Neutral Citation Number: [2011] EWHC 3107 (Ch)

Case No: HC10C04611

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2011

Before :

THE HON MR JUSTICE ARNOLD

- -

Between :

VTB CAPITAL PLC	**Claimant**
- and -	
(1) NUTRITEK INTERNATIONAL CORP	**Defendants**
(2) MARSHALL CAPITAL HOLDINGS LIMITED	
(3) MARSHALL CAPITAL LLC	
(4) KONSTANTIN MALOFEEV	

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- -

Clive Freedman QC, Paul McGrath QC, Stuart Ritchie, Iain Pester and **David Peters** (instructed by **PCB Litigation LLP**) for the **Claimant**
Daniel Toledano QC, Jamie Goldsmith and **Alexander Brown** (instructed by **Weil, Gotshal & Manges**) for the **First Defendant**
Michael Lazarus and **Christopher Burdin** (instructed by **SJ Berwin LLP**) for the **Second Defendant**
Stephen Rubin QC, Cyril Kinsky QC, Edward Brown and **James McClelland** (instructed by **SJ Berwin LLP**) for the **Fourth Defendant**

Hearing dates: 2-4, 7-9 November 2011

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE ARNOLD

MR JUSTICE ARNOLD :

Contents

Introduction

1. In these proceedings the Claimant ("VTB") contends that it has been defrauded by the Defendants. On 23 November 2007 VTB entered into a facility agreement ("the Facility Agreement") under which it lent some US$225 million to Russagroprom LLC ("RAP") to fund the acquisition of six Russian dairy plants and three associated companies ("the Dairy Companies") from the First Defendant ("Nutritek"). RAP subsequently defaulted on the loan. VTB has recovered less than US$40 million from the security provided. VTB alleges that it was induced to enter into the Facility Agreement by fraudulent misrepresentations made by Nutritek for which the other Defendants are jointly liable. VTB relies upon two alleged misrepresentations: first, that RAP was not under common control with Nutritek, contrary to the fact; and secondly, that the value of the Dairy Companies was much greater than they were in fact worth.

2. On 11 May 2011 Chief Master Winegarten granted VTB permission to serve the proceedings out of the jurisdiction on each of the Defendants. On 5 August 2011 Roth J made a worldwide freezing order ("WFO") against the Fourth Defendant ("Mr Malofeev") freezing his assets up to US$200 million. The following applications are now before the court:

   i) Applications by Nutritek, the Second Defendant ("MarCap BVI") and Mr Malofeev to set aside permission to serve out. (The Third Defendant ("MarCap Moscow") has not yet been served.)

   ii) An application by VTB to amend its Particulars of Claim to add a claim in contract against MarCap BVI, MarCap Moscow and Mr Malofeev.

   iii) An application by VTB to continue the WFO until trial.

   iv) An application by Mr Malofeev to discharge the WFO.

   v) An application by VTB for further disclosure of Mr Malofeev's assets.

3. It was agreed between counsel that argument on the last application listed above should be deferred until after I had given judgment on the other applications. Despite this, and despite the fact that counsel for the Defendants sensibly divided the issues between themselves so as to avoid repetition, argument on the other applications lasted a full six days (one more than originally estimated) after two days' pre-reading. There were 27 bundles of procedural documents, written evidence and exhibits, not including a bundle of skeleton arguments and one of transcripts. The written evidence was added to on a daily basis during the course of the hearing. One of the witnesses has made no less than twelve witness statements. In addition, I was supplied with 14 bundles of authorities, although there was some duplication between these, and again these were added to on a daily basis. As will appear, a key reason (although not the only reason) for this volume of materials and the time taken by the hearing is the number and complexity of the issues raised. It follows that this judgment is regrettably long, but even so I cannot possibly discuss all the evidence, authorities and

arguments I have read and heard. I have attempted, however, to take everything into account.

Factual background

4. The following account of the factual background is based on the evidence presently before the court. This evidence is incomplete, untested and in some respects highly controversial. It follows that my account is necessarily a provisional one. It is also selective, in that I shall concentrate on matters which are relevant to the applications before me. As I shall explain below, this account includes references to certain matters which were not referred to by VTB in its evidence either when applying for permission to serve out or when applying for the WFO.

The parties

5. VTB is a company incorporated in England and Wales. It carries on business as a bank. It is a member of the London Stock Exchange, and it is authorised and regulated by the Financial Services Authority for the conduct of investment business in the UK. VTB is majority owned by JSC VTB Bank ("VTB Moscow"). VTB Moscow is a state-owned Russian bank and is the second largest bank in Russia. JSC VTB Debt Centre ("VTBDC") is a wholly-owned Russian subsidiary of VTB Moscow.

6. Nutritek is a company incorporated in the British Virgin Islands ("BVI"). It is owned and operated from Russia. Nutritek was formerly the owner of the Dairy Companies. The primary purpose of the Facility Agreement was to fund the acquisition of the Dairy Companies by RAP from Nutritek through the purchase of the shares in a BVI special purpose vehicle called Newblade Ltd ("Newblade"), which was incorporated shortly before and for the purpose of the transaction.

7. MarCap BVI is a company incorporated in the BVI on 12 November 2004. It is a holding company which has no employees or operations of its own. VTB's evidence is that, at the time of the Facility Agreement, MarCap BVI owned Marshall Milk Investments Limited, a company incorporated in Cyprus, which in turn indirectly owned around 43% of OJSC Nutrinvestholding, which in turn indirectly owned Nutritek.

8. MarCap Moscow is a company incorporated in Russia. VTB's evidence is that, at the time of the Facility Agreement, MarCap Moscow was wholly owned by MarCap BVI and that Mr Malofeev and Georgy Sazhinov were business partners in MarCap Moscow.

9. Mr Malofeev is a Russian citizen resident in Moscow. He was formerly Head of Corporate Finance in the investment banking department of MDM Bank, a leading non-state bank in Russia at that time. In 2005 he left to set up Marshall Capital Partners, which is said to be a leading private equity house in Russia. He is alleged by VTB to be the principal beneficial owner and controller of Nutritek, MarCap BVI, MarCap Moscow and RAP.

RAP

10. RAP was incorporated in Russia on 21 May 2007. In November 2007 its parent company was Migifa Holdings Ltd ("Migifa"), a company incorporated in Cyprus. Migifa's parent company was Brentville Ltd ("Brentville"), a company incorporated in the BVI.

The negotiations

11. At the relevant time Konstantin Tulupov was employed by VTB Moscow as a Director with its Investment Business Acquisition and Leverage Finance Team in Moscow. His role was to act as the Project Manager in relation to projects assigned to him by his Managing Director, at that time Konstantin Ryzhkov. The negotiations leading to the Facility Agreement was one such project. During the course of the negotiations Mr Ryzhkov also became the Head of Investment Business Acquisition and Leverage Finance Team of VTB.

12. In the summer of 2007, before 19 July 2007, Mr Tulupov and Mr Ryzhkov met Mr Malofeev and Alexander Provotorov for lunch. Mr Tulupov's evidence is that Mr Malofeev led the discussions and was the person in charge. Mr Malofeev explained that he had founded "Marshall Capital", which was a family of funds. In context, this would appear to be a reference to MarCap Moscow. MarCap Moscow controlled Nutritek, a dairy and baby food producer. MarCap Moscow wanted to sell Nutritek's dairy business, but retain its baby food business. A potential buyer for the dairy business had been found, and MarCap Moscow was looking to create a package which included finance for a purchaser to buy the business. Mr Malofeev wanted to know what facilities VTB Moscow might be able to offer and what its requirements would be. He was looking to raise finance in the region of US$200 million. Mr Tulupov outlined the bank's requirements, including for an independent valuation of the business showing that there was sufficient equity in the business over and above the sum being lent and for due diligence of the borrower. The potential buyer was not identified, but Mr Tulupov says that he assumed it was an independent third party since the discussions were about the sale of the business.

13. On about 18 July 2007 Mr Tulupov instructed the London office of Dewey, LeBoeuf, Greene & MacRae ("DLGM") in relation to the proposed transaction. On 18 July 2007 various emails were exchanged setting up a conference call between representatives of VTB Moscow, VTB (Marina Bragina, who was a Director of Investment Business Acquisition and Leverage Finance Team in London), MarCap Moscow (Mr Provotorov and Yury Leonov) and DLGM on 19 July 2007. After the conference call, Bruce Johnston of DLGM sent Mr Tulupov an email asking "Who controls the borrower? I need to do conflict searches etc". Mr Tulupov replied the same day "Marshall Capital controls Nutritek, and the potential purchaser is controlled by a group of individuals with whom, MarCap assures, you can't have any conflict of interest." Mr Johnston replied that that was an evasive answer, and said that VTB would need to do a KYC (know your client) clearance on the borrower.

14. It appears that there was a meeting attended by Mr Tulupov on behalf of VTB Moscow and Mr Provotorov and Mr Leonov on behalf of MarCap Moscow, and possibly others, in Moscow on 24 July 2007. On 25 July 2007 Mr Tulupov sent a draft term sheet to Mr Provotorov and Mr Leonov by email, with copies to Mr Malofeev,

Mr Ryzhkov, Maxim Belousov of VTB Moscow and Ms Bragina. The draft term sheet provided for "VTB Group", specifically either VTB Moscow or VTB, to lend up to US$220 million to "the Borrower", a special purpose vehicle or one of the Dairy Companies; for MarCap Moscow (described as "the Beneficiary") to provide US$50 million to the Borrower as its own contribution; for the Borrower to purchase the shares in the Dairy Companies for US$250 million; for the Borrower to pay VTB Group an arrangement fee of US$5 million; and for the Beneficiary to ensure that "additional commission (equity fee)" was paid to VTB Group in the form of shares or an instrument tied to shares in an amount equivalent to 30% of the shares in the Borrower or the Dairy Companies. Among the conditions precedent listed were financial and legal due diligence of the Dairy Companies, the shares to be acquired and the transaction by VTB Group.

