Neutral Citation Number: [2020] EWCA Civ 109

Case No: A4/2019/0523 and 0530

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
TEARE J: [2018] EWHC 173 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE SIMON
and
LORD JUSTICE MALES

- -

Between:

(1) Filatona Trading Limited **(2) Oleg Vladimirovich Deripaska**	**Appellants**
- and -	
(1) Navigator Equities Limited **(2) Vladimir Anatolevich Chernukhin** **(3) Navio Holdings Limited**	**Respondents**

And between:

Lolita Vladimirovna Danilina	**Appellant**
- and -	
(1) Vladimir Anatolevich Chernukhin **(2) Navigator Equities Limited** **(3) Vadim Kargin**	**Respondents**

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- -

Justin Fenwick QC, **Lucy Colter** and **Nehali Shah** (instructed by **Reynolds Porter Chamberlain LLP**) for the appellants in the first appeal

Graham Chapman QC (instructed by **Byrne and Partners LLP**) for the appellant in the second appeal
David Railton QC, **James Weale** and **Fraser Campbell** (instructed by **Clifford Chance LLP**) for the respondents on the first appeal and the first and second respondents on the second appeal.
Iain Pester (instructed by **PCB Litigation LLP**) for the third respondent on the second appeal

Hearing dates: 3 and 4 December 2019

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Approved Judgment

Lord Justice Simon:

Introduction

1. The main question raised on this appeal is, in what circumstances does the wording of a contract preclude the intervention and reliance on that contract by a disclosed and identified principal?

2. In a judgment dated 7 February 2019, Teare J ('the Judge') found that one of the respondents to these appeals, Mr Vladimir Chernukhin, was the disclosed and identified principal although he was not named as a party to the contract and that, as such, he was entitled to rely on its terms.

3. The Judge identified a disclosed principal by reference to article 2(1) in *Bowstead and Reynolds on Agency* (21st ed, 2018) at §1-039: as 'a principal, whether identified or unidentified, whose interest in the transaction as principal is known to the third party at the time of the transaction in question'; and proceeded on the basis that the person claiming to be a disclosed principal had the burden (legal, if the claimant, and evidential if the defendant) of showing that, notwithstanding that he was not named as the party to the contract, he was in fact the principal of one of the named parties (Ms Lolita Danilina) and that the other party (Mr Oleg Deripaska) knew this, see judgment at [63]. However, as the Judge also recognised, the fact that a party was a disclosed principal of a named party and the other party to the contract knew this, did not entitle the disclosed principal to enforce the contract if its terms, expressly or impliedly, confined the contractual rights to the named parties, see judgment at [64]. Having considered this issue, the Judge concluded that neither the terms of the contract nor its surrounding circumstances showed that Mr Deripaska was <u>only</u> prepared to accept Ms Danilina as the counterparty; and that the terms of the contact did not 'unequivocally and exhaustively' define the parties to it, see judgment at [317].

4. In the light of the Judge's finding of fact that Mr Chernukhin was the principal party to the contract, that Ms Danilina was his nominee and that Mr Deripaska knew this, the argument on the appeal focussed on the second aspect of the Judge's finding: namely, whether the terms and surrounding circumstances of the contract, either expressly or by necessary implication, excluded Mr Chernukhin from exercising contractual rights (including the right to arbitrate).

5. The contract in question was a Shareholder Agreement (the 'SHA') dated 31 May 2005. Two sets of parties were named in the SHA: on the one hand, the appellants in the first appeal (Mr Deripaska and Filatona Trading Limited), and on the other, the appellant in the second appeal (Ms Danilina) and one of the respondents in each appeal ('Navigator'). The SHA was expressed in the Russian language; but subject to the substantive law of England and Wales (clause 12.5) and arbitration at the London Court of International Arbitration in accordance with its rules (clause 12.1).

6. Although it will be necessary later in this judgment to consider some of the particular provisions of the SHA, the relevant terms are set out for convenience in an appendix to this judgment.

7. The Judge's findings that Mr Chernukhin was the disclosed but unnamed principal party and that Ms Danilina was his nominee cannot be challenged on this appeal in view of the limited basis on which permission to appeal was granted.

8. There was a minor dispute as to whether it was necessary to consider the terms of the SHA before considering the background or the other way around. However, since it is common ground that the SHA contains no reference to Mr Chernukhin, it will be sensible to start by considering why this was so. Ultimately, the order in which a court approaches such issues may not matter, providing it considers both aspects of construction. Lord Hodge (with whom the other members of the Supreme Court agreed) expressed an analogous point in *Wood v. Capita Insurance Services* Ltd [2017] UKSC 24; [2017] AC 1173 at [12]:

> To my mind once one has read the language in dispute and the relevant parts of the contract that provide the context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

The facts found by the Judge

9. Ms Danilina and Mr Chernukhin met in 1989 and began to live together in 1991. Both were financially sophisticated. Ms Danilina had been involved in a textile business; and in 1996 Mr Chernukhin had joined a Russian Financial institution, Vneshekonombank ('VEB'), rising to the position of Vice-Chairman by 1999. In 2000, he was appointed Deputy Minister of Finance in the Russian Federation and, in 2002, Chairman of VEB. The Judge found (at [72]) that Mr Chernukhin had prospered financially following the collapse of the USSR; but that he would have had to have been discreet if he engaged in entrepreneurial activities while employed as a state official. By 2003, he was very wealthy and was regarded by Mr Deripaska as 'an extremely useful person to know and do business with.'

10. Mr Deripaska accepted in evidence that Ms Danilina did not have sufficient money to make a substantial investment (see judgment at [80]); and that the source of the wealth on the other side of any transaction was Mr Chernukhin.

11. In 2001, Mr Chernukhin had learnt of the possibility of acquiring a controlling interest in a textile company, OJSC Trekhgornaya Manufaktura ('TGM') at a price in the region of US$10m, see judgment at [84]. The attraction of the acquisition was the development potential of its large site in central Moscow. Mr Chernukhin approached Mr Deripaska as a potential partner in the venture because he wanted a prominent businessman to be the public face of the project; and it was agreed between Mr Chernukhin and Mr Deripaska that each would contribute equally towards the purchase. The parties' intention was to develop the site and move TGM's business outside Moscow, with Ms Danilina being involved in running it.

12. Shares in TGM were purchased over a period of time by companies owned by Mr Deripaska; and by July 2004, 75.4% of the shares had been acquired. In a later document, the Settlement Agreement Act, both parties to the SHA agreed that each of

Party 1 and Party 2 had contributed approximately equal sums towards the acquisition of 75.4% of the shares in TGM. The contribution of Party 2 was made by Mr Chernukhin by an offshore payment.

13. The joint venture agreement to acquire the controlling interest in TGM was not recorded in any document at the time, see judgment at [96]; and although the interest began to be acquired in 2002, the parties to the joint venture did not record their agreement in a binding document until the SHA in May 2005. Mr Chernukhin's explanation for this, which the Judge accepted, was that he needed to be discreet in relation to an investment of this sort at a time when he was Deputy Minister of Finance and Chairman of VEB. It was in these circumstances that he relied on Mr Deripaska's 'word of honour' in relation to his investment in TGM. The Judge accepted that there was contact between Mr Deripaska and Mr Chernukhin between 2002 and 2004 in relation to their investment in TGM, see judgment at [110].

14. On 27 May 2004, Mr Chernukhin was summarily dismissed from his government post and as Chairman of VEB, and left Russia shortly afterwards, never to return.

15. At this point, although the legal title to the shares rested with Mr Deripaska's companies, 'Party 2' seems to have provided the new management; and from June to September 2004, various draft terms sheets were produced, followed by the exchange of various drafts of what was to become the SHA.

16. Mr Kargin (the third respondent in the second appeal) was involved in the negotiations leading up to the signing of SHA (in 2004-5), the incorporation of Navigator and events in relation to the Compass Trust, which held the shares in Navigator (in 2004). The trustee of the Compass Trust was Compass View Ltd. Ms Danilina claimed that she was intended to be the beneficiary of the Compass Trust, but if not, then Mr Kargin held the interest on trust for her. The Judge concluded, see judgment at [171], that Mr Chernukhin was 'the true beneficiary' of the Compass Trust.

