transoil Payments, the Sovfracht Payments and the Transportation Payments" had been paid in breach of Russian Criminal and Civil Codes. As with Mr Scheklanov, there is no evidence that Mr Telser (who became a director of BJUK on 15 October 2010) knew anything about these payments.

269. In paragraph 51 of Mr Stewart's first witness statement dated 10 August 2012, he says that Mr Telser is a necessary or proper party "by reason of his position as sole director of BJUK". It was apparent from Mr Moverley Smith's submissions in the hearing before me that the case made against Mr Telser is that, like Mr Scheklanov, he was a co-conspirator who has kept Holding out of its property and caused Holding to incur costs. This is not easy to understand as a claim against Mr Telser. There are no particulars of the allegations made against Mr Telser to support this submission and no identification of any acts by Mr Telser or any consequences or damage flowing from them which might be said to establish a claim against Mr Telser. Nor is there any allegation that Mr Telser has received any of the funds.

270. The evidence of Russian law discussed above establishes that Holding is unable to assert a proprietary claim against Mr Telser or, even if it could assert such a claim, that it could then trace property into the hands of Mr Telser. Moreover, it is wholly unclear how Holding is able to maintain a claim in Russian law that Mr Telser could be liable as a director of BJUK.

271. On Holding's without notice application, no argument was addressed to Sales J as to how or why Mr Telser should be a necessary or proper party to the alleged cause of action relied upon against BJUK (Mr Telser is not even referred to in Holding's skeleton argument), nor did Holding address the court on any relevant law in relation to such an alleged cause of action.

The claim against the corporate Defendants

272. Holding's tort claim against the corporate Defendants (which include the "anchor" defendant BJUK) suffers from the same difficulties as the tort claim against Mrs Lazurenko, Mr Scheklanov and Mr Telser. Mr Rozenberg does not suggest that there is a tort claim against the corporate Defendants under Russian law. However, for the reasons given in paragraph 163 above, I am

unable to reach a concluded view on the issue of whether Holding has a claim against the corporate Defendants under Article 1102, although I have difficulty in understanding how it is alleged that the corporate Defendants have received the property of Holding or that Russian law enables Holding to trace the property of Holding to the receipts of the corporate Defendants.

273. It is also difficult to ascertain what claim Holding has against the corporate Defendants for loss. On Holding's case, the corporate defendants were no more than the means by which the alleged proceeds of wrongdoing were deployed. There is no suggestion that, but for anything done by the corporate Defendants, Holding would now be better off.

274. Furthermore, I have already held that as a matter of Russian law the participation of the Defendants other than Mr Lazurenko in a corporate structure used as a conduit for a fraud already alleged to have been committed by Mr Lazurenko is unlikely to make them liable to Holding as joint tortfeasors under Article 1080 of the Civil Code. Given that Holding does not (and is unable to) allege that the other Defendants played any part in Mr Lazurenko's original alleged wrongdoing, it is not presently clear to me what separate claims or remedies would be available to Holding against those Defendants as a matter of Russian law.

275. Nevertheless, I have concluded (for the reasons given in paragraph 163 above) that it is not appropriate to reach a concluded view at this stage on whether, as a matter of Russian law, Holding has a claim against the corporate Defendants in unjust enrichment under Article 1102 of the Civil Code.

Conclusion on serious issue to be tried

276. As stated in paragraph 72 above, in order to obtain permission to serve proceedings out of the jurisdiction on foreign defendants, Holding must satisfy the court that, in relation to those foreign defendants, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim.

277. So far as the claim against Mr Lazurenko is concerned, for the reasons given above, I consider that the factual basis of the claim is weak and that the claim has a fragile basis in Russian law. However, I cannot say at this stage in the proceedings that this claim has no real prospect of success such that the court is able to give reverse summary judgment in Mr Lazurenko's favour.

278. I therefore conclude that Holding has established a serious issue to be tried in relation to the claim against Mr Lazurenko.

279. So far as the claim against the corporate Defendants is concerned, for the reasons given, the factual and legal basis of the claim is also weak. However, I cannot say at this stage in the proceedings that this claim has no real prospect of success such that the court is able to give reverse summary judgment in the corporate Defendants' favour at this stage of the proceedings.

280. I therefore conclude that Holding has established a serious issue to be tried in relation to the claim against the corporate Defendants.

281. So far as the claims against Mrs Lazurenko, Mr Scheklanov and Mr Telser are concerned, I consider that the factual basis of these claims is weak and that they have no real prospect of success under Russian law.

282. I therefore conclude that Holding has not established a serious issue to be tried in relation to its claims against Mrs Lazurenko, Mr Scheklanov and Mr Telser.

The second requirement: has Holding established a good arguable case that its claim falls within one of the "gateways" to jurisdiction in Practice Direction 6B?

283. It is plain that BJUK has been sued as anchor defendant solely for the purpose of bringing in the other Defendants as necessary or proper parties to the claim and thus ensuring that the claim falls within one of the "gateways" to jurisdiction. However, as Lord Collins said in AK Investment at [79] this is a factor in the exercise of discretion and not an element in the question whether the action is properly brought against the anchor defendant, provided there is a viable claim against the anchor defendant.

284. I have concluded that Holding has (just) established a viable claim against BJUK. I have however held that Holding has not established a serious issue to be tried in relation to its claims against Mrs Lazurenko, Mr Scheklanov and Mr Telser so it is not appropriate to give Holding permission to serve the claim against them out of the jurisdiction since they are plainly not necessary or proper parties to the claim against BJUK.