15. On 30 July 2007 Mr Tulupov emailed a second draft term sheet to Mr Malofeev, Mr Provotorov and Mr Leonov, with copies to Mr Ryzhkov, Mr Belousov and Ms Bragina. The main differences from the first draft term sheet were that it provided for finance of up to US$222 million and an "additional commission (equity fee)" of 15%.

16. It appears that there was another meeting between Mr Tulupov on behalf of VTB Moscow and Mr Malofeev, Mr Provotorov and possibly Mr Leonov on behalf of MarCap Moscow in about early October 2007. Mr Tulupov's evidence is that at this meeting Mr Malofeev said that RAP, a new company, had agreed to buy the Dairy Companies. It was a friendly transaction, many of Nutritek's senior management would move to the new company, and MarCap Moscow and Nutritek would assist RAP while it established itself. Although it occurred to Mr Tulupov that the beneficial owners of the parties might know each other, there was no indication that Nutritek and RAP were under the common control of MarCap Moscow. There was also further discussion about the bank's requirements.

17. On 8 October 2007 Mr Tulupov emailed a third draft term sheet to Mr Malofeev, Mr Provotorov and Mr Leonov, with copies to Mr Ryzhkov and Mr Belousov (but not Ms Bragina). The main differences between this draft and the second draft were as follows: it identified the lender as VTB; it identified the Borrower as RAP; it did not identify the Beneficiary as MarCap Moscow; it provided for an increased arrangement fee of US$8.5 million; the finance was to be provided in two tranches of up to US$208.5 million and up to US$13.5 million; the "additional commission (equity fee)" was to be paid in the form of a derivative instrument (option/warrant) tied to the shares; and VTB Group would enter into appropriate derivative instruments in order to hedge interest rate and currency risks.

18. By this stage it appears to have been decided that VTB would be the "Lender of Record" on the proposed transaction, and that VTB Moscow would enter into a participation agreement with VTB under which VTB Moscow funded 100% of the loan. Mr Tulupov's evidence is that it was common practice for VTB to be the Lender of Record in these types of transaction since (i) VTB was able to offer more sophisticated lending structures than VTB Moscow and (ii) English law offers more protection in the case of default.

19. In addition, it was agreed at about this time that VTB would enter into an interest rate swap agreement with RAP to enable RAP to hedge the interest risk under the Facility Agreement.

20. It appears that it was around this time that work started in earnest on preparing the documentation to give effect to the proposed transaction. Mr Tulupov's evidence is that, as Project Manager, he was primarily responsible for obtaining information from MarCap Moscow (where his principal contact was Mr Leonov), Nutritek (where his principal contact was a Mr Skuratov) and RAP (where his principal contacts were Evgenia Kremneva, RAP's General Director, and later Nikolai Pankov, its in-house lawyer) and then distributing the information to the relevant departments within VTB Moscow and to Ms Bragina at VTB. Mr Tulupov says that Mr Leonov and Mr Skuratov were careful to give him the impression that RAP was an independent third party purchaser.

21. Mr Tulupov was also responsible for drafting the decision to approve the proposed transaction for VTB Moscow's Credit Committee.

22. On 22 October Mr Leonov sent Ms Bragina a description of Nutritek's dairy business in English, saying that it was the basis for the information provided to VTB Moscow's Credit Committee.

23. On 23 October 2007 Mr Tulupov sent DLGM, Ms Bragina and others an email informing DLGM that "this is a very friendly transaction and we expect full co-operation and sufficient flexibility on the part of the Seller in terms of both agreeing the conditions for share transfer most favourable for both parties and undertaking any and all corporate actions necessary to give effect to the security arrangements under the facility".

24. On the same day DLGM circulated revised drafts of an approval of the transaction by VTB Moscow's Credit Committee and of the Facility Agreement and the participation agreement. (It is not clear when drafts were first circulated.) The approval appears to have been drafted by Mr Tulupov in Russian, while the agreements were drafted by DLGM in English. Other documents were drafted by Dewey & LeBoeuf's Moscow office.

25. Also on about 23 October 2007 Ms Kremneva on behalf of RAP engaged Clifford Chance CIS Ltd to act for it in relation to the proposed transaction.

26. On 31 October 2007 VTB Moscow's Credit Committee approved the proposed transaction, and in particular VTB Moscow's participation in the provision of credit by VTB to RAP, at a meeting attended by Mr Tulupov and Mr Ryzhkov among others. The minutes of the meeting record the Committee's decision "[t]aking into consideration a good financial situation [sic] of the Borrower, [to] classify the Borrower's credit debt … as Quality Category 1".

27. On 1 November 2007 Dalford Consultants Ltd ("Dalford"), a company incorporated in Belize, entered into a consultancy agreement with RAP under which Dalford agreed to provide various financial advisory services for a retainer fee of US$3.5 million and a success fee in the form of a derivative instrument linked to 10% of shares in the Dairy Companies. It is accepted by VTB that Dalford was controlled by VTB Moscow; that no services were provided or intended to be provided by Dalford pursuant to the agreement; and that the true purpose of the agreement was to avoid tax. I will discuss the significance of this below.

28. On 2 November 2007 a trainee solicitor at DLGM circulated a Nutritek contacts list. This listed Mr Provotorov, Mr Leonov and Colin Magee (actually VTB's General Counsel) as contacts for RAP. Less than two hours later the same trainee circulated an amended contacts list which listed Mr Provotorov and Mr Leonov as contacts for MarCap Moscow, Mr Magee as a contact for VTB and "info@russagroprom.ru" as the sole contact for RAP. Unlike counsel for Mr Malofeev, I attach no significance to the errors in the original list. Nor does the contact information for RAP strike me as significant given Mr Tulupov's evidence about his contacts at RAP.

29. On 6 and 8 November 2007 Ms Bragina sent two emails which are central to VTB's first misrepresentation claim. The email dated 6 November 2007 was to Peter Yates, Peter Manning and Hugh Parsons of VTB, with copies to Mr Ryzhkov and Mr Tulupov, and read as follows:

> "Just wanted to let you know in addition to information supplied in ACF [presumably Application for Credit Facility] that:
>
> - OOO Rusagroprom [sic] was incorporated on 21.05.2002 [sic – this should read 2007] as an SPV with the purpose of a Nutritek DD [Dairy Division] acquisition and has no other operations;
>
> - OOO Rusagroprom's beneficiary is Mr Vladimir (Ivanovich) Alginin, who was up until recently the head of the Agro division of OAO Vimm-Bill-Dann Food Products (*The largest Russian Milk and Juice producer*). Before that Mr Alginin was the first vice-president of the federal contract corporation Roskhlebprodukt and the Deputy Minister of Agriculture."

There is nothing in the email to indicate Ms Bragina's source for this information. VTB's case is that it must have come from Nutritek or MarCap Moscow.

30. The email dated 8 November 2007 was to Mr Yates and Juliet Wool of VTB, with copies to Mr Ryzhkov, Mr Tulupov, Mr Magee and Boris Lvov (I assume of VTB Moscow). It appears to be a partial response to a list of questions she had been sent previously. It includes the following passages:

> "Following my conversation with Juliet this morning, below are the remaining pieces of information that we need to supply you with for Nutritek transaction. We will endeavour to answer all of them towards the end of the day. For the sake of time I will be sending you the answers as I have them. Some of the answers you will find in blue below. Please let me known if in your view the other info is outstanding.
>
> 1. Confirm that OOO Russagroprom is 100% owned by Alginin. As per the info just received from Nutritek management, Mr Alginin has a 90% share in

> Russagroprom, the remaining 10% share belongs to the management team.
>
> …
>
> 4. Sub-participation confirmation/participation agreement with VTB [i.e. VTB Moscow]. The VTB/VTBE [i.e. VTB Moscow/VTB] participation agreement signing is a CP [condition precedent] to Utilization of the Facility (see Schedule 2 of the Facility Agreement). Please let me know if anything else is needed, otherwise I assume this matter is closed.
>
> … "

VTB relies on the fact that the email states the information about Mr Alginin had come from Nutritek management, while counsel for Mr Malofeev points to the absence of any other documentary evidence to support this statement.

31. On 7 November 2007 the Moscow office of Ernst & Young Valuation LLC ("Ernst & Young") sent the final version of a valuation report on the Dairy Companies dated 5 September 2007 ("the 2007 E&Y Valuation") by email to Mr Leonov and to RAP. On 8 November 2007 RAP forwarded it to Mr Tulupov. Mr Tulupov's evidence is that he had first received the 2007 E&Y Valuation prior to this, and had submitted it to the VTB Moscow Credit Committee for its meeting on 31 October 2007. I have not seen any documentary support for this, but it seems probable that one or more drafts of the 2007 E&Y Valuation would have been circulated prior to 7 November 2007. The 2007 E&Y Valuation valued the Dairy Companies at around US $366 million. This valuation was based on information provided by Nutritek's management. The 2007 E&Y Valuation is central to VTB's second misrepresentation claim.

32. On 9 November 2007 DLGM circulated a revised draft of the Facility Agreement. On 12 November 2007 Mr Magee sent Ms Bragina, with copies to three other VTB personnel, an email setting out comments on the revised draft. Later the same day he also sent comments to DLGM.