17. The SHA described the agreement as:

> Between:
>
> **Filatona Trading Limited**, a company registered in accordance with the laws of the Republic of Cyprus … hereinafter referred to as '**Shareholder 1**', and also the Beneficial Owner of Shareholder 1, Oleg Vladimirovich Deripaska … hereinafter referred to as '**Beneficial Owner 1**', Shareholder 1 and Beneficial Owner 1 hereinafter jointly referred to as '**Party 1**';
>
> **Navigator Equities Limited**, a company registered and operating in accordance with the laws of the British Virgin Islands … hereinafter referred to as '**Shareholder 2**', and also the Beneficial Owner of Shareholder 2, Lolita Vladimirovna Danilina … hereinafter referred to as '**Beneficial Owner 2**', Shareholder 2 and Beneficial Owner 2 hereinafter jointly referred to as '**Party 2**'; and

> **Navio Holdings Limited**, a company registered and operating in accordance with the laws of the Republic of Cyprus (registration number No. 151271), hereinafter referred to as the 'Holding Company';
>
> Shareholder 1 and Shareholder 2 hereinafter individually referred to as a '**Shareholder**', and jointly referred to as the '**Shareholders**',
>
> Beneficial Owner 1 and Beneficial Owner 2 hereinafter individually referred to as a '**Beneficial Owner**,' and jointly referred to as the '**Beneficial Owners**', Party 1, Party 2 and the Holding Company hereinafter being jointly referred to as the '**Parties**'.

18. Mr Chernukhin was not named anywhere in the SHA and did not sign it. It was signed by a director on behalf of Filatona (Shareholder 1) and by Mr Deripaska as Beneficial Owner 1. It was signed by Mr Kargin on behalf of Navigator (Shareholder 2), and by Ms Danilina as Beneficial Owner 2.

19. A Supplemental Agreement was also signed on 31 May 2005. The Supplemental Agreement had the same parties as were named in the preamble to the SHA. Its material terms were in the terms of an agreement:

> 1. To supplement clause 10.1 of the Agreement with a paragraph reading as follows:
>
> 'However, the transfer by Beneficial Owner 2 of the rights referred to in this Clause to Vladimir Anatolevich Chernukhin … is not a Change of Control.'
>
> 2. All terms and definitions used in this Supplemental Agreement have the meaning defined in the [SHA].
>
> 3. This Supplemental Agreement shall come into force from the moment it is signed by the authorised representatives of the Parties and shall be an integral part of the Agreement.

20. Clause 1 was intended to make clear that any transfer by Ms Danilina to Mr Chernukhin would not amount to a 'change of control' for the purposes of clause 10 of the SHA. It will be necessary to return to the Supplemental Agreement in the context of an argument by Mr Fenwick QC (for Mr Deripaska) that, if Mr Chernukhin were a party to SHA with enforceable rights, Ms Danilina (as Beneficial Owner 2) would have had nothing to transfer to him.

21. In October 2005, Compass View transferred its shares in Navigator to a BVI company. This was owned by a Liechtenstein entity of which Mr Chernukhin was the beneficiary.

22. On 14 March 2006, an addendum to the SHA was agreed, which provided for the purchase of another textile company, some distance from Moscow for US$3.5m.

Consistently with the SHA, Ms Danilina was described as the beneficial owner of Navigator.

23. On 24 May 2006, Navigator paid US$6.25m to Navio. On 26 May, Filatona paid the same amount to Navio; and on the same day Navio purchased the shares in TGM from Mr Deripaska's companies for US$12.5m, see judgment at [153]. At this stage, the joint venture which had initially been agreed in late 2001 was governed by the SHA and the Supplementary Agreement. Navio owned 75% of the shares in TGM, both parties, according to their signed Settlement Reconciliation Act, having contributed more or less equally to the purchase of the shares.

24. By February 2007, the relationship between Mr Chernukhin and Ms Danilina was at end, see judgment at [183]. Her case at trial was that, at a meeting in Zurich at about this time, Mr Chernukhin had agreed orally to the division of their joint assets; and that Party 2's interest in TGM under the SHA would remain (as, on her case, it always had been) an asset of hers alone. This constituted the overlap between what was referred to at trial as her 'TGM claim' and 'Family Assets claim'.

25. During 2009, differences arose as to how the business of TGM was to be run, see judgment at [221], with Mr Deripaska wanting to replace the General Director, in order to concentrate on the development potential of the central Moscow site. In December 2010, the General Director tendered his resignation in a letter addressed to Mr Chernukhin and Mr Deripaska. Shortly afterwards, the TGM site was forcibly taken over in circumstances set out in the judgment at [242]-[249]. The Judge described the circumstances as 'of interest to observers of modern-day Russia', but acknowledged that they did not assist him in determining the issues he had to decide.

The background to the litigation

26. The forcible takeover of TGM's site and business brought about a claim by Mr Chernukhin and Navigator ('the Chernukhin Parties') against Mr Deripaska and Filatona ('the Deripaska Parties') under the arbitration clause in the SHA. In response Mr Deripaska contended that Mr Chernukhin was not a party to the SHA and that only Ms Danilina could bring an arbitration claim as Beneficial Owner 2.

27. Following a challenge by the Deripaska Parties to the Tribunal's jurisdiction, a hearing took place, following which the Tribunal delivered a partial final award on 16 November 2016. It dismissed the Deripaska Parties' challenge and concluded that it had jurisdiction to determine the Chernukhin Parties' claims.

28. On 14 December 2016, the Deripaska Parties brought proceedings under s.67(1)(a) of the Arbitration Act 1996 challenging the Tribunal's determination as to its jurisdiction. Paragraph 4 of the grounds claimed:

> [Mr Chernukhin] is not a named party to the SHA or the arbitration agreement. The Claimants contend that [Mr Chernukhin] is not a party to the SHA and is not entitled to and/or has no standing to bring an arbitration against the Claimants pursuant to the SHA, or to be a party to any such arbitration. Further arbitration has been brought without joining Ms Lolita Danilina. Ms Danilina is a named party to the SHA

> in her own right and as 'Party 2' jointly with [Navigator] as one of those persons jointly described as 'the Parties' in the SHA and specifically in the clause 12 arbitration agreement …

29. On 23 December 2016, 10 days after issuing the s.67 proceedings in the Commercial Court, the Deripaska Parties entered into an agreement with Ms Danilina, which was described as the 'Interest Purchase Option and Assignment of Rights' (the 'Option Agreement'). The preamble recorded that their views on the parties to the SHA were the same: namely that Ms Danilina was a party to the agreement and that Mr Chernukhin was not. Under the provisions of the Option Agreement, Ms Danilina agreed, among other obligations, to provide 'oral and/or written testimony' in the arbitration, (§5.2(a)); and to commence 'such other litigation as might relate to or affect the Arbitration as Filatona might reasonably request in any court of competent jurisdiction,' (§5.2(d)). The Option Agreement also stipulated that Ms Danilina should 'not communicate with … or provide any information or documents to any person … including, inter alia, Chernukhin, Navigator and/or their solicitors' (§5.6). In consideration of these contractual promises, Filatona agreed to pay Ms Danilina the sum of US$2 million, with a further payment of US$10 million if she were able to obtain 'confirmation' of her 'title'. Unsurprisingly the terms of the Option Agreement figured in the course of the trial; and it will be necessary to consider the agreement later in this judgment.

30. On 22 February 2017, Ms Danilina issued a Part 7 claim in the Commercial Court in which she advanced her claim that she, and not Mr Chernukhin was a party to the SHA and entitled to exercise the rights of Beneficial Owner 2 ('the TGM claim'). Vadim Kargin was an additional defendant to the TGM claim. Her claim against him was for damages for (i) breach of an alleged agency agreement by which he was to procure the incorporation of an off-shore company to hold her interest in TGM, and (ii) his part in an alleged conspiracy with Mr Chernukhin to injure her by unlawful means. In addition, she claimed to have acquired an interest in various other assets pursuant to oral agreements with Mr Chernukhin (the 'Family Assets Claim').