285. I must therefore consider whether Holding has a much better argument than Mr Lazurenko and the corporate Defendants other than BJUK that the court should give leave to serve the claim on them out of the jurisdiction on the basis that they are necessary or proper parties to the claim against BJUK.

286. Essentially for the reasons given below in relation to the third requirement, I am not satisfied that it is appropriate to exercise my discretion in favour of allowing Holding to serve the claim on Mr Lazurenko and the corporate Defendants other than BJUK out of the jurisdiction. Holding has not satisfied me that BJUK played any part in the events said to give rise to the allegations of fraud against Mr Lazurenko. Even if it may be said that the arguable existence of a restitutionary claim against BJUK means that the claims against Mr Lazurenko, BJUK and the foreign corporate Defendants involve one investigation, I prefer the Applicants' submission that such investigation is better pursued in Russia and the claims tried before a Russian court.

287. I therefore conclude that Holding has not established a good arguable case that its claim falls within one of the gateways to jurisdiction in Practice Direction 6B.

The third requirement: is England clearly and distinctly the appropriate forum and is it appropriate in all the circumstances to permit service out?

288. Very little was said at the without notice application before Sales J as to why England was the appropriate forum for this dispute. The only mention in the evidence was paragraph 56 of Mr Stewart's first witness statement where he said as follows:

> "56. [Holding]'s claim involves three Russian citizens, a Liechtenstein citizen, several companies incorporated in the BVI or Nevis, an Arkansas company, an English company and a Russian company. The claim centres in large part on assets held by the Corporate Defendants in Montenegro. Nevertheless, England is the proper place to bring the claims because (a) BJUK, an English company, is the centre piece of the elaborate structure created by Mr. Lazurenko; (b) Mr. Lazurenko has fled to England; (c) the Caldero Proceedings which concern many of the same issues as these proceedings are already before the English court; and (d) given the multiplicity of the places of incorporation or nationality of the parties there is no obvious alternative forum."

289. Holding therefore relied before Sales J on essentially four factors: (1) BJUK being an English company and the "centre piece" of Mr Lazurenko's corporate structure; (2) Mr Lazurenko having fled to England; (3) the Caldero claim having been commenced in England and (4) the multiplicity of places of incorporation and nationalities meaning there was no "obvious alternative forum".

290. Mr Lazurenko addressed the question of whether England was the proper forum for this claim at the end of his first witness statement dated 6 September 2012. He said at paragraphs 148-158:

> "148. I have instructed my lawyers to challenge the jurisdiction of the English Court to deal with the TNK-BP Claim and the Documents Claim. I do not even understand how TNK-BP can claim that these matters should be dealt with in an English Court given that my employment contract with Management makes clear that disputes will be addressed in Russian law and in the Russian courts. I am Russian. TNK-BP is a Russian company. The companies that have allegedly made corrupt payments to me are Russian. The corrupt payments are alleged to have been made in Russia and allegedly relate to contracts entered into in Russia. The witnesses are all Russian. There is no connection with England. I will return to Russia to fight these allegations along with the criminal allegations (if they are pursued).
>
> 149. Given that TNK-BP's allegations and my response are both a matter of press interest in Russia, and it is all out in the open, I feel that I would be safe returning to Russia because it would be too risky for anyone to do anything to me. I will not take my family back with me until it is all resolved, but there are very strong reasons for me to prefer to fight these allegations in Russia. Given the criminal proceedings, I really have no choice unless I am prepared to leave Russia forever, which I am not.
>
> 150. First, I have found it very difficult to deal with the huge volume of paperwork in English. Although my English is fairly good for everyday purposes, I would need all Court documents to be translated if I were to

> fight a trial. I feel that being forced, contrary to my employment contract, to defend myself in England and in the English language puts me at a real disadvantage.
>
> 151. Second, all of the relevant documents (of which there must be hundreds of thousands) will be in the Russian language. I expect that the need for translations would make things very difficult, slow and expensive. All of the documents that I know TNK-BP must have are in Russia and are in the Russian language. This will include all the original documents concerning dealings with the people who are alleged to have bribed me, dealings with other people and the documents that will allow a proper analysis of prices paid by TNK-BP.
>
> 152. Third, all of the witnesses, including other employees of TNK-BP and the people at the transportation companies are in Russia and would have to provide documents and evidence in Russian. It would make no sense for everyone to have to come to England, and I am not even sure that they would be willing or able to spend a lot of time away from Russia.
>
> 153. Fourth, I would want to be able to show that the allegations against me make no sense because of the specific practices and procedures for tendering and pricing at TNK-BP and in the Russian oil industry generally. This will be much harder to do if everyone has to come over to England.
>
> 154. Fifth, I am already aware of the enormous cost of fighting this kind of case in England. It will be much cheaper to do so in Russia.
>
> 155. Sixth, it seems to me to be crazy to have court claims in England about things that all allegedly took place in Russia and (I am advised) are matters for Russian law.
>
> 156. Seventh, I have to fight the criminal allegations in Russia anyway, and it would be extremely unfair for TNK-BP to be allowed to make me defend some claims in England and some in Russia, especially when it does not seem to want to make the same allegations in the two countries.
>
> 157. Eighth, I believe that a Russian judge who is familiar with commercial practices in Russia would find it easier to form a view on my case concerning my dealings with Mr Scheklanov, the conduct of Mr Khan and the allegations made against me regarding Transoil and Sovfracht.
>
> 158. I feel that I am at a huge disadvantage having to defend myself in England and I think that this is exactly why TNK-BP has proceeded in the way that it has."