33. Also on 12 November 2007 Mr Tulupov circulated the 2007 E&Y Valuation (albeit in Russian) to Ms Bragina and Mr Magee among others.

34. Also on 12 November 2007 VTB sent RAP a fee letter reciting RAP's agreement to pay the arrangement fee of US$5 million and a mandate to arrange the loan. The latter refers to a (fourth) draft term sheet. This differs from the third draft in various respects, including the following: it provides for a total facility of US$230 million in two tranches of up to US$208.7 million and up to US$21.3 million; it provides for an arrangement fee of US$5 million; and it provides for an equity fee of 5%.

35. On 13 November 2007 VTB Moscow's Management Board approved the proposed transaction.

36. An "Application for Credit Facilities" dated 13 November 2007 prepared by VTB, and signed off by Ms Bragina and Steve Thunem (Head of Debt Capital Markets) of

VTB, in respect of the Facility Agreement states under the heading "Business Proposal/Rationale":

> "VTB [i.e. VTB Moscow] Funding Participation and No Credit Risk for VTBE [i.e. VTB]. A Participation Agreement between VTB and VTBE provides that VTB fully funds the facility before any draw-downs are made against it. This makes the transaction possible under the current liquidity situation in the market and helps to circumvent the per customer lending limit of VTBE. Also, the Participation Agreement ensures that in the event of default VTB takes responsibility for all the amounts due from the Borrower, thus eliminating the credit risk exposure for VTBE for the main credit facility."

37. A similar document dated 15 November 2007 prepared by VTB, and signed off by Ms Wool (a credit risk analyst), Peter Yates (Head of Credit Risk) and Peter Manning (Chief Risk Officer) of VTB, in respect of the interest rate swap specifically as well as the overall transaction more generally includes the following passages:

> "**Business Proposal/Rationale**
>
> VTB [i.e. VTB Moscow] Funding Participation and no Credit Risk for VTBE [i.e. VTB]: The participation agreement between VTB and VTBE provides that VTB fully funds the facility before any draw-downs are made against it. Further, VTB takes responsibility for all the amounts due from the Borrower, eliminating any credit risk faced by VTBE.
>
> …
>
> **Risk Comments and Recommendation**
>
> … The total value of the transaction is US$280M, with Russagroprom contributing US$50M equity. The ultimate beneficiary of Russagroprom appears to be Mr Vladimir Alginin, who has held a number of government posts in the agricultural sector, however, IB [Investment Branch] is required to confirm this as a CP [Condition Precedent]
>
> …
>
> US$5M 2 year interest swap line supported, subject to:
>
> …
>
> - Confirmation by VTBE Legal that the participation agreement with VTB is in compliance with FSA requirements ensuring that no credit risk is reportable on VTBE balance sheet (C/P).
>
> **Risk Summary**

Structure Risk Potentially High but Acceptable

…

- The structure risk is potentially high, as Credits considers the transaction to be unsecured; the security package is of little tangible value. The pledge of shares by the Borrower for the subsidiaries is for 100% of the capital owned by the Borrower….

…

- The Facility structure includes guarantees from the Borrower's intermediate holding companies (Brentville, the parent company of Migifa, the parent of Russagroprom). We have no financial visibility of Brentville, and we are not aware whether it has any other subsidiaries besides Migifa, or who the parent of Brentville is, besides being advised the ultimate beneficial owner is Mr Vladimir Alginin. Consequently, we consider the Brentville/Migifa guarantees as having minimal tangible value.

…

Financial Risk High

- Credit has limited visibility to financial information on all parties involved in this transaction. Russagroprom is newly formed and subsequently has no historical information. We have no financial visibility to Brentville, Migifa (borrower holding companies), or Mr Alginin, however the Business Information Report (BIR) states that Migifa is not listed as a parent company for any other legal entity besides Russagroprom….

…

- The historical balance sheets (unaudited management figures) will be key operating subsidiaries indicate that the price being paid for the company appears to be at a level significantly above the book value of the assets….

Legal/Documentation Risk Medium

- As VTB Moscow are participating 100% in this loan, while VTBE are to the Lender of Record, under FSA guidelines we will be required to ensure that the VTB have approved and are committed to this transaction. Therefore as a condition precedent to drawdown, we

> will require a signed copy of the credit approval from VTB Moscow.
>
> …"

38. It is not clear from the evidence presently available what, if any, due diligence was carried out by or on behalf of either VTB Moscow or VTB to verify the assertion by Nutritek that the ultimate beneficial owner of 90% of RAP was Mr Alginin.

39. On 18 November 2007 a representative of Clifford Chance sent an email to a long list of recipients asking that Natalia Tyurina from MarCap Moscow be copied in all emails since she was dealing with the condition precedents under the Facility Agreement and it was crucial that she received all the drafts and instructions. After the transaction had been completed, Ms Tyurina was involved in assisting RAP to answer queries from VTB.

40. The transaction was completed over the period 23-28 November 2007, during which a number of agreements were entered into by the various parties.

41. Subsequently, on 3 December 2007, VTB entered into an associated hedging agreement with Dresdner Kleinwort AG.

The agreements

42. The principal agreements entered into as part of the overall transaction were as follows:

    i) the Facility Agreement;

    ii) a share purchase agreement between RAP, Nutritek and Newblade dated 27 November 2007 ("the SPA");

    iii) an interest rate swap agreement between VTB and RAP dated 28 November 2007 ("the ISA");

    iv) a participation agreement between VTB and VTB Moscow dated 28 November 2007 ("the Participation Agreement").

43. In addition, however, there were a series of other agreements or apparent agreements including the following:

    i) A share charge executed by RAP in favour of VTB in respect of the shares in Newblade dated 23 November 2007.

    ii) A share warrant deed between Migifa, VTB, Brentville and RAP dated 23 November 2007 under which VTB held five 1% warrants for RAP shares.

    iii) An undated share warrant deed between Migifa, Dalford, Brentville and RAP apparently executed on 28 November 2007 under which Dalford held ten 1% warrants for RAP shares.

iv) A loan facility agreement between Migifa as lender and RAP as borrower dated 23 November 2007 for a facility not to exceed US$30.5 million.

v) A loan agreement between Migifa as lender and RAP as borrower dated 26 November 2007 in respect of promissory notes totalling a little over 573 million roubles.

vi) A loan facility agreement between Leskata Finance SA ("Leskata", a company incorporated in the BVI) as lender and Migifa as borrower dated 26 November 2007 for a facility not to exceed US$30.5 million.

vii) An undated loan agreement between Leskata as lender and RAP in respect of promissory notes totalling nearly 473 million roubles.

44. I referred to "apparent agreements" in the preceding paragraph because there are question marks over at least three of the agreements listed. So far as the share warrant dated 23 November 2007 is concerned, this appears to bear the signature of Ms Kremneva on behalf of Migifa and RAP; but she has given evidence that she did not sign it. On the other hand, VTB has adduced evidence tending to show that it was duly executed on behalf of Migifa and RAP. Obviously, I cannot resolve this issue.

45. So far as the undated share warrant is concerned, it appears to be common ground that this was duly executed. Nevertheless, the following points should be noted about this. First, this warrant is in same format as the one dated 23 November 2007 except that the latter bears Dewey & LeBoeuf's logo on the cover page while the former does not. There has been no explanation for this. Secondly, when Mr Tulupov sent a draft of this warrant to Mr Leonov by email on 27 November 2007, the subject line included the instruction "Please delete immediately upon receipt". Mr Tulupov's evidence is that he did this because he was not aware of the precise nature of the relationship between VTB and Dalford, he considered that the information might be sensitive and thus that he should be cautious.

46. So far as the undated loan agreement is concerned, this has been executed on behalf of Migifa but not Leskata.

The Facility Agreement

47. The parties to the Facility Agreement are RAP ("Company"), VTB ("Lender"), Migifa and Brentville ("the Original Guarantors"). It includes the following terms:

> "1. **DEFINITIONS AND INTERPRETATION**
>
> 1.1 **Definitions**
>
> In this Agreement:
>
> …
>
> '**Acquisition Agreement**' means the sale and purchase agreements to be entered into relating to the sale and purchase of the Target Shares …

…

'**Buyer's Account**' shall mean the blocked bank account in the name of the Company with the London officer of the Lender with account number 1001632020.

…

'**Fee Letter**' means the letter dated on or about the date of this Agreement between the Lender and the Company in respect of the arrangement fee.

…

'**Obligor**' means each of the Company, the Guarantors and the Production Companies.

…

'**Participant**' means [VTB Moscow] in its capacity as participant under the Participation Agreement.

'**Participation Agreement**' means the Terms and Conditions of the funded participation agreement dated or on about the date hereof between the Lender as grantor and the Participant …

'Party' means a Party to this Agreement.

…

'**Pledged Shares**' means the Production Company Shares, the Company Participatory Interest, the Target Shares and the Migifa Shares.

…

'**Production Companies**' means [the Dairy Companies].

…

'**Repeating Representations**' means each of the representations set out in Clause 18 (*Representations*) other than Clauses 18.9 (*No Filing or Stamp Taxes*) and 18.29 (*Sales Contracts*).

…

'**Seller**' means [Nutritek].

'**Seller's Acquisition Account**' means the account at the offices of the Lender with account number 1001622020.

…

'**Target**' means [Newblade].

…

'**Target Shares**' means 49,001 shares (being 100% of the issued and outstanding shares) in the Target purchased by the Company pursuant to the Acquisition Agreement

…

'**Tranche A Commitment**' means two hundred eight million seven hundred thousand Dollars ($208,700,000).

…

'**Tranche B Commitment**' means twenty-one million three hundred thousand Dollars ($21,300,000).