31. Since the TGM claim raised common issues with Mr Deripaska's jurisdiction challenge, an order was made that they be tried together, and with the Family Assets claim.

32. In the meantime, a subsequent hearing on the merits had taken place before the arbitrators in March 2017. In a second partial final award, made on 20 July 2017, the Tribunal found that the Chernukhin Parties had suffered oppressive conduct as minority shareholders in Navio, within the meaning of s.202 of the Cyprus Companies Law, Cap 113. The Tribunal ordered the Deripaska Parties to buy the Chernukhin Parties' shares in Navio at a price of US$95,181,285 within 42 days.

33. The trial before the Judge took place in November and December 2018, and January 2019.

34. Although a considerable amount of oral evidence was led as to the true parties to the SHA, the Judge found that the main witnesses (Messrs Deripaska and Chernukhin, and Ms Danilina) could not be relied on to give truthful evidence. Consequently, in general, he approached their evidence on the basis that it could not be relied on,

unless it was consistent with the probabilities, was supported by contemporaneous documents or was not in dispute.

The issues on the appeal

35. The identity of parties to a contract is generally a factual question which does not give rise to any questions of legal principle, see for example Chitty on Contracts, 33rd edition, (2018) at §18-004.

36. A disclosed principal to a contract is a principal, whether identified or unidentified, whose interest in the transaction is known to the counterparty at the relevant time, see for example, *Bowstead & Reynolds on Agency* (21st ed.), at 1-039. As such a disclosed principal:

> … may sue or be sued on any contract made on his behalf by his agent acting within the scope of his actual authority or whose acts are validly ratified.

See *Bowstead & Reynolds*, at 8-01.

37. The principle that an agent acting within the scope of an express or implied actual authority binds his principal to the contract is well-established, see for example: C*alder v. Dobbell* (1871) LR 6 CP 466, and the Privy Council decision in *Basma v. Weekes* [1950] AC 441 at 454.

38. Although in the present case the Judge found that Mr Chernukhin was a *disclosed* and *identified* principal party to the SHA, and although the parties were not able to identify any case in which a disclosed principal had been excluded from suing or being sued on a contract to which he was a party, it was common ground that the terms of the contract and the surrounding circumstances might demonstrate an intention, expressly or by necessary implication, to exclude a disclosed party from the contract.

39. It was in these circumstances that we were referred to a number of cases on how the courts approach the question when considering an *undisclosed* principal in order to identify an analogous approach.

40. The editors of *Bowstead & Reynolds* at 8-068 summarise the rights and liabilities of *undisclosed* principals in two relevant rules:

> (1) An undisclosed principal may sue or be sued on a contract made on his behalf … by his agent acting in the scope of his actual authority. Where a contract is involved, the agent on entering into it must have intended to act on the principal's behalf.
>
> …
>
> (4) The terms of a contract may, expressly or impliedly, exclude the (undisclosed) principal's right to sue and his right to be sued. The contract itself, or the circumstances

> surrounding the contract, may show that the agent is the true and only principal.

41. Paragraph 8-069 contains part of the commentary on rule (1), and includes:

> The proposition that a principal, someone of whose existence or connection with the transaction the third party was totally unaware, can in appropriate circumstances sue and be sued on a contract made by his agent may seem surprising, but is well established.

In contrast, the proposition that a disclosed and identified principal can sue and be sued on a contract made by his agent is by no means surprising.

42. Paragraph 8-079 contains the commentary on rule (4) and includes:

> It is to be supposed that there are some limits on the principal's intervention, but it is not clear what these are … when there is an express term of the contract that the agent is the only party to it, there can be no intervention by an undisclosed principal. It may indeed be prudent to insert such clauses into contracts where it is desired to exclude the possibility of intervention … As Rule (4) states, there can however be cases where the agent impliedly contracts that he is principal, or that no other party is involved. Sometimes this implication is derived from the interpretation of words descriptive of the agent himself, and of the contract as a whole, that he alone answers the description in question.

43. Further on, the editors add:

> Other guidance is therefore needed as to when the terms of the contract are to be regarded as either expressly or impliedly excluding the principal's intervention. It is clear that this will not occur often.

44. Three material points arise. First, there is the possibility of inserting an express clause into a contract so as to exclude the possibility of intervention by an undisclosed principal. This is a matter relied on by the respondents.

45. Second, there may be contracts in which a party is identified by a material description which applies only to that party and where the intervention of an undisclosed principal may be presumed to be excluded: for example, in a contract to paint a portrait, where the identity of the painter is likely to be crucial. These types of contract are sometimes identified by reference to the decisive nature of the 'personality' of the party to the contract. They are cases where the circumstances make it clear that the counterparty would not be willing to contract with an undisclosed principal.

46. Third, in the opinion of the editors of *Bowstead & Reynolds*, although the contractual terms and the surrounding circumstances may lead to the conclusion that a principal's

intervention is excluded, this will not occur often. In commercial contacts this is due to what has been described as the 'beneficial assumption' referred to in the judgment of Diplock LJ in *Teheran-Europe Co Ltd v. S.T. Belton (Tractors) Ltd* [1968] 2 QB 545, at p.555, see below.

47. In the present case, the Judge's starting point was to direct himself as to the 'heavy burden' on Mr Chernukhin to establish, contrary to what the SHA stated, that he was the Beneficial Owner of Navigator, that Ms Danilina only signed the SHA as his nominee or agent and that Mr Deripaska knew this. The Judge was satisfied that he had discharged this burden.

The approach to deciding whether an undisclosed principal is excluded from suing and being sued on a contract

48. A convenient starting point is the decision of the Court of Appeal in the *Teheran-Europe case* (above) and the judgment of Diplock LJ at p.555:

> Where an agent has …..actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or lead the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness by the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing.

49. In the advice of the Privy Council in the *Siu Yin Kwan case (Administratrix of the estate of Chan Ying Lung deceased) and anor v. Eastern Insurance Co. Ltd* [1994] 2 AC 199, Lord Lloyd at 207D said:

> For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

In the context of an argument that an undisclosed principal should be excluded from the right to sue on a contract of insurance, Lord Lloyd (at p.208H) warned of the particular danger:

> If courts are too ready to construe written contracts as contradicting the right of an undisclosed principal to intervene, it would go far to destroy the beneficial assumption in commercial cases, to which Diplock LJ referred to in *Teheran-Europe Co Ltd v. S.T. Belton (Tractors) Ltd* [1968] 2 QB 545, 555.

50. Mr Fenwick submitted that these were observations made in the context of what Diplock LJ had referred to as an 'ordinary commercial contract' and that the SHA was not such a contract. However, the principle set out in Lord Lloyd's proposition (5), that the terms of the contract or the surrounding circumstances may show an intention to exclude an undisclosed principal are of general application; and, although the SHA had some particular features relied on by the appellants, it can properly be characterised as a commercial.

51. In *Aspen Underwriting Ltd v. Credit Europe Bank NV* [2018] EWCA Civ 2590, Gross LJ giving the leading judgment, also referred to the possibility of excluding the right of an undisclosed principal to sue or be sued, at [47]:

> It is not in dispute that English Law permits an undisclosed principal to sue or be sued on a contract, subject (for present purposes): (1) to the terms of the written contract expressly or impliedly confining it to the named parties …

52. More recently in *Kaefer Aislamientos de CV v. AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 at [55], Green LJ summarised the relevant principle:

> For a party to be an undisclosed principal it must hence be established that … (3), there is nothing in the contract or surrounding circumstances showing that the agent is the true principal and which excludes the making of a contract with an undisclosed principal.

53. In the present case, the relevant enquiry involved two questions. First, why was Mr Chernukhin not named as a party to the SHA? Secondly, in the light of this circumstance, is the SHA to be construed as excluding him from the contract?