291. Mrs Lazurenko says this at paragraph 7 of her witness statement dated 7 September 2012:

> "7. I was not in England when the claim in this case was sent to Mishcon de Reya. I have never lived in England and have never planned to do so. After leaving Russia at the end of April 2012 I stayed primarily with friends and sometimes in hotels in Europe. I have spent very little time in England since April 2012. The last time I went to England was for several days in early July 2012. I have never intended to reside anywhere other than Russia and plan to return there to live."

292. Mr Scheklanov also addresses the issue of forum in paragraph 33 of his witness statement dated 7 September 2012 as follows:

> "33. For my part, I would ask the court to find that Russia is the more appropriate forum for the following reasons:-
>
> 33.1 It will be far easier and more convenient for me to fight the case in Russia, where I live.
>
> 33.2 I believe that a Russian judge will have a more natural understanding of the cultural context in which the facts of this case must be assessed. For example, a Russian court would need less assistance in understanding (for good or for ill) my relationship with Mr Lazurenko and the way in which I arrange my business affairs.
>
> 33.3 If (which I am advised is the case) the case will be governed by Russian law then it seems more appropriate for these matters to be decided by a Russian judge with the possibility of appeal to higher Russian courts."

293. At the hearing before me Holding submitted that Mr Lazurenko's assurance that he intended to return to Russia sat uneasily with his secrecy as to his present whereabouts. Mr Moverley Smith also referred me to paragraph 27 of Mr Egorov's first witness statement and the relevant exhibits which suggest that Mr Lazurenko (1) has given an address in the Czech Republic as his formal stated address in the Leibson corporate register, (2) has made use of an address in Almaty, Kazakhstan and (3) has a Greek passport.

294. It is helpful to consider the five factors identified by Briggs and Rees (see paragraph 86 above) in deciding whether England is clearly or distinctly the appropriate forum for this claim.

295. *The personal connection of the parties to the litigation*: There can be no doubt that the main protagonists to the proposed claims are Holding and Mr Lazurenko. They are both domiciled in Russia. So are Mr Schlekanov and Mrs Lazurenko. None of them is present in this jurisdiction or has any substantial links to it. Of the remaining defendants, 9 are companies and one (Mr Telser) an individual established or resident abroad. All of them are said by Holding to be no more than pawns controlled by Mr Lazurenko. BJUK, an English company now in provisional liquidation of which Mr Telser is sole director, has never carried on business in England.

296. In view of the above factors, I am in no doubt that the closest connection of the parties to this case is to Russia. Apart from BJUK whose director does not reside in England, none of the parties has any real connection with England.

297. *The factual connections between the events and particular courts*: The facts giving rise to this claim arose in Russia and concern the internal management of TNK-BP, which is one of Russia's biggest oil companies.

298. Of particular significance is the fact that the claims arise out of Mr Lazurenko's employment in Russia by Management, a Russian service company within the TNK-BP group. Mr Lazurenko was employed by

Management to provide services on its behalf to other TNK-BP group companies, including Holding. The allegation is that Mr Lazurenko took bribes in the course of his employment. He is alleged to have taken bribes in Russia from Russian businessmen representing Russian counterparties of Holding, a Russian company. What is alleged therefore is a Russian bribery, agreed between Russian businessmen, representing Russian companies, doing business together in Russia. The facts are substantially connected with Russia.

299. The allegations made by Holding and counter-allegations made by Mr Lazurenko are likely to involve a detailed investigation of (amongst other things):

299.1. The course of Mr Lazurenko's employment over about 10 years and his dealings with counterparties over that period of time;

299.2. The commercial relationships between TNK-BP and a large number of Russian counterparties (as Mr Levin identifies at paragraph 16 of his first witness statement where he refers to "Mr Lazurenko and subordinates in his department" having negotiated and concluded "thousands of contracts with hundreds of contracting parties"). Of particular relevance will be contracts or other dealings between TNK-BP and TK Transoil, Nikolaev Transoil, Sovfracht or anyone else identified by Mr Nikolaev or Mr Ivanov;

299.3. The transactions that are the subject matter of the Documents Claim;

299.4. Documents showing payments to Mr Lazurenko or any communications between Mr Lazurenko and the alleged payers of bribes;

299.5. Documents evidencing unusual or manipulated prices or price movements or other indirect evidence of the manipulation of TNK-BP's business practices in return for bribes.

300. These matters all involve consideration of Russian contracts, commercial relationships and trade practices. The witnesses relating to all the above matters are Russian, namely:

300.1. Mr Lazurenko and subordinates in his department as well as Mr Khan, Mr Levin and Mr Kollek from TNK-BP;

300.2. Mr Nikolaev and any representative of companies connected to Mr Nikolaev said to have been involved in making corrupt payments to Mr Lazurenko;

300.3. Mr Ivanov and his unnamed "subordinate" said "on a few occasions" to have delivered "bags of cash" to Mr Lazurenko;

300.4. Witnesses from companies with which Mr Lazurenko dealt in order to carry out "tender manipulation". On Holding's case, Mr Lazurenko must have coordinated the actions of all the tenderers for each corrupt transaction, necessitating an extremely broad factual enquiry.