…

1.3 **Contracts (Rights of Third Parties) Act 1999**

A person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement.

…

2. **THE FACILITY**

2.1 **The Facility**

Subject to the terms of this Agreement, the Lender makes available to the Company:

2.1.1 a US Dollar term loan facility in an aggregate amount equal to the Tranche A Commitment ('**Tranche A**'); and

2.1.2 a US Dollar term loan facility in an aggregate amount equal to the Tranche B Commitment ('**Tranche B**'),

together, the '**Facility**'.

…

3. **PURPOSE**

3.1 **Purpose**

The Company shall apply all amounts borrowed by it:

3.1.1 under Tranche A, towards partial payment of the purchase price for the Target Shares under the Acquisition Agreement, payment of the Acquisition Costs, (other than periodic fees), payment of financing and other transactional costs (including legal fees) incurred in connection with the Finance Documents, or for the general corporate purposes of the company; and

3.1.2 under Tranche B, towards the general corporate purposes of the Company.

3.2 **Direction to Pay**

3.2.1 The Company directs the Lender to deposit into the Buyer's Account (and such monies shall be thereafter immediately transferred into the Seller's Acquisition Account in accordance with the irrevocable instructions referred to in Schedule 2, Part 1 Clause 4.17) on the date of first Utilisation of Tranche a, part of the proceeds of the first Utilisation of Tranche A equal to the purchase price (howsoever defined) under the Acquisition Agreement to be paid by the Company less the Reserved Amount.

…

4. **CONDITIONS OF UTILISATION**

4.1 **Initial Conditions Precedent**

4.1.1 The company may not deliver a Utilisation Request in respect of Tranche A unless the Lender has received all of the documents and other evidence listed in Part 1 of Schedule 2 (*Conditions Precedent*) in form and substance satisfactory to the Lender (acting reasonably). The Lender shall notify the Company promptly upon being so satisfied. The first drawdown of Tranche A shall comply with Clause 3.2 above.

…

4.2 **Further conditions precedent**

Subject to Clause 4.1 (*Initial Conditions Precedent*), the Lender will only be required to comply with Clause 5.3 (*Lender's Funding*), if on the date of the Utilisation Request and on the proposed Utilisation Date:

4.2.1 no Default is continuing or would result from the proposed Loan;

4.2.2 the Repeating Representations to be made by each Obligor are true in all material respects; and

4.2.3 the Participant has credited the Receiving Account of the Lender with the funding for that Loan in accordance with the terms of the Participation Agreement.

…

11. **FEES**

11.1 **Arrangement Fee**

The Company shall pay to the Lender an arrangement fee in the amount and manner specified in the Fee Letter.

…

18. **REPRESENTATIONS, UNDERTAKINGS AND EVENTS OF DEFAULT**

…

18.11 **No Misleading Information**

Save as disclosed in writing to the Lender prior to the date of this Agreement:

18.11.1 any factual information (including in relation to the Acquisition and the Group) provided to the Lender was true and accurate in all material respects as at the date it was provided;

18.11.2 any financial projection or forecast (including in relation to the Acquisition and the Group) provided to the Lender has been prepared on the basis of recent historical information and on the basis of reasonable assumptions and was fair (as at the date it was provided) and arrived at after careful consideration;

18.11.3 the expressions of opinion or intention provided by or on behalf of an Obligor to the Lender were made after careful consideration and (as at the date of the relevant report or document containing the expression of opinion or intention) were fair and based on reasonable grounds; and

18.11.4 no event or circumstance has occurred or arisen and no information has been omitted from the information provided to the Lender pursuant to paragraphs 18.11.1 to 18.11.3 above and no information has been given or withheld that results in the information, opinions,

intentions, forecasts or projections contained in the information provided to the Lender pursuant to paragraphs 18.11.1 to 18.11.3 being untrue or misleading in any material respect.

…

34. **GOVERNING LAW**

This Agreement is governed by English law.

35. **ENFORCEMENT**

35.1 **Jurisdiction of English Courts**

35.1.1 Subject to Clause 35.3 (Arbitration) below, the courts of England have nonexclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a Dispute regarding the existence, validity or termination of this Agreement) (a '**Dispute**').

35.1.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

35.1.3 This Clause 35.1 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.

…

35.3 **Arbitration**

In addition to Clause 35.1 (*Jurisdiction of English Courts*) above, the Lender shall have the right to refer any dispute which may arise out of or in connection with this Agreement to final and binding arbitration in London, England, pursuant to the arbitration rules of LCIA (the '**LCIA Rules**'). The language of the arbitration proceedings shall be English. Such arbitration shall be conducted in accordance with LCIA Rules. The seat or legal place of arbitration shall be deemed to be England, and accordingly the substantive laws of England shall be applicable for the purposes of the arbitration. The procedural law for any reference to arbitration shall be English law. …

…

Schedule 2

Conditions Precedent

Part I

Conditions Precedent Utilisation of Tranche A

The Lender shall have received (in form and substance satisfactory to the Lender) each of the following:

…

2. **Finance Documents**

The following original Finance Documents each duly executed by each of the parties to it:

2.1.1 this Agreement;

2.1.2 the Participation Agreement (and confirmation thereto);

2.1.3 the Transaction Security Documents;

2.1.4 the Hedging Documents;

2.1.5 the Production Company Guarantees (other than MK Penzensky);

2.1.6 the Fee Letter; and

2.1.7 an Accession Letter from the Target.

3. **Transaction Security**

3.1 A financial report of an independent valuer acceptable to the Lender regarding the determination of the market value of the Pledged Shares (other than the shares in Molkombinat and the participatory interests in Aktiv).

…"

The SPA

48. The purchase price under the SPA was US$250 million less the "Indebtedness" as defined in clause 3.2 and determined under Annex 1 of the SPA. It was to be paid in two instalments: on the Closing Date, US$50 million less the "Indebtedness" was to be paid by RAP to Nutritek, whereupon the shares in Newblade were to be transferred to RAP (clause 3.3.2); and within two days thereafter, a further US$200 million (less US$5 million which was to be retained by RAP pending performance by one of the Nutritek group companies of a particular obligation (clause 19.6)) was to be paid (clause 3.3.5).

49. The SPA is governed by English law (clause 17.1) and provides that any dispute arising out of or in connection with it shall be referred to arbitration under LCIA rules (clause 18.1).

The ISA

50. The ISA takes the form of a Confirmation supplemental to an International Swap and Derivative Association Master Agreement between VTB and RAP dated 23 November 2007. The purpose of the ISA was to hedge against an increase in the interest paid by RAP pursuant to the Facility Agreement which was to be calculated by reference to, amongst other matters, LIBOR. The dates and spreads under the Facility Agreement and the ISA were matched. The ISA benefited from the same security as the Facility Agreement.

51. The ISA is governed by English law and provides that any dispute arising out of or in connection with it shall be referred to arbitration under the LCIA rules (Part 5 (g)).

The Participation Agreement

52. The Participation Agreement includes the following terms:

> "1. **APPLICABILITY AND INTERPRETATION**
>
> …
>
> 1.2 **Interpretation**
>
> In these Terms and Conditions words and expressions shall (unless otherwise expressly defined in these Terms and Conditions) have the meaning given to them in the Facility Agreement and:
>
> …
>
> '**Enforcement Proceeds**' means, following an Enforcement Event, all receipts and recoveries by the Lender (or by any person which are properly paid over to the Lender):
>
> (a) pursuant to, upon enforcement of or in connection with the Transaction Security; and
>
> (b) without prejudice to subclause (a) above, in respect of all representations, warranties, covenants, guarantees, indemnities and other contractual rights of the Lender made or granted in or pursuant to any Finance Document.
>
> …
>
> 2. **PARTICIPANT'S PAYMENT OBLIGATIONS**
>
> 2.1 **Sums Due Under the Relevant Finance Documents**

If at any time on or after the date of the Confirmation a sum falls due from the Grantor under the Relevant Finance Documents and the sum is, in the Grantor's reasonable opinion, attributable in whole or in part to any Loan or Participated Tranche, then the Participant shall pay to the Grantor amount equal to such sum.

2.2 **Payment of sums due**

The Participant shall make each payment required under Clause 2.1 (*Sums Due Under the Relevant Finance Documents*) in the currency and funds and in the place and time at which the Grantor is required to make the payment under the Relevant Finance Documents.

3. **PAYMENTS**

3.1 **Receipts**

The Grantor is entitled to receive, recover and retain all principal, interest and other money payable under the Relevant Finance Documents in relation to each Participated Tranche.

3.2 **Payments**

Subject to compliance by the Participant with its payment obligations under the Participation, on and after the date of the Confirmation the Grantor shall, upon applying any amount actually received by it in respect of any Loan or Commitment (whether by way of actual receipt, the exercise of any right of set-off or otherwise), pay to the Participant:

(a) if that amount is applied in respect of the principal of a Loan, an amount equal to the amount so applied by the Grantor;

..

4. **PAYMENTS ADMINISTRATION**

4.1 **Place**

All payments or deposits by either Party to, or with, the other under the Participation shall be made to the Receiving Account of that other Party. Each Party may designate a different account as its Receiving Account for payment by giving the other not less than five Business Days notice before the due date for payment.

…

4.5 **Failure to remit**

The Grantor shall not be:

…

(b) liable to remit to the Participant any amount greater than the amount it received from any Obligor in respect of any Participated Tranche or Loan.

6. STATUS OF PARTICIPATION

6.1 Status of Participation

(a) The Grantor does not transfer or assign any rights or obligations under the Relevant Finance Documents and, subject to Clause 6.3 (*Assignment Following Event of Default*) the Participant will have no proprietary interest in the benefit of the Relevant Finance Documents or in any monies received by the Grantor under or in relation to the Relevant Finance Documents.