54. This was the Judge's approach.

The reasons why Ms Danilina was named, and Mr Chernukhin was not named, as Beneficial Owner 2

55. The Judge dealt with this in [173]-[174]:

> 173. It is, I think, more probable than not that Mr Chernukhin, having recently been dismissed as chairman of VEB, did not wish to advertise his interest in TGM and put forward Mrs Danilina's name, with her consent, as his agent, for that purpose. Of course, it would not take a member of the Russian 'establishment' (Mr Chernukhin's phrase) long to connect Mrs Danilina with him, especially where he was expressly named in

> the Supplemental Agreement. But I do not consider that that renders his suggested motive in nominating Mrs Danilina as the beneficial owner improbable. (Experience suggests that those who use nominees to hide their beneficial interest cannot avoid using persons who for one reason or another, can be connected to the true beneficial owner; cf *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm), at [16]-[18].)
>
> 174. … It is more likely than not Mr Deripaska appreciated why Mr Chernukhin did not wish the latter's beneficial interest to be stated in the SHA.

56. This led to the Judge's important conclusion, expressed at [176]:

> 176. In my judgment, having reviewed all of these matters and the detailed submissions made in writing, the extrinsic evidence clearly points to Mr Chernukhin having been in late 2001 the true joint venture partner of Mr Deripaska and in May 2005 the true beneficial owner of [Navigator]. That extrinsic evidence, in my judgment, outweighs the otherwise cogent evidence provided by the SHA (and its related contractual documents) that Mrs Danilina was the true joint venture partner and beneficial owner of [Navigator].

57. At [177] of the judgment, the Judge came to two further significant conclusions on the facts. First, he found that it was more probable than not that Mr Deripaska knew that Mr Chernukhin was his true joint venture partner. Second, he found that Ms Danilina 'agreed to being used as Mr Chernukhin's nominee or agent.' At [274] of the judgment, the Judge reached the further factual conclusion that Mr Chernukhin was the beneficial owner of Navigator, through an intermediate corporate structure.

58. Later in the judgment, he added this:

> 284. Mrs Danilina was trusted by Mr Chernukhin in 2004 and 2005 (as she had been before). That is why he was content for Mrs Danilina to be named as the partner in the October 2004 term sheet and as the beneficial owner of Navigator in the 2005 SHA. It is to be inferred that he asked her to use her name in this way as his nominee and that she agreed to do so. I do not doubt that Mr Deripaska appreciated at all times that his true joint venture partner was Mr Chernukhin …
>
> 285. In denying that that was so Mr Deripaska has given dishonest evidence to the court as he did to the arbitrators. What his motive was for doing so is known only to himself. Mrs Danilina also gave dishonest evidence to the court that she was in reality Mr Deripaska's joint venture partner …

59. He concluded:

> 293. On my findings of fact Mr Chernukhin authorised Mrs Danilina to sign the SHA as his nominee as beneficial owner of Navigator and, together with Navigator, as Party 2. Further, Mrs Danilina agreed to do so and Mr Deripaska knew that she did so. The remaining question is whether the terms of the SHA confined those entitled to sue and be sued upon the SHA to those named in it as party.

60. It is important to note that the Judge did not treat his findings as determinative of either Mr Deripaska's challenge to the jurisdiction of the arbitrators or Ms Danilina's claims; and that he regarded it as necessary to consider whether the terms of the SHA were such as to exclude Mr Chernukhin from suing or being sued on the SHA as the disclosed principal of Ms Danilina.

61. At [294] of the judgment, the Judge observed that, in the light of the long-established right of a principal, whether disclosed or undisclosed, to enforce a contract made by his agent, 'very clear words' were required to show that only the named party rather than his principal were intended to have the right to perform the contract.

62. Mr Fenwick had two broad submissions. First, he argued that where a contract 'unequivocally and exhaustively' defined the parties to it, it was impermissible to seek to contradict it, see *Aspen Underwriting Ltd and others v. Kairos Shipping Ltd and others 'The Atlantik Confidence'* [2017] EWHC 1904 (Comm), Teare J at [42]-[43]. In the present case, the SHA had that effect. Secondly, he submitted that there were good reasons in the present case why Mr Chernukhin wanted the contract unequivocally and exhaustively to be seen to exclude him: while he held high political office and was Chairman of VEB, it was expedient to keep any commercial interests entirely out of sight; and that, once he had left Russia, he did not wish to advertise his interest in TGM.

63. In my view the Judge was right to ask himself whether there were clear and unambiguous words or indications of an intent to exclude the known and identified principal. The expression 'very clear' used by the Judge may bring an emphasis to the exercise, where the principal is *disclosed*, but does not add very much to what is a general principle of construction that clear and unambiguous language is necessary before a court will hold that a contract has removed rights or remedies which one of the parties to it would have at common law.

64. The principle finds expression in *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717G, where Lord Diplock, in the context of the right to exclude a remedy for breach of contract for the sale of goods or for work and labour, observed:

> But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising from operation of law, and clear express words must be used in order to rebut this presumption.

65. In *Seadrill Management Services Ltd v. OAO Gazprom* [2010] EWCA Civ 691 at [29], Moore-Bick LJ said that:

> … the principle encapsulated in Lord Diplock's dictum is, with respect, essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so.

66. The speech of Lord Jauncey of Tullichettle in *Trafalgar House Construction (Regions) Ltd v. General Surety & Guarantee Co Ltd* [1996] AC 199 at 208C is to similar effect:

> There is no doubt that in a contract of guarantee parties may, if so minded, exclude any one or more of the normal incidents of suretyship. However, if they choose to do so clear and unambiguous language must be used to displace the normal legal consequences of the contract.

See also, the cases cited in *Lewison on the Interpretation of Contracts* 6th ed. at 12-19.

67. So far as Mr Fenwick's second point is concerned, the Judge very plainly had in mind the reasons why Mr Chernukhin was not named in the SHA. It formed an important foundation for his conclusion that he was a party to the contract.

The features of the SHA relied on by the appellants

68. Mr Fenwick relied on a number of features of the SHA and the background as demonstrating a common intention that Ms Danilina was to be treated as Beneficial Owner 2, to the exclusion of Mr Chernukhin: (1) the preamble of the SHA; (2) the 'relational' nature of the contract; (3) clause 13.1 (warranties and representations); (4) clause 14.5 (entire agreement); (5) clause 14.8 (transfer of control); and (6) clause 10.1 and the Supplemental Agreement.

(1) The preamble and clause 2 of the SHA

69. He pointed out that in the preamble, where the parties were named, there was no reference to Mr Chernukhin.

70. Plainly, the naming of the parties in a contract does not 'unequivocally and exhaustively' define the parties to it. As the Judge put it at [296] of the judgment:

> … the mere fact that a person is described or identified in a contract as the party to the contract cannot generally be sufficient to exclude the right of the party's principal to enforce the contract. Otherwise, that right would generally be excluded, and principals would rarely have the right to enforce a contract made by their agent.

71. As such, and by itself, the fact that an *undisclosed* principal is not named in the contract is the start of the enquiry as to the presumed intention of the parties.

72. Mr Fenwick questioned how Navio would know the identity of Beneficial Owner 2 and how the SHA was to work if Mr Chernukhin could intervene whenever he liked. The answer to the first question is that Navio's interest would have been in the

Shareholders, not the Beneficial Owner and the Shareholders were always Filatona and Navigator. The answer to the second question would normally be answered by reference to the agreement by which the principal appoints his nominee. This does not appear to be a matter investigated at trial, perhaps because Ms Danilina denied she was anything of the sort.

73. The obligations of the Beneficial Owners were described at clause 2.2:

> … to ensure due fulfilment of the conditions of this Agreement by the Shareholder of which he is the Beneficial Owner.

74. Clause 2.2 demonstrates that the intent of the SHA was to bind not only the corporate bodies (Filatona and Navigator), but also of their respective Beneficial Owners to the terms of the SHA. Mr Fenwick submitted that both parties proceeded on the basis that Ms Danilina was to be treated as the party with the contractual rights and duties under the SHA. She was the one with the particular skills to make the business of a textile company succeed, and there were sound political reasons why Mr Chernukhin would not want to be identified as a party.

75. The Judge acknowledged Ms Danilina's expertise in the textile business, see judgment at [118]; but made clear findings that one of the primary obligations of Party 2 was a funding obligation, which both parties knew would be carried out by Mr Chernukhin:

> 119. It was submitted on behalf of Mr Deripaska that the fact that the term sheets contemplated Party 2 as having exclusive management of the textile business was 'strong evidence' that Mrs. Danilina was the joint venture partner. I do not view it in that light. It is consistent with Mrs. Danilina having knowledge and experience of the textile business and with there being a need for such knowledge and experience when the business of TGM had to be carried on for 'social' reasons (albeit that it might be moved out of the centre of Moscow). TGM could not simply be closed down overnight and the site redeveloped. But the requirement for Party 2 to share the finance of the project is not consistent with Mrs. Danilina being the joint venture party.