301. The only other additional relevant witnesses that I can presently identify are as follows:

301.1. Mr Scheklanov and Mrs Lazurenko, both of whom are Russian;

301.2. Mr Becirovic who is Montenegrin and resides there;

301.3. Mr Telser and possibly one of his colleagues, both of whom reside in Liechtenstein.

302. The vast majority of the documents that are relevant to the issues arising in the case are located in Russia and will be in the Russian language. Most of those

documents are in the possession or control of TNK-BP. In response to a question from me as to why certain documents had not come to light [Transcript Day 4 p.34 lines 19-24], Mr Moverley Smith responded as follows [p.35, lines1-9]:

> "…at the stage we are at, should further documents have come to light by now? That obviously depends on how the fraud was carried out, whether it is one that will give rise to documents, and, whilst your Lordship makes the point that the investigations are ongoing and my client should have the documents, as your Lordship knows, TNK-BP is a vast organisation, millions and millions of documents, and sifting through documents may take a while." (emphasis supplied)

303. It is not difficult to foresee that the disclosure exercise if carried out under the Civil Procedure Rules would be a mammoth task. That task will be made even more substantial if all the Russian documents need to be translated into English which is likely to be a hugely time consuming and expensive exercise. At paragraphs 162-165 of his report, Mr Rozenberg comments upon the powers of a Russian civil court to make orders for specific disclosure which do not appear dissimilar to the powers of an English civil court. The fact that disclosed documents will not need to be translated will obviously result in a substantial saving of time and costs.

304. The only connection with England is that BJUK is an English company. BJUK does not own any English assets and it has no English director. It is the owner of all the shares in its subsidiary BJM, the Montenegrin company that owns and operates the Avala and Bianca hotels in Montenegro, and the registered owner of the land in Montenegro on which those hotels have been built. BJUK is alleged by Holding to have been used as part of the corporate structure by which the corrupt money was ultimately invested in Montenegro.

305. Apart from the fact that BJUK is incorporated in this jurisdiction, England has no connection with the subject matter of Holding's claim. Holding's reliance on the Caldero claim is beside the point. The Caldero claim had to be brought in this jurisdiction because BJUK is an English company and Caldero is seeking (amongst other things) unfair prejudice relief against the company. Mr Stewart's assertion (in his affidavit before Sales J seeking permission to serve out) that the "multiplicity of places of incorporation and nationalities" meant there was no "obvious alternative forum" simply does not accord with the reality of the position. The obvious alternative forum has always been Russia.

306. *The law which will be applied to resolve the substantive dispute*: I have concluded that Holding's claims are governed by Russian law and I regard this as a strong factor suggesting that Russia is the natural forum. It is generally convenient for the court trying the claim to apply its own law rather than apply foreign law on the basis of expert evidence: Ceskoslovenska at [12(5)]. Courts can be expected to apply their own law more cheaply and accurately than foreign law, and errors at first instance can be corrected more readily on appeal. If Holding is prevented from suing the Defendants in England, it remains able to bring proceedings against the Defendants in Russia, thereby

avoiding the risk of the English court misinterpreting Russian law and the parties having a less effective right of appeal.

307. *The possibility of there being a lis alibi pendens; the relevance of the other parties to, and overall shape of, the litigation*: The fourth and fifth factors identified by Briggs and Rees can be addressed together. Insofar as they are not already covered by the matters considered above, I take the view that these factors point to Russia as the natural forum.

308. I bear in mind that, in response to a complaint lodged by TNK-BP, the Russian police have instituted a criminal investigation against Mr Lazurenko. I have summarised the substance of the criminal complaint in paragraph 63 above, from which it is apparent that the subject matter of the criminal complaint is not the same as the Transoil, Sovfracht and Transportation Payment allegations. It nevertheless concerns related allegations that Mr Lazurenko acted fraudulently in the course of his employment by Management. I consider that the existence of the Russian criminal investigation confirms that Russia is the natural forum for the civil claim as well.

309. In paragraphs 9-11 of his third report, Professor Maggs says as follows:

> "9. A Russian civil court must suspend a civil proceeding under Article 215 of the Civil Procedure Code in case of "the impossibility of considering the present case until the decision of another case being considered in civil, administrative, or criminal procedure." This would apply where the same allegations are the subject of a criminal prosecution. There is no specific rule in the Civil Procedure Code requiring or allowing suspension of a civil case before criminal proceedings have begun. As I said in paragraph 30 of my first report, however, the Russian civil court may stay a civil claim if the same allegations are the subject of a criminal investigation. Some recent cases indeed have involved higher courts overruling reluctant trial courts that suspended proceedings merely because the allegations were of actions punishable under the Criminal Code.
> 10. However, none of this applies where the allegations in the civil claim are not the same as the allegations that are the subject of the criminal investigation or prosecution. The court has no power to stay a civil claim simply because different (albeit related) allegations are the subject of a criminal investigation or prosecution.
> 11. As I have said, the Criminal Case is in respect of specific allegations regarding specified contracts with [TK Transoil]. If the allegations in the criminal case were different from those in the civil case, the civil court would not stay the proceedings but would simply resolve the civil dispute. So, in this case, if a prosecution is brought in relation to the bribes referred to in the Criminal Case, a civil action against Mr. Lazurenko on those bribes would be stayed. But a civil action against him regarding other alleged bribes would not be stayed."