(b) The relationship between the Grantor and the Participant is that of debtor and creditor with the right of the Participant to received monies from the Grantor restricted to the extent of an amount equal to the relevant portion of any monies received by the Grantor from any Obligor.

(c) The Participant shall not be subrogated to or substituted in respect of the Grantor's claims by virtue of any payment under the Participation and the Participant shall have no direct contractual relationship with or rights against any Obligor.

(d) Nothing in the Participation constitutes the Grantor as agent, fiduciary or trustee for the Participant.

…

6.3 Assignment Following Event of Default

At any time following an Event of Default and while such Event of Default is continuing, the Participant may (at its election and in its sole discretion):

(a) require the Grantor to assign and/or novate all of its rights and interest in the Facility Agreement and other Relevant Finance Documents to the Participant; and/or

(b) instruct the Grantor to procure that all amounts payable by the Obligors to the Grantor under the Relevant Finance Documents be paid by such Obligors directly to the Participant, at such account as the Participant may inform the Grantor,

and the Grantor shall so comply.

6.4 Enforcement Event

Notwithstanding any other provision of these Terms and Conditions the Parties hereby agree that, subject to Clause 6.3 (*Assignment Following Event of Default*) above, following the occurrence of an Early Termination Date, the Grantor shall apply all Enforcement Proceeds in the following manner:

(a) first, in payment of costs, charges, expenses and liabilities incurred by on or behalf of the Grantor and any receiver, attorney or agent in connection with exercising its powers of enforcement under the Finance Documents and the remuneration of every receiver, attorney or agent under or in connection with the Finance Documents;

(b) second in *pro rata* payment of:

(i) amounts due to the Participant under the Participation; and

(ii) amounts due under the Hedging Documents;

…

9.2 **No obligation to support losses**

(a) The Grantor notifies the Participant and the Participant acknowledges that the Grantor shall have no obligation to repurchase or reacquire all or any part of the Participation from the Participant or to support any losses directly or indirectly sustained or incurred by the Participant for any reason whatsoever, including the non-performance by any Obligor under the Relevant Finance Documents of its obligations thereunder (other than any loss caused by the gross negligence or wilful default of the Grantor in performing its obligations under the Participation).

(b) Any rescheduling or renegotiation of Participation shall be for the account of, and the responsibility of, the Participant, who will be subject to the rescheduled or renegotiated terms.

…

16. **GOVERNING LAW AND JURISDICTION**

16.1 **Governing Law**

These Terms and Conditions and the Participation are governed by English law.

16.2 **Jurisdiction**

The parties submit to the non-exclusive jurisdiction of the English courts.

…

16.4 **Convenient Forum**

Save as provided below, the Parties agree that the courts of England are the most appropriate and convenient courts to determine and settle any dispute arising relation to the Agreement (including any question as to its existence, validity or termination) (a "Dispute") between them and accordingly no party shall raise any arguments based on forum non convenience.

…

16.7 **Arbitration**

Notwithstanding the submission by the Parties to the jurisdiction of the English courts in Clause 16.2 (*Jurisdiction*), either Party refer any Dispute to be finally resolved by arbitration under the Rules of the London Court of International Arbitration in London, England. There will be 3 arbitrators, one of whom will be nominated by each of the claimant and the defendant, and the third to be agreed by the 2 arbitrators so appointed and in default thereof shall be appointed by the President of the London Court of International Arbitration. If there is more than one claimant or defendant they will jointly nominate one arbitrator. The arbitration will be conducted in English and any judgment rendered shall be final and binding on the Parties.

…"

Drawdown of the loan

53. On 28 November 2007 VTB Moscow paid VTB US$208.5 million (all of Tranche A). On the same day VTB credited the same amount to RAP's US$ account at VTB. Of that sum, and in accordance with the Facility Agreement, US$195 million was immediately transferred by RAP to Nutritek. In addition, US$5 million was paid by RAP to VTB in respect of the arrangement fee and US$3.5 million was paid by RAP to Dalford.

54. Tranche B was paid by VTB as follows: US$5.325 million credited by VTB to RAP's account on 7 April 2008; US$5.325 million was paid to a BVI company called Madinter Associates Ltd ("Madinter") on 21 May 2008 and US$5.7 million was paid to Madinter on 5 September 2008. VTB's evidence is that Tranche B was used to make a payment of interest due to VTB in respect of the loan of Tranche A.

Default

55. On 24 November 2008 RAP failed to pay an interest payment of approximately US$4.27 million due under the Facility Agreement. Since then RAP has made no payments of interest or principal. VTB sent a first notice of default under the Facility Agreement on 15 December 2008 and a second notice of default on 14 January 2009. At a meeting between Martin Pasek and Evgeniy Agenshin of VTB, Svetlana

Tolkacheva of VTB Moscow, Gennadiy Popov of RAP and Mr Leonov of MarCap Moscow to discuss the situation on 23 January 2009, Mr Leonov indicated that MarCap Moscow had an informal agreement to support RAP. In February 2009 VTB and VTB Moscow were told that the ultimate owner of RAP was "Marshall Estate Ltd".

56. For various reasons, it was not until August 2009 that the VTB Group began to enforce its security. In due course VTBDC took control of Newblade, Migifa, and eventually RAP itself. VTB's evidence is that the present value of all the various assets (including the assets of the Dairy Companies) available to VTB for the purposes of recouping the loan is substantially less than the amounts advanced, even without taking account of accruing interest. Determining the current value is not a straightforward exercise and in any event is subject to a margin of error, but VTB says that it is less than US$40 million and probably no more than US$35 million.

VTB's claims

57. As indicated above, VTB claims that it was induced to enter into the Facility Agreement and the ISA, and to advance sums totalling US$225,050,000 to RAP, by two fraudulent misrepresentations.

58. First, VTB claims that both VTB Moscow and itself relied on representations made primarily by Nutritek to the effect that the SPA was a sale between companies that were under separate control. VTB contends that these representations were false and must have been known by Nutritek to be false when made. VTB knew at the time that Mr Malofeev through MarCap Moscow had *de facto* control of Nutritek. What it says it did not know at the time, but has since discovered, is that Mr Malofeev through MarCap BVI also controlled RAP. Thus RAP and Nutritek were under common control at the date of the Facility Agreement and of the SPA, and it was not therefore a commercial transaction carried on at arm's length.

59. It is not necessary to go into detail concerning the basis of VTB's contention that Mr Malofeev ultimately controlled RAP as well as Nutritek, since it has not been the subject of challenge before me. (Indeed, VTB contends that Mr Malofeev's evidence as to his assets given pursuant to the WFO supports the contention.) It is sufficient for present purposes to note that it involves an 83% owned subsidiary of MarCap BVI called Marshall Estates Ltd, a company registered in the Cayman Islands.

60. Secondly, VTB claims that both VTB Moscow and itself relied upon the 2007 E&Y Valuation and that that valuation was based on false financial figures and unsupportable forecasts provided to Ernst & Young by Nutritek. In this regard, VTB relies upon an opinion obtained from Deloitte LLP dated 11 April 2011, which analysed the figures provided by Nutritek to Ernst & Young and compared them with the financial information provided by the Dairy Companies from their own accounting records, which represents the true trading position, as well as information from other sources. It is apparent from Deloitte's opinion that Nutritek very substantially overstated the true performance figures for the Dairy Companies. It is VTB's case that the extent of the overstatement is such that it could only have been deliberate.

61. The false representations are alleged to have been made principally by Nutritek. It is VTB's case that they were made pursuant to a conspiracy between a number of persons including MarCap BVI, MarCap Moscow and Mr Malofeev. Given the significant role they played in introducing the business opportunity to VTB and the conduct of the negotiations, VTB says that Mr Malofeev and MarCap Moscow were the prime movers in the conspiracy to deceive VTB.

62. In its original Particulars of Claim VTB pleaded causes of action against the Defendants in deceit and unlawful means conspiracy, the unlawful means being the fraudulent misrepresentations. So far as the claim in deceit is concerned, VTB's case against MarCap BVI, MarCap Moscow and Mr Malofeev is they are jointly liable with Nutritek on the basis that the misrepresentations were made pursuant to a common design between them.

63. In addition to the tortious claims already made against the Defendants for deceit and/or conspiracy, VTB now seeks to amend its claim to bring a contractual claim against MarCap BVI, MarCap Moscow and Mr Malofeev.