76. At [304] of the judgment, the Judge recognised the difficulties that Mr Deripaska might have in proving that Mr Chernukhin was a party to the SHA and that Ms Danilina was only his nominee: the lack of any documentation to support the claim, which would have to be proved in a foreign language arbitration if he wished to enforce the contract against Mr Chernukhin. However, the Judge also found that this was a risk that Mr Deripaska would have been prepared to take in order to bind Mr Chernukhin so to ensure his financial contribution to the enterprise.

77. Later, the Judge said this:

> 312. The contractual purpose of the parties in naming the beneficial owner of the two corporate vehicles named in the SHA was to bind the beneficial owner to the contract; see clause 2.2 of the SHA. Having regard to that purpose and

> having regard to Mr Deripaska's knowledge that his true joint venture partner was in fact Mr Chernukhin, it is to be expected, on an objective analysis, that Mr Deripaska would be, in the words of Diplock LJ, 'willing to treat as party' to the SHA the person for whom, as he appreciated, Ms Danilina was acting as nominee or agent. Otherwise he would not have the benefit of being able to bind the true beneficial owner of Navigator to the SHA.
>
> 313. This would be an important consideration for Mr Deripaska not only in relation to the financial obligations of the corporate vehicles to ensure that Navio purchased the shares in TGM (clause 3) but also in the relation to the clause (clause 7) which prohibited the parties from competing developments in the relevant area of Central Moscow.

78. In my view, the words of the preamble and clause 2.2 do not come close to constituting clear and unequivocal words or indications demonstrating a common intention that Mr Chernukhin was excluded from performing, and being able to enforce, the obligations set out in the SHA. The proper approach to construing these provisions is to treat him, and not Ms Danilina, as the actual principal of the SHA and therefore the person described as Beneficial Owner 2.

(2) The significance of the SHA being a 'relational' contract

79. The appellants also drew attention to what they described as the 'relational' aspects of the contract: the importance to the success of the joint venture of Ms Danilina's involvement, in contrast to Mr Chernukhin's involvement which was entirely financial. They argued that the SHA was an example of the type of agreement described by Leggatt J (as he then was) in *Yam Seng Pte Ltd v International Trade Corp Ltd.* [2013] EWHC 111 QB at [142]. A contract that:

> … may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements…

80. The point is similar to that expressed by the editors of *Chitty on Contracts* 33rd edition (2018) volume 2, at 31-066, in a part edited by F.M.B Reynolds:

> It seems that not too much should be derived from the use of particular words: the question is whether on the full interpretation of the situation, personality is a term of the contract.

81. The appellants submitted that Beneficial Owner 2 had both express and implied obligations which were to be performed by Ms Danilina; and that this was

inconsistent with the involvement of an unnamed party to the contract to the exclusion of the named party.

82. Whilst I would accept that there were contractual obligations that would be performed by Ms Danilina as Mr Chernukhin's nominee, I do not consider that this point adds more to argument (1) above or that the existence of such obligations comes close to overriding the contra-indications deriving from the surrounding circumstances and the importance of the participation of Mr Chernukhin, identified by the Judge. A relevant question might be: what was to happen if Beneficial Owner 2 did not make the necessary funds available through Shareholder 2?

(3) Clause 13.1 (d) and (e) (warranties and representations)

83. The warranties of each of 'the Parties' can be read perfectly coherently as the warranties of a disclosed and identified principal party to the SHA.

(4) Clause 14.5 (the entire agreement clause)

84. Clause 14.5 is part of Part XIV of the SHA:

> 14.5 This Agreement together with the preamble, appendices and other documents necessary in accordance with this Agreement is the complete and exhaustive agreement between the Parties in respect of the subject matter thereof, and replaces all previous verbal or written agreements, obligations and arrangements of the Parties in relation to its subject matter that do not comply with the provisions of this Agreement.

85. The appellants relied on this provision as showing that the identity and obligations of the parties were exhaustively defined by the documents referred to; and that, since there was no mention of any rights or obligations of Mr Chernukhin, it was strong support for a common intent to exclude any rights or obligations which might otherwise arise from his status as principal party to the contract. They relied on a passage from the judgment of Green LJ in *Kaefer Aislamientos de CV v. AMS Drilling Mexico SA de CV* [2019] EWCA 10 Civ at [113]:

> Where there is an entire agreement clause this is evidence which tends to negative any suggestion that a party intended to sue or be sued by a person other than the counterparty in respect of disputes under the agreement.

86. However, in the following paragraph, there is this:

> For my part I do not think that the entire agreement clause in the terms and conditions necessarily serves to exclude *altogether* the possibility that there might be undisclosed principals. The language used is not wholly unequivocal and the parties could, had they wished, have expressly stated that the parties thereto were the *only* parties that could sue and/or be sued. But they did not. On the other hand, I do consider that it is a cogent indication that the alleged agents (the First and

> Second Defendants) did not intend to act on behalf of an undisclosed third-party principal and that this was also the view of the Claimant. It is evidence that can go into the mix.

87. The observation was made in the context of whether there might be an *undisclosed* principal. In such a case, an entire agreement clause was part of the evidence. It could tend to negative a willingness to contract with a person not named as a party; but might not do so unequivocally where the contract does not state that *only* the named parties may sue or be sued on a contract.

88. The Judge followed this approach:

> 310. Thus the approach of the Court of Appeal in *Kaefer* was that an entire agreement is part of the evidence. It can tend to negative a suggestion that a party was willing to contract with a person not named as a party. But it may not do so unequivocally where it does not state that *only* the named parties may sue or be sued on a contract. It is 'evidence that can go into the mix', that is, the whole of the extrinsic evidence which must be considered on the question whether a party was willing to contract with a person not named in the contract.
>
> 311. The entire agreement clause in this case can be said to be an indication that the parties to it intended only to contract with each other. The phrase 'the complete and exhaustive agreement' suggests that. But that phrase is qualified by 'in respect of the subject matter' of the contract and the clause does not say, as it might have done, that the *only* persons who may sue upon it are the named parties. Thus the clause does not unequivocally exclude the ability of a disclosed principal to sue upon it.
>
> 312. The contractual purpose of the parties in naming the beneficial owner of the two corporate vehicles named in the SHA was to bind the beneficial owner to the contract; see clause 2.2 of the SHA. Having regard to that purpose and having regard to Mr. Deripaska's knowledge that his true joint venture partner was in fact Mr. Chernukhin, it is to be expected, on an objective analysis, that Mr. Deripaska would be, in the words of Diplock LJ, 'willing to treat as party' to the SHA the person for whom, as he appreciated, Mrs. Danilina was acting as nominee or agent. Otherwise he would not have the benefit of being able to bind the true beneficial owner of Navigator to the SHA.
>
> 313. This would be an important consideration for Mr. Deripaska not only in relation to the financial obligations of the corporate vehicles to ensure that Navio purchased the shares in TGM (clause 3) but also in the relation to the clause (clause 7) which prohibited the parties from competing developments in the relevant area of Central Moscow.

89. I would accept that the phrase 'the complete and exhaustive agreement' in clause 14.5 is an indication that the parties intended only to contract with each other. However, it did not say, as it might that the *only* persons who may sue upon it were the named parties, see the extract from *Bowstead & Reynolds*, quoted above at [42]; and the clause certainly did not unequivocally exclude a disclosed principal from suing on it.

90. In the course of argument, Mr Railton QC showed us that such clauses are in general circulation. The most recent edition of *A-Z Guide to Boilerplate and Commercial Clauses (Anderson and Warner)* contains the following draft clauses which could have been amended to cover the position of a disclosed principal:

> Precedent 7 – No agency
>
> Each party represents and undertakes that it is entering this agreement as principal and not as agent for any other party
>
> Precedent 9 – No undisclosed principal
>
> [Party A] warrants that it is not the nominee or agent of any undisclosed principal and that it will assume sole and complete responsibility for the performance of the obligations under this agreement expressed to be informed by [Party A].