310. I find this evidence persuasive and conclude that the existence of the criminal complaint will not prevent Holding from bringing a civil claim in a Russian court. Nor will Holding be prejudiced if the criminal complaint against Mr Lazurenko is amended or expanded to include the allegations made against him in these proceedings for the reason given by Professor Maggs in paragraph 30 of his first report: "… If a criminal trial is held, civil claimants alleging harm

caused by an alleged crime may present their civil claims in the criminal proceeding. If they do so, the court trying the criminal case can rule simultaneously on the civil claims". Mr Rozenberg does not disagree with this evidence.

311. I also consider that I should have regard to the fact that Article 7 of Mr Lazurenko's employment contract contains an express choice of Russian law and a jurisdiction clause in favour of the Russian courts as follows:

> "If the Parties are unable to settle disputes or differences between them by means of direct negotiations, such disputes or differences shall be resolved in Russian courts of common jurisdiction in accordance with the laws of the Russian Federation."

312. The employment contract was between Management and Mr Lazurenko; Holding was not directly bound by it. Even so, Holding and Management were members of the same corporate group, and Holding would have known of the terms on which group employees such as Mr Lazurenko were contracted. This clause provides Mr Lazurenko with a reasonable expectation that, if he is to be sued in respect of his conduct in the course of employment, he would be sued in a Russian court in accordance with Russian law. I also consider there is a risk of injustice being caused to Mr Lazurenko as a result of his having to defend the criminal complaint in Russia at the same time as having to defend civil proceedings in a foreign country conducted in a foreign language.

313. It is necessary to consider the possibility of parallel proceedings in England and Russia. Mr Kitchener accepts that Owusu v. Jackson [2005] QB 801 prevents this court from declining jurisdiction over the claim against BJUK on *forum conveniens* grounds. Accordingly, if the claim against this anchor defendant is viable it may continue even if permission to sue the Applicants is refused. The result might be the existence of parallel proceedings in Russia and England. However, as Mr Kitchener points out, if this is of concern to Holding, the solution is in its own hands. It can join BJUK as a defendant to any Russian proceedings. The Applicants have indicated that if the claim proceeds in Russia they will be content for BJUK to be joined as a defendant (or alternatively to agree to be bound by the result). Given that the Applicants own 75% of the shares in BJUK and the other shareholder is Mr Becirovic who has agreed to sell his shares to the Applicants and is funded by TNK-BP, I see no impediment to BJUK agreeing to be joined to Russian civil proceedings or at least agreeing to be bound by the result. This is a case where it is important to have regard to Lloyd LJ's observation in The Golden Mariner [1990] 2 Lloyds Rep 215 at 222 referred to in paragraph 89 above. The fact that Russia is the natural forum means that the claim against BJUK should not dictate the location of trial against the Applicants.

314. In summary, my conclusion in relation to the first stage of the inquiry is that I cannot be satisfied that England is clearly or distinctly the natural forum, that is to say, the forum with which the action has the most real and substantial connection. The obvious natural forum for this claim is Russia.

315. I therefore need to consider the second stage of the inquiry whereby, if England is not the natural forum, the English court will only assert jurisdiction if Holding will not receive substantial justice in Russia. I can deal with that shortly.

316. Holding submits in paragraph 91 of its written submissions that:

316.1. If the claim is not allowed to proceed in England it will not proceed in Russia or anywhere else;

316.2. It is unrealistic to suppose that Mr Lazurenko and his wife will return to Russia whilst the threat of criminal proceedings is extant;

316.3. At the very least, Holding would face an indeterminate delay before any possible entitlement to prosecute its civil law claim in Russia may arise. Justice delayed in that context is justice denied.

317. I cannot accept these submissions. I accept Mr Lazurenko's evidence in paragraphs 148 and 149 of his witness statement (see paragraph 290 above) that he will return to Russia to defend himself against any civil claim brought against him in the Russian courts as well as the criminal allegations if they are pursued. I am persuaded by his evidence that, given the existence of the criminal complaint, he really has no choice but to return to Russia to defend himself unless he is prepared to leave Russia for good. I accept Mr Kitchener's submission that it is absurd for Holding to suggest that Mr and Mrs Lazurenko have exaggerated their links to Russia. Mr Lazurenko may have a Greek passport (as well as a Russian passport) and used a Czech address but he is clearly a Russian citizen who has lived and worked and brought up his family in Russia. He served as an officer in the Russian army from 1984 to 1993 and since then has worked in Russia full time for AAR and then TNK-BP until April 2012.

318. Nor do I accept that Holding would face an inordinate delay if it was required to bring a civil claim in Russia. The criminal complaint concerns different allegations to those made in these proceedings so there should be no impediment to Holding bringing a civil claim in Russia. I see no reason not to accept what Professor Maggs says in paragraph 12 of his third report:

> "12. The Russian Civil Procedure Code contains strict provisions setting short time limits for trials and appeals. I have followed numerous cases in the Russian courts and have studied or participated as an expert in numerous cases in courts in the United States and England. My overall impression based on decades of observation is that civil cases involving large amounts of money tend to move faster in Russia than in the United States or England."

319. Accordingly, Holding has not satisfied me that it will not obtain justice in Russia and, since Russia is the natural forum for the determination of this dispute, there are no grounds on which an English court should conclude that the claim ought nevertheless to proceed here.

Should the freezing injunctions be continued or should they be set aside on the grounds of material non-disclosure?

320. The law on the duty of full and frank disclosure at without notice hearings is well-known. It is emphasised frequently that the duty is a serious and onerous one. The ordinary consequence of serious and material non-disclosures is that the relief obtained at the without notice hearing should be set aside and that the court should refuse to re-instate that relief.