Service out of the jurisdiction: general principles

64. The general principles governing service out of the jurisdiction were recently re-stated by Lord Collins of Mapesbury LSC delivering the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, 1 CLC 205 as follows:

> "71. On an application for permission to serve a foreign defendant … out of the jurisdiction, the claimant … has to satisfy three requirements: *Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [24]. Second, the claimant must satisfy 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 may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]. Third, the claimant must satisfy 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 of the proceedings out of the jurisdiction.
>
> …

> 81. A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *Hutton (EF) & Co (London) Ltd. v Mofarrij* [1989] 1 WLR 488, 495 (CA); *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [2002] 3 All ER 17, [136].
>
> …
>
> 88. The principles governing the exercise of discretion set out by Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, at 475-484, are familiar, and it is only necessary to re-state these points: first, in both stay cases and in service out of the jurisdiction cases, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; second, in service out of the jurisdiction cases the burden is on the claimant to persuade the court that England (in this case, of course, the Isle of Man) is clearly the appropriate forum; …"

VTB's application to amend the Particulars of Claim

65. The core allegations which VTB seeks to add to its Particulars of Claim by the amendment are as follows:

> "71. Further and in any event, VTB is entitled and seeks to 'pierce the corporate veil' and to hold Marcap BVI, Marcap Moscow and Mr Malofeev jointly and severally liable with RAP on the Facility Agreement (and the associated [ISA]) in respect of VTB's losses.
>
> 72. The reason for this is by reason of the control which each of Marcap BVI, Marcap Moscow and/or Mr Malofeev exercised over RAP, together with the connected impropriety, that is, the use of the corporate structure of RAP to conceal their wrongdoing, and the accompanying misrepresentations about control and the trading performance and value of the Dairy Companies. As regards control, as set out in paragraphs 55 and 56 above, and contrary to the representations that they were under separate control, RAP was at all material times controlled by each of Marcap BVI, Marcap Moscow and/or Mr Malofeev. As regards impropriety, the use of RAP as the corporate vehicle to enter into the Facility Agreement (and the accompanying [ISA]) and to obtain thereby the sums of US$225,050,000 from VTB involved the fraudulent misuse of the company structure. This was an improper use of the company structure of RAP, which was used as a device or façade to conceal the wrongdoing of each of Marcap BVI, Marcap Moscow and Mr Malofeev."

66. Particulars are given in support of these allegations, some of which recycle matters already pleaded in support of the tort claims and some of which are new, but which could equally be relied upon to support the tort claims.

67. VTB makes no bones about the fact that its primary motive in seeking to make this amendment is to provide an alternative basis for establishing the jurisdiction of this court for a claim against the Defendants. In short, VTB contends that, if the amendment is allowed, this court has mandatory jurisdiction in respect of the contract claim against MarCap BVI, MarCap Moscow and Mr Malofeev pursuant to Article 23(1) of the Brussels Regulation and that Nutritek is a necessary or proper party to that claim.

68. It should be noted, however, that the amendment would also have the effect of enabling VTB to claim damages according to the contractual measure. Paragraph 77 of the draft Amended Particulars of Claim pleads as losses claimed by VTB the principal under the Facility Agreement, accrued unpaid interest, additional interest on the principal at the default rate, additional interest on outstanding interest at the default rate and amounts due under the ISA in the total sum of over US$346 million. It is clear that this is substantially more than the loss which VTB can claim in tort.

Piercing the corporate veil

69. The application to amend the Particulars of Claim gives rise to a number of issues. The first is that the Defendants resist the amendment on the ground that, even assuming that all the factual allegations pleaded are true, VTB's contract claim is unsustainable as a matter of law. It is therefore necessary to consider the law with regard to "piercing the corporate veil".

70. As counsel for VTB observed, it is important to distinguish between cases in which the courts have pieced the corporate veil and cases in which it has been held that a particular transaction was a sham, that is to say, a transaction which was never intended by the parties to it to have the legal effect which it appeared to have: see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 (Diplock LJ). As counsel for VTB made clear, it is not VTB's case that the Facility Agreement was a sham in that sense. On the contrary, VTB accepts that the Facility Agreement was intended to have the legal effect which it appeared to have. VTB's case is that the Facility Agreement should be enforced against persons who were not party to it.

71. As counsel for the Defendants observed, the expression "piercing the corporate veil" is a convenient label which is used to identify cases in which the courts have granted relief which involves, or perhaps more accurately appears at first blush to involve, disregarding the separate legal personality of a company from the person or persons who control it. It is not a substitute for analysing the legal basis for such relief.

72. Two decisions in which such relief was granted that are central to the debate in the present case are *Gilford Motor Company Ltd v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832.

73. In *Gilford v Horne*, Mr Horne was the managing director of Gilford. He entered into a covenant not to solicit Gilford's clients after ceasing to be managing director. He left his employment and formed a new company, J.M. Horne and Co Ltd, the shares in

which were held by his wife and a friend, to carry on a competing business and to solicit his former employer's customers. Gilford brought proceedings contending that Mr Horne was in breach of his covenant and seeking relief on that ground against both Mr Horne and J.M. Horne and Co Ltd. The main issue in the proceedings was the enforceability of the covenant. Farwell J held that it was unenforceable, but he was reversed by the Court of Appeal. The Court of Appeal granted an injunction against both Mr Horne and the company on the basis that, as Lord Hanworth MR put it at 962, "the company was 'a mere cloak or sham' … a mere device for enabling Mr E.B. Horne to continue to commit breaches of [the covenant]" (see Lawrence LJ at 965 and Romer LJ at 969 to similar effect). It should be noted that there was no claim for damages.

74. In *Jones v Lipman*, Mr Lipman contracted to sell land to Mr and Mrs Jones. He then conveyed the land to Alamed Ltd, a company which had been purchased for the purpose by his solicitors and which he controlled, in order to defeat Mr and Mrs Jones' right to specific performance. Russell J granted an order for specific performance against both Mr Lipman and the company. Having cited passages from all three judgments in *Gilford v Horne*, he said at 836-837:

> "Those comments on the relationship between the individual and the company apply even more forcibly to the present case. The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. The case cited illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances."

Although there was a claim for damages in that case, there is nothing to suggest that Russell J awarded damages against the company.

75. There has been much subsequent discussion as to the true basis for the relief granted by the courts against the companies in *Gilford v Horne* and *Jones v Lipman*. I agree with counsel for the Defendants that it is crucial to note that the remedies granted in those cases were equitable remedies: an injunction and order for specific performance (which can be regarded as a species of mandatory injunction).

76. What is now section 37(1) of the Senior Courts Act 1981 gives the High Court power to grant injunction "in all cases in which it appears to be just and convenient to do so". The ambit of this power has been much contested (see *L'Oréal SA v eBay International AG* [2009] EWHC 1094, [2009] RPC 21 at [449]-[454] and the cases and commentary cited there). It is firmly established, however, that the power extends at least to the two situations described by Lord Brandon of Oakbrook (with whom the other members of the House of Lords agreed on this point) in *South Carolina Insurance Co Ltd v Assurantie Maatschappij De Zeven Provincien NV* [1987] AC 24 at 40C-D:

> "Situation (1) is where one party to an action can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2)

> is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable."

77. Counsel for the Defendants argued that *Gilford v Horne* and *Jones v Lipman* were examples of situation (2): injunctive relief was granted against the companies because the companies had behaved in a manner which, in the light of the knowledge and intentions of the individuals who controlled the companies, was unconscionable. I accept this analysis, which is supported by the treatment of those cases as examples of equitable fraud by Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (4th ed) at §12-140.

78. Equitable remedies are, of course, not confined to injunctions. In *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, simplifying slightly, the facts were as follows. Mr Smallbone, in breach of his fiduciary duty as managing director of Trustor, transferred substantial sums belonging to it to an account with Barclays Bank of which he was a signatory. This money was later paid out to Mr Smallbone and a company he owned, Introcom. Trustor obtained summary judgment against Mr Smallbone and Introcom for the sums they had respectively received on the grounds of knowing receipt of trust property. Trustor then sought summary judgment against Mr Smallbone as being jointly and severally liable in respect of the sums received by Introcom, and argued that it was entitled to pierce the veil.

79. Sir Andrew Morritt V-C pointed out at [12] that "the claim for summary judgment is necessarily advanced on a restitutionary basis only". For the reasons he explained, the only pleaded basis open to Trustor having regard to the previous history of the litigation was knowing receipt. He went to say at [17] that "The issue is whether the court is entitled to treat the receipt by Introcom as the receipt by Mr Smallbone". Having reviewed the authorities, he made what has come to be recognised as the classic statement of the relevant principle at [23]:

> "In my judgment the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s). …"

80. Applying this principle to the facts, he held at [25] that Mr Smallbone was liable in knowing receipt for the following reasons:

> "In my view these conclusions are such as to entitle the court to recognise the receipt of the money of Trustor by Introcom as the receipt by Mr Smallbone too. Introcom was a device or facade in that it was used as the vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed unauthorised and inexcusable breaches of his duty as a director of Trustor…."

81. Counsel for VTB submitted that *Trustor v Smallbone* was authority for the proposition that, in order to pierce the corporate veil, it was necessary and sufficient to establish (i) control of the company by the wrongdoer and (ii) impropriety consisting of misuse of the company as a device or façade to conceal his wrongdoing.

I do not accept that submission. In my judgment *Trustor v Smallbone* is authority for the proposition that, in a claim for knowing receipt of trust property, the court will treat the receipt by a company as the receipt of the individual who controls it if those conditions are satisfied; but it goes no further than that. The most I think one can say, if *Trustor v Smallbone* is taken together with *Gilford v Hone* and *Jones v Lipman*, is that equitable remedies (in particular, injunctions and accounts) may be granted against a company in respect of legal or equitable wrongdoing committed by an individual who controls the company where those conditions are satisfied. It does not follow that the individual can be held liable for breach of a contract entered into by the company.