While I accept that suggesting ways in which a contract could have made clear how an opposing party's construction could have been more clearly expressed will not usually assist in the task of construction, it seems to me that the point carries some weight.

91. To the extent that Clause 14.5 refers to 'Parties', the appellants' argument does not take the matter significantly beyond that advanced in relation to the preamble; and the Chernukhin Parties do not rely on any previous agreement or any surrounding circumstances beyond those that legitimately established that Mr Chernukhin was a party to the SHA and Beneficial Owner 2.

92. Although a clause would have been easy enough to draft so as to achieve the effect argued for on behalf of the appellants, it would not have been an appropriate contractual provision since the commercial interests in the SHA were only viable if Mr Chernukhin was a party, providing half of the funding for the TGM acquisition.

(5) Clause 14.8 (transfer of control)

93. The clause provided:

> This Agreement creates legal rights and obligations for its parties, and also for their legal successors. The rights and obligations under this Agreement may not be transferred and/or ceded by one Party without prior consent of the other Parties in writing.

94. The appellants argued that this clause gave effect to the importance of the identities of the named parties to the agreement. This is plainly right. However, once it is accepted that Mr Chernukhin was a party to the SHA (as the Judge found), a provision dealing

with transfer of the obligations of the principal parties does not assist on the relevant question: whether the terms of the SHA precluded him from enforcing his rights as a disclosed principal.

(6) Clause 10.1 and the Supplemental Agreement

95. Clause 10.1 provided a right of redemption by the counterparty in the event of a change of control. However, this was subject to the Supplemental Agreement that was signed on the same day and with the same named parties as in the preamble to the SHA. Its material terms were in the form of an agreement which provided that a transfer of the rights of Beneficial Owner 2 to Mr Chernukhin would not constitute a change of control triggering the operation of clause 10.

96. Without disservice to Mr Fenwick's other arguments, it is fair to describe his reliance on the Supplemental Agreement as his strongest point. It is the expressed means by which Mr Chernukhin could intervene in, and assert rights under, the SHA. Mr Fenwick submitted that this provision showed that the SHA is to be regarded as unequivocally and exhaustively identifying the parties to the SHA to the exclusion of Mr Chernukhin. If he were a party to the SHA, Ms Danilina would have nothing to transfer to him. It demonstrated that he was not 'the real and only principal' or 'the only person' who had the rights and obligations under the contract, see *Fred. Drughorn Limited v. Rederiaktiebolaget Trans-Atlantic* [1919] AC 203, Lord Sumner at p.209 and *Ferryways NV v. Associated British Ports*, '*The Humber Way'* [2008] EWHC 225 (Comm) Teare J at [49]. The SHA was structured in such a way that, even if Ms Danilina were Mr Chernukhin's agent or nominee (as the Judge found), some further 'collateral' action under the Supplementary Agreement was required before he could intervene.

97. The Judge accepted that his being named in the Supplemental Agreement was inconsistent with Mr Chernukhin's attempt to disguise his interest in the SHA, see judgment at [316]; but in the light of the factual background, he considered it likely that Mr Chernukhin wished to ensure that, if his position as Beneficial Owner 2 were formally recognised, it would not amount to a change of control. In any event:

> … having regard to the factual context in which the SHA and the Supplemental Agreement are to be found, I am not persuaded that this materially weakens the force of those many matters which suggest that the real beneficial owner of Navigator and joint venture partner of Mr. Deripaska was Mr. Chernukhin.

98. Whatever else may be said about the Supplementary Agreement it plainly recognised the position of Mr Chernukhin; and it may be, as Mr Railton suggested, that it was intended to prevent Mr Deripaska taking a technical point on the effect of Clause 10. As Mr Railton also submitted, the Supplementary Agreement reinforces the view that Mr Chernukhin was already bound to the SHA. If it were otherwise he 'broke cover' in the Supplementary Agreement, but in doing so acquired no rights.

99. The Judge's approach, which gave weight to the appellants' arguments on this issue, is not one that gives rise to any legitimate complaint.

Conclusion on the primary issue

100. The Judge concluded:

> 317. Having regard to these considerations I do not consider that there is anything in the SHA which makes clear that Mr. Deripaska was *only* prepared to accept Mrs. Danilina as beneficial owner of Navigator and not Mr. Chernukhin. Nor do I consider that the terms of the contract *unequivocally and exhaustively* define the parties to it. On the contrary there is every reason why Mr. Deripaska would have been prepared to accept Mr. Chernukhin as the beneficial owner of Navigator.

101. Whether a contract 'unequivocally and exhaustively' defines the parties or whether the rights of a disclosed and identified principal have been 'clearly excluded by the terms of the contract', may be regarded as two ways of asking the same question; either way there is a heavy burden of persuasion on a party who seeks to argue that a known and identified principal is to be excluded from a contract. Like the Judge, I would accept that there are indications in the contractual provisions that the political importance of not referring to Mr Chernukhin as a party gives weight to the appellants' arguments; but like the Judge, I am satisfied that there is nothing in the background or the contractual terms sufficient to demonstrate a clear intent to exclude him from exercising his rights or incurring obligations under the SHA. To put it another way, the parties were not unequivocally and exhaustively defined by the terms of the SHA.

102. It follows that in my view the Judge was right to conclude, as he did (at [322] and [323] of the judgment), that Mr Chernukhin and not Ms Danilina was a party to the SHA, that Mr Chernukhin was entitled to exercise contractual rights under the agreement, that the arbitration proceedings were therefore validly constituted, that Mr Deripaska's s.67 claim failed and that Ms Danilina's TGM claims against the Chernukhin Parties and Mr Kargin (who was a signatory but not a party to the SHA) also failed.

103. I would dismiss the appellants' appeals on this issue.

104. The Judge also dismissed Ms Danilina's Family Assets Claim, while giving directions for a differently framed claim. Since neither of these arise on the appeal it is unnecessary to say anything further about them.

The remaining issues

105. Although the appellants raised arguments based on 'contractual estoppel', as described in *Spencer Bower, Reliance-Based Estoppel* (5th edition 2017) and estoppel by convention, it was recognised that, if the appeal failed on the primary issue (Mr Chernukhin's right to sue as a principal to the SHA) they could not succeed on these alternative bases.

106. However, the respondents relied on two additional grounds for dismissing appeal, which I will address shortly.

107. First, Mr Railton submitted that, even if Mr Chernukhin were not Beneficial Owner 2, the relevant part of the arbitration clause in the SHA (Clause 12.2) was sufficiently wide to enable each of the named Shareholders and Beneficial Owners to bring arbitration proceedings, and that Shareholder 2 did not necessarily need to act jointly with Beneficial Owner 2 in bringing such proceedings.

108. It is sufficient for present purposes to observe that it is unnecessary to decide the point.

109. Second, Mr Railton submitted that the Judge should have struck out the claims of Mr Deripaska and Ms Danilina in the light of the 'Option Agreement', which he characterised as an 'improper agreement', an agreement for Ms Danilina to provide evidence which both she and Mr Deripaska knew was false, to bring a claim based on such false evidence and for withholding evidence from the respondents.

110. The Judge explained why Ms Danilina gave dishonest evidence to the Court at [285]:

> … She was persuaded to give such evidence by the large sum of money which Mr. Deripaska agreed to pay her if she won her claim in this court.

111. Mr Railton submitted that the Option Agreement constituted both a perversion of the course of justice and a contempt of court. In such circumstances the Judge was 'bound to conclude' that the pursuit of the s.67 claim on behalf of the Deripaska parties was an abuse of process which merited striking out or dismissing the claim; and that the claim by Ms Danilina, pursued under the terms of the Option Agreement was also an abuse of process, which should have resulted in her claim being struck out or dismissed. In each case the conduct of the appellants warranted an expression of condign disfavour by the Court. The Chernukhin parties argued that the Judge failed to 'grapple' with this issue: neither refusing their application nor allowing it.