321. In Memory Corporation v Sidhu (No 2) [2000] 1 WLR 1443 at 1459-1460, Mummery LJ stressed the importance and broad scope of the duty on applicants for without notice relief to present the case fairly:

> "It cannot be emphasised too strongly that at an urgent without notice hearing for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."

322. In Siporex Trade v Comdel Commodities [1986] 2 Lloyd's Rep 428 at 437, Bingham LJ described the duty and the consequences of not observing the duty as follows:

> "[An applicant] must identify the crucial points for and against the application… He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full inquiry the view is taken that the order made was just and convenient and probably would have been made even if there had been full disclosure."

323. I have concluded that Holding signally failed to discharge its duty of full and fair disclosure, both in relation to the facts and the applicable law.

Non-disclosure of the facts

324. So far as the facts are concerned, for the reasons set out below, there was in my view a material failure by Holding on the without notice application to present the facts to Sales J in a full and fair manner.

324.1. The key Transoil allegation was positively misrepresented to Sales J. He was told that a rail transportation company called TK Transoil with which Holding had contracted had been approached by Mr Lazurenko with a demand for money. In fact, as Holding must have known, TK Transoil had not done any rail transportation business with Holding or any TNK-BP company. Both Mr

Egorov's affidavit and the Particulars of Claim were false and misleading (although there has been no application to amend the Particulars of Claim).

324.2. Sales J was not told that the allegation concerning Mr Nikolaev had started (in the Documents Claim) as an allegation concerning geographical swaps with TK Transoil (a company with which Mr Nikolaev had no connection) and had become an allegation concerning rail transportation contracts with a different Transoil company (what I have called Nikolaev Transoil), although that different Transoil company was not identified.

324.3. On the final day of the hearing (transcript at p.5 lines 2-8), Mr Moverley Smith accepted that there had "obviously been real confusion within TNK-BP Holding and those in its investigations department and legal department as to what's gone on here. Clearly the court needs to know in a definitive way how this has happened. With that in mind, Mr Egorov has gone to make a witness statement to explain this statement, and also [Mr Egorov's statement in the Documents Claim]". However, when Mr Egorov's second statement was served later that day, it offered no explanation as to what had occurred. In particular it offered no explanation as to why or how Mr Egorov had been able to make the false assertion in paragraph 10 of his affidavit that "TNK-BP had previously contracted with [TK Transoil] for the transportation of oil and oil products and Mr. Lazurenko had been responsible for the prequalification of [TK Transoil], negotiations of the terms of the relevant contracts, preparing the final agreements and obtaining the necessary internal consents". I infer from the absence of any explanation from Mr Egorov for the false information provided in his affidavit, coupled with his failure to explain the discrepancy between what he said in his affidavit and the very different account (relating to geographical swaps) given in his witness statement in the Documents Claim, that no satisfactory explanation exists.

324.4. Sales J was not given a critically important piece of information which was known to Holding at the without notice hearing, namely, that Mr Lazurenko was not in charge of rail transportation in the period in which he was said to have taken bribes related to that part of the business. In paragraph 15 of the Particulars of Claim, it is pleaded that on 1 February 2010 Mr Lazurenko ceased to be head of the Logistics Department and became Head of Department for New Business and Development and Processing. Holding obviously appreciated the significance of this change of role but it was not pointed out to Sales J that Mr Nikolaev's allegations concerned a period when Mr Lazurenko no longer had responsibility for rail transportation. At the time of the without notice hearing it appears Holding was unaware of June and December 2010 framework contracts or the fact that some business appears to have been conducted under them. Even if Holding had been so aware, it would have had to disclose to Sales J that (1) neither 2010 framework contract was signed by Mr Lazurenko and (2) any business transacted under those contracts took place many months after he had ceased to be involved in rail transportation. Moreover, Sales J was not told that Nikolaev Transoil and TNK-BP did not do business for at least 6 months of the period during which Mr Nikolaev was alleging that payments had been made.

324.5. The failure to disclose the KPMG report to Sales J was a material non-disclosure. It was incumbent on Holding not only to disclose the existence of the KPMG report but also to draw to his attention the fact that (1) the report showed that Nikolaev Transoil was not shown as one of TNK-BP's suppliers

and (2) KPMG's findings were that Holding was contracting with the optimal suppliers offering optimal terms. This in turn would have called into question the reliability of Mr Ivanov's unparticularised allegations that Mr Lazurenko had somehow manipulated the tender process.

324.6. It was not explained to Sales J that (as Mr Khan in his subsequent statement has accepted) Mr Nikolaev had not been clear in his allegations, that he had ceased cooperating with Holding and that the two documents which he had handed to Holding had contained no link to Mr Lazurenko nor had Holding's investigations between April and August 2012 resulted in any such link being established.

324.7. Paragraph 31 of the Particulars of Claim, at the end of the section dealing with the allegations made by Mr Nikolaev, states: "Following a report of the foregoing matters, in July 2012 the Moscow police began a criminal investigation". The obvious inference to be drawn from this statement is that the report made by Holding to the Moscow police had resulted in a criminal investigation into the same matters as had been raised by Mr Nikolaev. In fact, as Holding must have known (because it made the report to the Moscow police), the allegations against Mr Lazurenko in the criminal complaint were quite different to those made in the civil proceedings. They did not concern rail transportation contracts. They concerned contracts for the geographical swap of oil between TK Transoil and TNK-BP, which the complaint says were entered into between March 2010 and February 2012, and the amount Mr Lazurenko was alleged to have received by way of corrupt payments (the equivalent of approximately US$31,000) was obviously very different to the sum of US$8 million which Mr Nikolaev alleged was paid to Mr Lazurenko.