82. In my view, this analysis is supported by the next four decisions to which I shall refer. In *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 Yukong sought to pierce the veil so as to hold the wrongdoer (Mr Yamvrias) liable for repudiation of a charterparty entered into by his company (Rendsberg) in circumstances where Rendsburg had repudiated the contract and Mr Yamvrias had then transferred all of its assets to another company he controlled, Ladidi, so as to put them beyond the reach of Yukong. Toulson J rejected this claim, holding at 308D-G:

> "The present case differs from *Jones v. Lipman* [1962] 1 W.L.R. 832 and *Gilford Motor Co. Ltd. v. Horne* [1933] Ch. 935, where equitable relief was granted against the company being used to perpetrate a continuing breach of contract by its controller, of which the company had full knowledge. If either Mr. Horne's wife or Mr. Lipman's wife (assuming their existence) had agreed to act in a similar role to that of company, no doubt similar equitable relief would have been granted against the lady concerned. *Salomon's* case [1897] A.C. 22 would have been irrelevant. In the same way, the fact that the company had separate legal personality was no bar to the court granting relief against it as well as the contract breaker. That is quite different from awarding damages against it for some antecedent breach of duty by the contracting party (for example, some breach by Mr. Horne of his employment contract prior to its termination or some misrepresentation by Mr. Lipman in answers to inquiries before contract) on the basis that the company was to be put in the shoes of the contract breaker. Mr. Gross submitted that this was the logical result of such cases and was sound in principle. I do not agree. I do not see why in logic or in principle the company should have been liable for damages in such a situation, any more than Mrs. Lipman, if the land had been conveyed to her, should thereby have become liable for any and every breach by Mr. Lipman of his contract with Mr. Jones. I do not therefore regard those cases as establishing a principle enabling Mr. Yamvrias to be treated as the charterer and so liable to Yukong for damages for wrongful repudiation of the charterparty."

83. In *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch) Dadourian contended that the defendants (Jack and Helga) had fraudulently misrepresented that they were mere intermediaries in a contract between Dadourian and a company (Charlton). In fact, Jack and Helga owned Charlton. If Dadourian had known this, then it would not have entered into the contract. Dadourian claimed in deceit and also sought to pierce the veil and hold Jack and Helga liable under the contract. Warren J accepted the former claim, but rejected the latter claim. As he explained:

> "682. In all of the cases where the court has been willing to pierce the corporate veil, it has been necessary or convenient to do so to provide the claimant with an effective remedy to deal with the wrong which has been done to him and where the interposition of a company would, if effective, deprive him of that remedy against him. It seems to me that the veil, if it is to be lifted at all, is to be lifted for the purposes of the relevant transaction. It must surely be doubtful at least that the ex-employee in *Gilford Motor Co v Horne* would have been liable for the company's electricity bill simply because he was using the company as device and sham to avoid a covenant binding on him personally; and the same goes for the vendor of the property in *Jones v Lipman*.
>
> 683. It is not permissible to lift the veil simply because a company has been involved in wrong-doing, in particular simply because it is in breach of contract. And whilst it is clear that the veil can be lifted where the company is a sham or façade or, to use different language, where it is a mask to conceal the true facts, it is, in my judgement, correct to do so only in order to provide a remedy for the wrong which those controlling the company have done. Charlton was not being used to conceal the purchase of the Tooling and General Equipment [i.e. the subject matter of the contact]; what it was being used for was to hide Jack and Helga's involvement in that purchase.
>
> 684. However, Mr Freedman submits that it [is] no answer to a claim that the corporate veil should be lifted that there are concurrent liabilities or remedies in tort and that DGI must proceed by the tortious route. He relies on *Trustor* where he says that the court proceeded on the basis of lifting the veil but could have proceeded on a restitutionary basis. I am not sure that the position in relation to a restitutionary claim is as clear as Mr Freedman suggests. But even if it were, there would be no overlap between the two claims and to put forward different ways of recovering the same compensation/loss/property is perfectly acceptable. It seems to me, in contrast, that whilst a person committing the tort of deceit should be liable for all the loss which flows from his misrepresentation, it would be unprincipled to impose a liability on him for the loss of bargain suffered by a misrepresentee in respect of a contract with a

> third party with whom he had been induced to contract by the misrepresentation.
>
> 685. In relation to that point, Mr Freedman says that it is no answer to say that the loss of bargain damages claimed are by reference to a bargain which was not desired - an innocent party entering into a contract owing to a fraud is not restricted to a claim for reliance loss. Now, it may well be that where A contracts with B as a result of B's fraudulent misrepresentation and the contract has been completed (so that questions of rescission and adoption of the contract with knowledge of the fraud to do not arise), A is able to claim (a) damages for loss of bargain as a result of B's breach of contract and (b) reliance loss, although he could not obtain double recovery. It does not follow that B should be liable for contractual damages to A where the contract which he procured was one between A and C, even where C is the creature of B. To put the point another way, where in that example the principle of corporate separation exemplified in *Salomon v A Salomon & Co Ltd* [1897] AC 22 would apply absent a misrepresentation by the person controlling the company, there is no need, and it would be inappropriate, to lift the veil in order to provide A with a contractual remedy against B; A recovers all his loss arising as a result of the misrepresentation by his tortious claim in deceit.
>
> 686. If that is correct, the question arises whether it is necessary in the present case to lift the veil of Charlton and perhaps Ancon as well in order to provide the Claimants with the remedy to which they are entitled. In my judgment, it is not. Charlton, if it was being used as a device at all, was being used to hide the involvement of Jack and Helga and, if that concealment had not taken place, the Option Agreement would not have been entered into. The Claimants have their remedy against Jack and Helga in the form of an action for fraudulent misrepresentation. There is simply no need, in order to give the Claimants redress for that misrepresentation, to lift the veil at all: indeed, to do so would achieve nothing in relation to that wrong."

84. In *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115 Munby J (as he then was) extracted the following principles from the authorities as they then stood:

> "159. In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle in *Salomon v A Salomon & Co Ltd* [1897] AC 22 , but clear statements to this effect are to be found in *Mubarak* at page 682 per Bodey J and *Dadourian* at para [679] per Warren J. Control may be a necessary but it is not a sufficient condition (see below). As Bodey J said in *Mubarak* at page 682 (and, dare I say it, this reference requires emphasis, particularly, perhaps, in this

Division): 'it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control.'

160. Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice. In common with both Toulson J in *Yukong Line Ltd of Korea v Rendsberg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 at page 305 and Sir Andrew Morritt VC in *Trustor* at para [21], I take the view that the dicta to that effect of Cumming-Bruce LJ in *In re a Company* [1985] BCLC 333 at pages 337-338, have not survived what the Court of Appeal said in *Cape* at page 536:

> '[Counsel for Adams] described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'

161. Thirdly, the corporate veil can be pierced only if there is some 'impropriety': see *Cape* at page 544 and, more particularly, *Ord* at page 457 where Hobhouse LJ said:

> 'it is clear … that there must be some impropriety before the corporate veil can be pierced.'

162. Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability. As Sir Andrew Morritt VC said in *Trustor* at para [22]:

> 'Companies are often involved in improprieties. Indeed there was some suggestion to that effect in *Salomon v A Salomon & Co Ltd* [1897] AC 22. But it would make undue inroads into the principle of Salomon's case if an impropriety not linked to the use of the company

> structure to avoid or conceal liability for that impropriety was enough.'

163. Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing. As the Vice Chancellor said in *Trustor* at para [23]:

> 'the court is entitled to "pierce the corporate veil" and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s).'

And in this connection, as the Court of Appeal pointed out in *Cape* at page 542, the motive of the wrongdoer may be highly relevant.

164. Finally, and flowing from all this, a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."

85. He went on at [199] to say this:

> "The common theme running through all the cases in which the court has been willing to pierce the veil is that the company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely *dehors* the company. It is therefore necessary to identify the relevant wrongdoing – in *Gilford* and *Jones v Lipman* it was a breach of contract which, itself, had nothing to do with the company, in *Gencor* and *Trustor* it was a misappropriation of someone else's money which again, in itself, had nothing to do with the company – before proceeding to demonstrate the wrongful misuse or involvement of the corporate structure. But in the present case there is no anterior or independent wrongdoing. All that the husband is doing, in the circumstances with which he is now faced – the wife's claim for ancillary relief – is to take advantage, in my judgment legitimately to take advantage, of the existing corporate structure and, if one chooses to put it this way, to take advantage of the principle in *Salomon*."

86. In *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) Mr Lindsay contended that Mr O'Loughnane had misrepresented his company's activities, which induced Mr Lindsay to enter into contracts with the company. Mr Lindsay claimed in deceit and also sought to pierce the veil and hold Mr O'Loughnane liable under the contracts. Flaux J concluded that the claim in deceit succeeded, but rejected the claim to pierce the corporate veil. As he explained:

> "130. Given that I have found that the claim in deceit succeeds, it is not strictly necessary to decide whether this is an appropriate case in which to pierce the corporate veil and permit a claim which should otherwise be pursued against the company to be pursued against the defendant. Indeed, in *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch), at paragraphs 684 and 685, Warren J held that where a claim in deceit succeeded against the person controlling the company, it would be inappropriate to permit the veil to be lifted to enable the claimant to pursue a contractual claim against that person. As he put it the claimant 'recovers all his loss arising as a result of the misrepresentation by his tortious claim in deceit' (paragraph 685). This point was not addressed in the Court of Appeal.
>
> 131. I can deal relatively briefly with the question whether I would have permitted the corporate veil to be lifted if the claim in deceit had not succeeded. Clearly if the claim in deceit had failed because I had concluded that there had been no fraudulent misrepresentations made, there being no other impropriety pleaded, there would be no basis for piercing the corporate veil.
>
> 132. The position would have been more difficult if I had concluded that fraudulent misrepresentations had been made, but that they were unenforceable by virtue of section 6 of the Statute of Frauds (Amendment) Act 1828. In that case there would have been impropriety by the defendant….
>
> 137. This is not an easy point, but on reflection I consider that [counsel for the defendant] is right in his submission that the cases where it is appropriate to pierce the corporate veil are all concerned with the defendant who controlled the relevant company using the corporate structure to disguise his wrongdoing, which had nothing to do with the company. As Munby J put it [in *Ben Hashem*], the wrongdoing was 'entirely *dehors* the company'.
>
> 138. The pleaded case here is that the defendant used Global FX and/or FX Solutions as a façade for his fraudulent trading. The relevant fraudulent trading is defined in paragraph 7 of the Particulars of Claim as, inter alia, accepting payments from customers pursuant to currency exchange contracts and then using the money for other purposes including the payment of