112. It is apparent from *R v. Kellett* [1976] 1 QB 372 and *R v. Toney & Ali* [1993] 1 WLR 362, that a threat or promise to a witness with the intention of persuading the witness to alter their evidence may constitute the crime of attempting to pervert the course of public justice. Furthermore, it is plainly objectionable for a party to direct or put pressure on a witness not to attend an interview with the opposing solicitor, see for example, *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG and others* [2013] EWHC 581 (Comm) at [22].

113. In *Summers v. Fairclough Homes Ltd* [2012] 1 WLR 2004 at [35], there is a passage from the judgment of Lord Clarke (giving the judgment of the Supreme Court) which was relied on by the respondents:

> (iv) Although it appears clear that in the vast majority of cases in which the court struck out a claim it did so at an interlocutory stage and not after a trial or trials on liability and quantum, the cases show that the power to strike out remained even after a trial in an appropriate case. The relevant authorities, such as they are, were considered by Colman J in *National Westminster Bank plc v Rabobank Nederland* [2006]

EWHC 2959 (Comm), where he summarised the position thus in paras 27 and 28:

> 27. In my judgment, there can be no doubt that the court does have jurisdiction to strike out a claim or any severable part of a claim of its own volition whether immediately before or during the course of a trial. This is clear from the combined effect of CPR 1.4, 3.3 and 3.4 as well as 3PD 1.2, and by reason of its inherent jurisdiction.
>
> 28. However, the occasion to exercise this jurisdiction after the start of the trial is likely to be very rare. The normal course will be for all applications to strike out a claim or part of a claim on the merits to be made under CPR 3.4 or 24.2 and determined well in advance of the trial.

(v) We agree with Colman J. His conclusions are consistent with *Glasgow Navigation Co v Iron Ore Co* [1910] AC 293, *Webster v Bakewell RDC* (1916) 115 LT 678, *Harrow LBC v Johnstone* [1997] 1 WLR 459, *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724 per Latham LJ at para 75 and *The Royal Brompton Hospital NHST v Hammond* [2001] EWCA Civ 550; [2001] Lloyd's Rep PN 526, per Clarke LJ at paras 104-109, especially at para 107.

114. Lord Clarke added at [36]:

> As we see it, the present position is that, whether under the CPR or under its inherent jurisdiction, the court has power to strike out a statement of case at any stage on the ground that it is an abuse of process of the court, but it will only do so at the end of a trial in very exceptional circumstances.

115. This statement is support for the proposition that, in 'very exceptional circumstances', the court may strike out a statement of case even at the end of a trial. It is unnecessary for present purpose to examine what circumstances might very exceptionally justify this course, although they will most likely occur as a result of a development in the course of the trial. The reference to [27] in the *National Westminster Bank case* which in turn refers to CPR Part 3.4 and 24.2 indicates that issues of proportionality will arise before a claim that (on this hypothesis) would otherwise succeed, should be peremptorily dismissed.

116. The difficulty with Mr Railton's argument is that, although references were made at the trial to the impropriety of the transaction being a 'self-standing basis for striking out Ms Danilina's claim', no point was made in relation to Mr Deripaska's s.67 claim, no application notice was issued and no oral application was made that the appellants' claims should be struck out on the basis of the Option and Loan Agreement. The best that Mr Railton could say was that the application to strike out was 'in play', in the sense that the possibility was mentioned in argument. In complex and protracted

Commercial Court litigation this is not sufficient to justify, what was described in *Summers v. Fairclough* at [49] as, 'a draconian step'. No doubt many issues came into play in the course of the hearing, but if a party wishes the court to take the exceptional course of striking out a claim during or post trial, there must be a degree of formality to the process, so that the Judge can consider the competing arguments.

117. In my view, this additional ground for upholding the Judge's order cannot succeed. The Judge's approach in the circumstances cannot be faulted.

118. He rightly took into account the Option and Loan Agreement when considering the complex credibility issues that arose and, when it came to the issue of costs, he made an order in the Chernukhin Parties' favour on an indemnity basis. This was fully consistent with the approach commended by the Supreme Court in *Summers v. Fairclough* at [61]. The Judge summarised his approach in an ancillary judgment, [2019] EWHC 727 (Comm) at [18]:

> Mr Deripaska and Ms Danilina lied to the Court. What is more, Mr Deripaska encouraged her to do so by promising to pay her a large sum of money; and she willingly entered in that agreement. This was misconduct of a high order. It was the engine that drove Mr Deripaska's arbitration applications and Ms Danilina's TGM claim.

119. The Judge was in a good position (and certainly a better position than this court) to assess the effect of the appellants' misconduct; and came to a sensible and proportionate response to it. I would accordingly have rejected this ground for upholding the judgment and order.

Conclusion

120. For the reasons set out above, I would dismiss both appeals.

Lord Justice Males:

121. I agree that the appeal should be dismissed for the reasons given by Simon LJ.

122. While the cases concerned with undisclosed principals provide a convenient starting point, the situation with which they deal is very different from the present case of a disclosed and identified principal. When an agent acts for an undisclosed principal, the counterparty has no knowledge at the time of making the contract that there is an undisclosed principal who is entitled to intervene to enforce the contract purportedly made between the counterparty and the agent. However, the law will assume (the 'beneficial assumption' as Lord Lloyd described it) that the counterparty 'is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract' unless the terms of the contract or background circumstances expressly or impliedly exclude that possibility (see the *Teheran-Europe* and *Siu Yin Kwan cases* (above)).

123. In the case of a principal whose existence and identity are known to the counterparty, however, there is no need to resort to any such assumption. All parties know the true

position and can be taken to agree with it. If the counterparty did not agree to contract with the principal, he would say so.

124. On the facts found by the judge here, the counterparty (Mr Deripaska) knew that Ms Danilia was entering into the contract as the nominee or agent for a disclosed and identified principal (Mr Chernukhin); he always regarded Mr Chernukhin as the real party with whom he was contracting; it was in his interests, because only Mr Chernukhin and not Ms Danilina was in a position to provide the necessary finance, that this should be so; and he never said anything to indicate that he did not agree.

125. It was common ground between the parties that, in such a case, it would in theory be possible for the contract to provide that, notwithstanding the existence of the disclosed and identified principal, the contract should after all take effect as a contract between the counterparty and the agent. But that would be an odd agreement to make, at any rate on facts such as those found by the judge here. I do not find it surprising that the parties were unable to cite any case where a contract was concluded by an agent known to be acting on behalf of an identified principal, but where the contract contained language making it clear that it was the agent and not the principal who was to be bound.

126. I agree, therefore, that there is a heavy burden of persuasion on a party who seeks to argue that a known and identified principal is to be excluded from a contract, and that any such intention must appear clearly and unequivocally from the terms of the parties' contract. I agree also that no such intention appears in this case, for the reasons given by Simon LJ.

Lord Justice Lewison:

127. I agree with both judgments.

Appendix

THIS AGREEMENT was concluded on 31 May 2005.

BETWEEN:

FILATONA TRADING LIMITED, a company registered in accordance with the laws of the Republic of Cyprus … hereinafter referred to as '**Shareholder 1**', and also the Beneficial Owner of Shareholder 1, Oleg Vladimirovich Deripaska … hereinafter referred to as '**Beneficial Owner 1**', Shareholder 1 and Beneficial Owner 1 hereinafter jointly referred to as '**Party 1**';

NAVIGATOR EQUITIES LIMITED, a company registered and operating in accordance with the laws of the British Virgin Islands … hereinafter referred to as '**Shareholder 2**', and also the Beneficial Owner of Shareholder 2, Lolita Vladimirovna Danilina … hereinafter referred to as '**Beneficial Owner 2**', Shareholder 2 and Beneficial owner 2 hereinafter jointly referred to as '**Party 2**'; and

NAVIO HOLDINGS LIMITED, a company registered and operating in accordance with the laws of the Republic of Cyprus (registration number No. 151271), hereinafter referred to as the '**Holding Company**';

Shareholder 1 and Shareholder 2 hereinafter individually referred to as a '**Shareholder'**, and jointly referred to as the '**Shareholders**',

Beneficial Owner 1 and Beneficial Owner 2 hereinafter individually referred to as a '**Beneficial Owner**,' and jointly referred to as the '**Beneficial Owners'**, Party 1, Party 2 and the Holding Company hereinafter being jointly referred to as the '**Parties**'.