324.8. The Sovfracht allegations were also misrepresented to Sales J in a manner which amounted to material non-disclosure. The Particulars of Claim stated that Mr Ivanov's allegations had been made "a few years earlier" to Mr Khan, that Mr Khan had been very concerned to learn of the allegations but that in the absence of anything to substantiate the allegations and in view of Mr Lazurenko's flat denial of any wrongdoing, TNK-BP was unable to pursue the matter further at that time. Sales J was not told that the allegations when initially made by Mr Ivanov in 2008 were considered by Mr Khan "not impressive" and "confused", supported by no documents and explicable by the fact that Sovfracht had been removed by Mr Lazurenko from TNK-BP's list of approved tenderers because of its poor performance.

324.9. There was no proper explanation to Sales J of the fact that, despite several months of an investigation to which substantial resources were committed, Holding had been unable to establish how the fraud alleged by Mr Ivanov could have been committed. In view of the fact that the allegations were at least four years old, and had initially been rejected by Mr Khan as incredible, it was incumbent on Holding to provide convincing evidence to demonstrate why it had changed its mind and now believed that Mr Ivanov's allegations were true. Mr Egorov made confident assertions in his evidence to Sales J that Mr Levin's internal investigations conducted between May and August 2012 had established that the Sovfracht allegations were true (namely that "six figure amounts … were paid several months a year over a period of several years"). In the Documents Claim, he said that Mr Levin's investigations had revealed that payments from Sovfracht had "ranged from US$100,000 to US$300,000, and were paid every 1-3 months". Mr Egorov's evidence was entirely

misleading as became clear when Mr Levin's witness statement was served subsequent to the hearing before Sales J. Mr Levin provides no support for Mr Egorov's assertions as to the amounts and regularity of the alleged cash payments by Sovfracht. The furthest he is able to go is to say that he has been told by an unnamed "subordinate of Mr Ivanov" (who, like Mr Ivanov, refused to sign a witness statement) that "on [a] few occasions" he delivered "bags of cash" to Mr Lazurenko. Mr Levin also confirms that "there are no self-apparent defects on the face of the contracts to easily identify the wrongdoings". He gives no explanation as to how the contracts between TNK-BP and Sovfracht could have accommodated corrupt payments of US$5 million to Mr Lazurenko or to anyone. Mr Lazurenko's evidence that they could not have done is unchallenged. The fact that no such explanation is forthcoming, despite the fact that Mr Levin and his colleagues had several months in which to investigate the position, strongly suggests that Mr Ivanov's allegations remained as confused and unimpressive as Mr Khan found them when they were originally made in 2008.

324.10. The way in which Holding presented its case to Sales J regarding the Transportation Payments allegedly received by Mr Lazurenko from other transportation companies was equally misleading. It was not drawn to his attention that the evidence in support of this allegation was extremely weak or that when Mr Egorov first dealt with the Sovfracht allegations in July 2012 (in his witness statement in the Documents Claim), he did not suggest that Mr Ivanov had alleged that Mr Lazurenko had taken bribes from other parties. It was not properly disclosed or explained to Sales J that extensive investigations had been conducted by Mr Levin and his team over several months but those investigations had revealed no evidence of corruption by Mr Lazurenko in relation to other transportation companies. On the contrary, the KPMG report compiled in mid-2010 (which was not shown to Sales J), far from indicating that there was any malpractice in the logistics department, made no criticism of any of the department's practices or arrangements and concluded that TNK-BP was "using the optimal operators from the market perspective". As I conclude at paragraphs 238 and 239 above, Sales J should have been told in terms that Holding's extensive investigations into the Transportation Payments allegation had revealed nothing to support its case. Instead, he was left with the impression that these payments from other transportation companies provided a properly arguable basis for the "much wider" fraud that Holding alleged Mr Lazurenko had committed and the explanation for the discrepancy between the total alleged value of the Transoil and Sovfracht payments (US$13 million) and the level of the freezing order at that stage being sought by Holding (€69 million).

Non-disclosure concerning Russian law

325. So far as the applicable law is concerned, Sales J was told (by paragraph 98 of Mr Deuchrass' first affidavit) that Holding's claims were based on general provisions of the Civil Code and the English tort of unlawful means conspiracy. But no attempt was made to inform Sales J of the arguments that were likely to be available to Mr Lazurenko and his co-defendants with regard to the applicable law governing these claims.

326. Moreover, since it was accepted that Holding's claims were governed at least in part by "general provisions" of the Civil Code, it was incumbent on Holding to inform Sales J of the possible defences that might be available to the Defendants under Russian law, all of which should have been obvious to Holding's advisers as a result of Andrew Smith J's detailed analysis of Russian law at paragraphs 78 to 139 in the Fiona Trust case. The facts of Fiona Trust were directly analogous to the allegations in the present case. In Fiona Trust, at [78], Andrew Smith J summarised the various ways in which the defendants in that case were able to argue that Russian law would be less favourable to the claimants than English law. The same arguments were available to the Defendants in this case.

327. In particular, it was evident from Fiona Trust that the Defendants might be able to argue that:

327.1. Mr Lazurenko could only be liable to Management as his employer and only in contract and under the Russian Labour Code, with the result that he could not liable in tort to Management or to any other claimant including Holding.