…

II **General Provisions**

…

2.1 The subject matter of this Agreement is:

(a) definition of the principles of mutual relations between Party 1 and Party 2 within the scope of the Joint Business;

(b) definition of the principles of mutual relations between Party 1 and Party in relation to the management of the Assets;

…

2.2 Each Beneficial Owner undertakes to ensure due fulfilment of the conditions of this Agreement by the Shareholder of which he is the Beneficial Owner.

III. **Acquisition of shares of the Issuer**

3.1 The Parties agree to ensure transfer to the Holding Company, within 60 (sixty) calendar days of the date of this Agreement coming into force, the ownership rights to the Assets held by Party 1 (its Affiliates) and/or Party 2 (its Affiliates) as of the date of this Agreement coming into force.

Acquisition of the Assets by the Holding Company is effected at a price equal to 12,500,000 (twelve million five hundred thousand) US dollars.

Purchase of the Assets by the Holding Company is financed in its entirety by the Shareholders by granting of loans to the Holding Company. The sums

granted to the Holding Company as a loan by each of the Shareholders shall be equal.

…

…

V. Principles of management of the joint business

5.1 The Parties shall manage the Joint Business jointly and on a parity basis ..

…

5.11 The Parties agree that the appointment and termination of powers of persons who hold key management posts of the Issuer (excluding Representatives on the Supervisory Board) are effected independently by the Shareholder whose representative is the current General Director, excluding the case indicated below.

The post of Deputy General Director for textile production is formed at the Issuer. Here, regardless of the fact, which Shareholder's representative is the current general Director, the post of Deputy General Director for textile production will be held by a representative of Shareholder 2. In this case, his area of competence will cover all matters connected with the production, technology and sale of textile products.

The powers of the Deputy General Director for textile production and the rights which he is granted and which are necessary and sufficient for the solution of problems he faces, shall be agreed upon by the supervisory board of the Issuer.

…

VI. Withdrawal from Joint Business

…

6.2 The Parties agree that neither of the Shareholders may alienate its shares in the Holding Company in a manner other than by sale. Each of the Shareholders has a preferential right to acquire the Holding Company's shares to be sold by the other Shareholder, at the price offered to a third party.

…

6.5 The Parties agree that neither of the Shareholders may Transfer the Holding Company’s shares to any other person (whether legal or natural) or in the interest of such a person, unless such a person, before the time of such a Transfer, concludes a binding shareholder agreement with the other Shareholder under conditions identical to those stated in this Agreement.

…

VII. Prohibition of Competition

7.1 Party 1 and Party 2, each individually, is prohibited from carrying on Developer Activity on ‘Krasnaya Presnya’ council territory in the City of Moscow, independently, or through representatives or Affiliates, unless additionally otherwise agreed by the Parties.

…

VIII. Reorganisation (Restructuring) of the Issuer

8.1 The Parties undertake to ensure due adoption and fulfilment by the competent management bodies of the Issuer of a resolution to reorganise (restructure) the Issuer by dividing the Issuer's business into a Textile Business and a Developer Business.

8.2 After the division of the Issuer's business into the Textile Business and the Developer Business, the said businesses shall be managed on the basis of the following principles:

(a) the Textile Business shall be managed by representatives of Shareholder 2;

(b) the Developer Business, unless additionally otherwise agreed by the Shareholders, shall be jointly managed by the Shareholders on a parity basis, namely: on the basis of equal participation by the Shareholders in the management and in the adoption of resolutions – including equal representation on management bodies – by the legal entities, to which shall be transferred the Issuer's Developer Business and/or real estate held by the Issuer as a result of the reorganization (restructuring) of the Issuer; an equal number of votes during the adoption of resolutions by the management bodies of such legal entities; and equal participation in the income and profits from the Developer Business conducted by such legal entities.

The cooperation of the Shareholders in the course of dividing the Issuer's business (as indicated above) shall be additionally defined by the Shareholders.

…

…

X. Change of Control

10.1 A change of control ('Change of Control') in respect of either of the Shareholders signifies a change directly or indirectly, including indirectly through third parties or in any other manner whatsoever, of the rights of the Beneficial Owner of such a Shareholder in relation to: (i) exercise or control of the right to vote associated with shares making up no less than one-half of all shares in the authorised capital of either of the Shareholders; (ii) transfer or control of transfer of no less than one-half of the shares in the authorised capital of either of the Shareholders; (iii) appointment or control of appointment of no less than half the directors of either of the Shareholders.

The transfer by Beneficial Owner 1 of the rights indicated in this Clause to a person who is lawfully married to him on the date of this Agreement coming into force, shall not be considered Change of Control.

…

…

XII. Settlement of Disputes, Applicable Law

12.1 The Parties undertake to do their utmost to settle all disputes and disagreements arising from this Agreement or in connection therewith, including those concerning its execution, breach, termination or invalidity ('Dispute'), by negotiations.

If, within 30 (thirty) calendar days of the date of receipt by one Party of a first notice of Dispute in writing from the other Party, this Dispute is not settled by negotiations, then the Parties undertake to try to settle the Dispute by mediation. To conduct mediation, the Parties shall appoint a mediator who has undergone special training as a mediator and has the corresponding certificate. In the event that (1) within 30 (thirty) calendar days of the commencement of mediation or, (2) if mediation has not commenced, then within 45 (forty-five) calendar days of receipt by a Party of a written proposal from the other Party to submit the issue to mediation, or (3) after conducting mediation, this Dispute is not settled, then the Dispute is to be settled at the London Court of International Arbitration in accordance with its rules, the provisions of which are deemed to be included in this Clause 12.1.

12.2 The place for arbitration in accordance with this Agreement shall be the City of London (Great Britain). The court of arbitration consists of three arbitrators. Each Shareholder (its Beneficial Owner) shall select one arbitrator. In the event that either of the Shareholders (its Beneficial Owner) does not appoint its own arbitrator, this arbitrator shall be appointed by the London Court of International Arbitration. The two arbitrators appointed in this way select the third arbitrator. The third arbitrator is the chairman of the arbitration panel. In the event that the arbitrators do not select a third arbitrator within 30 (thirty) calendar days of their appointment, the third arbitrator shall be appointed at the request of either of the Shareholders (its Beneficial Owner) by the London Court of International Arbitration. The arbitration hearing shall be conducted in English.

12.3 The arbitration award granted in connection with any arbitration hearing according to this Section XII is final and binding, and a ruling based on it may be made by any court of competent jurisdiction.

12.4 Until the final settlement of the dispute according to the procedure provided by this Section XII, the Parties undertake to carry on the Joint Business in accordance with the current (last agreed) Business Plan of the Issuer.

12.5 This Agreement shall be governed and interpreted in accordance with the substantive law of England and Wales, disregarding its conflict of laws.

XIII. Warranties and Representations

13.1 Each of the Parties hereby warrants and represents to the other Parties that:

…

(d) there are no agreements, provisions of applicable law or other restrictions of any kind that apply to any of the Parties which might restrict or in any way impede the conclusion or and execution of this Agreement or result in the application of any penalties, forfeiture of rights, termination of any agreements or restriction of economic activity of any of the Parties as a result of the conclusion and execution of this Agreement;

(e) this Agreement creates valid and lawful obligations of each of the Parties that are subject to enforcement in accordance with the conditions thereof, taking into account the restrictions which may be provided by the applicable law relating to bankruptcy, insolvency, reorganisation, moratorium or similar creditors' rights as a whole, and also to the general principles of equity

XIV. Final Provisions

…

14.5 This Agreement together with the preamble, appendices and other documents necessary in accordance with this Agreement is the complete and exhaustive agreement between the Parties in respect of the subject matter thereof, and replaces all previous verbal or written agreements, obligations and arrangements of the Parties in relation to its subject matter that do not comply with the provisions of this Agreement.

…

14.8 This Agreement creates legal rights and obligations for its parties, and also for their legal successors. The rights and obligations under this Agreement may not be transferred and/or ceded by one Party without prior consent of the other Parties in writing.