327.2. Holding could not sue any of the other Defendants in tort unless it could show that they actually participated in the corrupt transactions. The receipt of proceeds of those corrupt transactions and assistance in concealment of those proceeds is not enough.

327.3. In order for a defendant to be liable in tort, Holding would have to show actual harm directly caused by that defendant's unlawful fault.

327.4. Holding could not sue Mr Lazurenko or any of the other Defendants in unjust enrichment.

327.5. Even if Holding had a claim for the allegedly corrupt payments, that claim did not extend to the profits made from reinvesting the corrupt payments where the investment is not of a kind that Holding would have made.

327.6. Holding did not have an arguable proprietary claim against any of the Defendants.

328. In my judgment, Holding's failure to disclose to Sales J the potential impact of Russian law and the possible defences under Russian law was a breach of its duty of full and fair disclosure on the without notice application. It ought to have been possible for Holding to produce an expert report as to Russian law for the purposes of the without notice hearing and, in fulfilling his duty to the court, that expert ought to have identified the potential difficulties facing Holding's claim as a matter of Russian law. Even if no such expert report was produced, Sales J ought at least to have been referred to the relevant parts of Fiona Trust which analyse the differences between Russian and English law as applied to the similar facts of that case.

329. In considering the materiality of the non-disclosures, I take into account two factors which I consider to be significant in the circumstances of this case. First, Holding is part of a substantial organisation with substantial resources and access to expert legal advice. Second, by the time of the without notice application, Holding had been investigating the allegations made against Mr Lazurenko for at least four months. This was not a case which was critically urgent and where it might be thought Holding could be excused for cutting corners.

330. Furthermore, I am doubtful whether Sales J would have been persuaded to make a freezing order in the amount of €39 million had he fully appreciated that there was no real risk of dissipation of the assets to which Holding claimed an entitlement. The core asset in question, namely BJUK (which owns the two Montenegrin hotels said by Holding now to be worth about €320 million), is already secure since it has been in the hands of English provisional liquidators since 4 May 2012, over 3 months before the without notice application was made to Sales J. Leibson's 75% shareholding in BJUK has been lodged with the provisional liquidators as security for the share purchase of Caldero's 25% holding. The other assets not owned by BJUK are interests in land in Montenegro that are not easily dealt with. I see no reason why Holding should not have applied on notice for a freezing order over the specific assets which it had identified which constituted more than sufficient security for its claim.

331. In seeking to show a risk of dissipation and to justify a without notice application, Holding referred to the attempted sale of shares in Roychamp. Much was made of this evidence but on analysis it is not especially impressive in terms of establishing that there was a real risk of dissipation such as to justify a without notice application. What Sales J is unlikely to have appreciated is that (as is clear from Mr Deuchrass' affidavit at paragraph 39) the proposed sale transaction came to Caldero's attention on 19 June 2012 and, given TNK-BP's involvement in the Caldero claim, it was inevitable that Caldero would immediately inform TNK-BP of the same. No explanation of the proposed sale was sought by Caldero or TNK-BP over the two months between 19 June 2012 (when the attempted share sale came to Caldero's attention) and 13 August 2012. An explanation is given by Mr Scheklanov in paragraphs 29 to 31 of his witness statement and, in view of the fact that Mr Scheklanov had already identified himself in April 2012 as the silent investor, it is likely that the same explanation would have been given at an earlier stage had it been requested.

332. In Arena Corporation Ltd v Shroeder [2003] EWHC 1089 (Ch) at [213], the Deputy Judge (Alan Boyle QC), after an extensive review of the authorities, provided the following summary of the main principles which should guide the court in the exercise of its discretion in circumstances where it has held that there have been breaches of the duty of full and fair disclosure:

> "(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
>
> (2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction

> of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.
>
> (6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

333. I consider that the matters to which I have referred which were either not disclosed or not drawn to Sales J's attention were material matters that were relevant to the weighing operation he had to make in deciding whether or not to grant the order. Taking account of the principles summarised at paragraph 213 of Arena v Schroeder, it is appropriate to apply the general rule by discharging the order obtained in breach of the duty of full and fair disclosure and refusing to renew the order until trial.

Conclusions

334. My conclusions may be summarised as follows:

334.1. I am not satisfied that Holding has established a serious issue to be tried against Mrs Lazurenko, Mr Scheklanov and Mr Telser so it is not appropriate to give Holding permission to serve the claim against them out of the jurisdiction and the order made against those Defendants on Holding's without notice application on 14 August 2012 should be set aside;

334.2. In respect of the Transoil allegations (but not the Sovfracht and Transportation Payment allegations), Holding's claim against BJUK, Mr Lazurenko and the other corporate Defendants has a real prospect of success;

334.3. However, I am not satisfied it is appropriate to exercise my discretion in favour of allowing Holding to serve the claim on Mr Lazurenko and the other corporate Defendants other than BJUK out of the jurisdiction and the order made against those Defendants on Holding's without notice application on 14 August 2012 should also be set aside;

334.4. I discharge, or decline to continue, the worldwide freezing injunctions granted without notice against the relevant Defendants on 14 August 2012 on the grounds of material non-disclosure and also because in the exercise of my discretion I do not consider that Holding's case against those Defendants is sufficiently strong to justify the grant of worldwide freezing relief.

335. I shall, if necessary, hear representations from the parties on the terms of my order.