> the company's expenses, payments to himself and associates and paying money to other customers to give the appearance of legitimate trading. That is not wrongdoing which has nothing to do with the company or companies. It is wrongdoing at the heart of the actual business of the company.
>
> …
>
> 140. In my judgment, this would not be an appropriate case in which to pierce the corporate veil. …"

87. The authority on which counsel for VTB principally relied in support of VTB's contract claim was the recent decision of Burton J in *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyds Rep 617. In that case, the claimants were 30 "one ship" companies in common ultimate beneficial ownership of LSC. In earlier proceedings the claimants had brought proceedings against five companies registered in the BVI and Gibraltar ("the Corporate Defendants"). The claimants' case was that, in order dishonestly to siphon out substantial profits from the chartering business of LSC and the claimants, instead of the claimant companies chartering out their vessels to arms-length commercial charterers, the Corporate Defendants were interposed, so that in the case of 63 charterparties they became the charterers, and the arms-length third parties were caused to be sub-charterers at substantially higher rates than in the head charters. On the claimants' application for summary judgment, Gross J granted permission to defend conditional upon payment into court. The Corporate Defendants failed to comply with the condition, and judgment was entered against them. In his judgment Gross J held that the five individuals who were the beneficial owners of the Corporate Defendants had master-minded a scheme which exposed themselves to a real and cogent case of dishonesty. The claimants then brought proceedings against Mr Stepanovs, one of the beneficial owners of the Corporate Defendants. In order to establish jurisdiction, the claimants relied upon the English jurisdiction clause in the charterparties between the claimants and the Corporate Defendants. The claimants argued that the corporate veil should be pierced and Mr Stepanovs treated as a party to these charterparties and thus bound by the jurisdiction clause. Mr Stepanovs applied to set aside service of the claim form on him. Burton J acceded to the claimants' argument, and dismissed the application to set aside service.

88. The Defendants contend that *Gramsci v Stepanovs* was wrongly decided and should not be followed. It is therefore necessary for me to set out Burton J's reasoning in some detail. He began at [13] by saying that the "seminal passage" on piercing the veil was the statement of Morritt V-C in *Trustor v Smallbone* at [23] which I have quoted above. He then observed at [14] that it was "quite clear that that is exactly what (on the claimants' case) occurred" here. He went on:

> "The only apparent limitation that has been placed on the doctrine, given the necessary requirement that the trigger for it is not simply fraudulent dealing by a company but the fraudulent misuse of the company structure, as Morritt VC made clear, is that, using the gallicised words of Munby J in *Ben Hashem* at para 199 (referred to by Flaux J in *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at para 134) the wrong-

> doing must not be '*dehors* the company', i.e. something outside the ordinary business of the company. Whether the phrase '*dehors* the company' is ever a very helpful or meaningful expression, I do not know, but consideration of it is clearly inappropriate on the facts of this case, when the Corporate Defendants had, on the claimants' case, *no* independent or non-fraudulent existence. The fraud was plainly '*dedans*' the company, but that was because the company was set up for that very purpose, in order to abuse the company's structure."

89. Next, Burton J held at [16]-[17] that it was not necessary for the claimants to show that Mr Stepanovs had been in sole control of the Corporate Defendants. He then turned to consider the submission made by counsel for Mr Stepanovs, in reliance in particular on *Dadourian v Simms* and *Lindsay v O'Loughnane*, that the corporate veil could not be pierced unless it was necessary to provide the claimants with a remedy because they had no other remedy. Burton J rejected that submission for reasons which he expressed as follows:

> "18. … What Warren J said [in *Dadourian v Simms* at [682]] seems to me plainly not to be the case. As will be seen, in *Gilford* Mr Horne was under a restrictive covenant preventing competition (clause 9) in his contract of employment, and he set up a company in order to disguise the existence of such competition. There would not have been any difficulty in putting the case, and seeking or granting a remedy, by reference to a claim against the company for knowing procurement of Mr Horne's breach of contract, or simply relying upon agency, by granting an injunction against Mr Horne restraining breaches by himself his servants or agents, which would plainly have included his company: but this was neither done nor addressed. Similarly in *Jones v Lipman* [1962] 1 WLR 832 where Mr Lipman personally entered into a contract for sale of a property to the plaintiff, and then sold on to his puppet company (as found), there could have been relief and remedy, as Mr Millett himself pointed out by virtue of his researches in *Snell's Equity***,** by the grant of an order in equity for specific performance by reference to the estate contract, against the puppet company as being a third party purchaser with notice: but again this was not addressed or considered at all, and specific performance was granted only by reference to *Gilford* and the piercing of the veil. In *Trustor* too, it is plain that there could have been a claim against the puppeteer for equitable compensation for breach of fiduciary duty.
>
> …
>
> 20. It is in [the circumstances explained in *Dadourian v Simms* at [684]-[686]] that, at the end of a lengthy trial and a lengthy judgment, Warren J did not think it was *necessary* to consider piercing the veil. So too, in not dissimilar circumstances, Flaux J said in *Lindsay*:

> '130. Given that I have found that the claim in deceit succeeds, it is not strictly necessary to decide whether this is an appropriate case in which to pierce the corporate veil and permit a claim which would otherwise be pursued against the company to be pursued against the defendant.'
>
> and he refers to Warren J's conclusion in para 685 of *Dadourian* that the claimant 'recovers all his loss arising as a result of the misrepresentation by his tortious claim in deceit'.
>
> 21. It is wholly clear to me that the fact that a trial judge may conclude in his judgment that it is not *necessary* on the facts of a particular case (particularly where the defendant sought to be made liable as alter ego has already been found personally liable, and by reference to an inconsistent measure of damages), to pierce the veil, in no way supports the proposition that a claim at the outset of proceedings is *demurrable* unless it is shown to be *necessary*. The concept of necessity is not a fetter upon such a claim. It does not need to be pleaded or proved *in limine*. …"

90. Burton J then went on to consider the claimants' case that, as a result of piercing the corporate veil, Mr Stepanovs could be held jointly and severally liable for the Corporate Defendants' breaches of the charterparties, beginning at [23]:

> "Mr Rainey accepts that there is no reported case in which the veil has been pierced so as to place the puppeteer into the puppet's contract, but he submits not only that there is nothing in the decided cases to cast doubt upon his proposition, but that support can be gained from them:
>
> (i) In *Gilford*, the puppet company was not in existence at the date when Mr Horne entered the restrictive covenants. The remedy that was granted, and upheld on appeal, was an injunction restraining breach of clause 9 against both Mr Horne and his company. Mr Rainey submitted that the company was treated as party to the contract – no other jurisdiction to grant the injunction against Mr Horne and the company was relied upon. Mr Millett submitted that it was a question of remedy only, but Lord Hanworth MR at 956 did expressly refer to breaches of the covenant by Mr Horne and his company, which tends to support Mr Rainey's submission. It is a case in which, if such is what occurred, the puppet was liable under the puppeteer's contract, but, submits Mr Rainey, there is nothing to prevent the puppeteer being made liable under the puppet's contract and he would be if, for example, a contract for sale by Gilford to the puppet company (in

breach of a similar obligation on non-competition) were sought to be enforced against the puppeteer.

(ii) In *Jones* the puppet company was probably in existence at the date of the sale contract by Lipman (though still on the shelf). Although, as Mr Millett says (see paragraph 18 above), the cause of action could have been put on a different basis, it was not. Specific performance of the contract of purchase was ordered both against puppeteer and puppet, by express reference to *Gilford* and piercing of the veil. Again in the reverse situation the same result could have occurred if it had been, for example, a sale by the puppet company, and the sale on had been to the puppeteer; on exactly the same basis the contract could have been enforced against both.

(iii) In *Dadourian*, the decision of Warren J was not to lift the corporate veil so as to render 'Jack and Helga' liable in contract, though to an extent the decision could be said to have been obiter, or at any rate less significant, as he concluded that he would not have lifted the corporate veil anyway (paras 690 to 693) and that he would not have found that the fraud was *dehors* the company: 'the fraud….was the misrepresentation not the use of a company' (at 692). …"

91. After further consideration of *Dadourian v Simms* and *Lindsay v O'Loughnane*, he concluded:

"26. I am satisfied that both Warren J in *Dadourian* and Flaux J in *Lindsay* were only ruling out the course of finding the puppeteer liable for breach of contract because in neither case was it appropriate to do so in the event, since a remedy of finding the puppeteer personally liable (as tortfeasor) had already been granted which was, certainly in the case of *Dadourian***,** inconsistent with taking the contractual route. None of the reasons which Warren J put forward argues against a conclusion, depending on how the facts fall out at trial, that in this case the puppeteer should be held party to the puppet company's contract. There is in my judgment no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppet who, all the time, was pulling the strings. The claimants seek to enforce the contract against both puppeteer and the puppet company (as in *Gilford* and *Jones*). …

27. Two matters remain to be dealt with:

(i) I accept the force of Mr Rainey's case that the puppeteer can be made liable, as a party to the contract, but that as

> a matter of public policy he cannot enforce the contract. This is, to an extent, the obverse of the case where, if a third party can establish that an agreement was entered into for its benefit, he can enforce, but not be sued under, that contract by reference to the Contracts (Rights of Third Parties) Act 1999 (see eg *WPP Holdings Italy SRL v Benatti* [2006] 2 CLC 142). Mr Millett raised what he said was an anomaly, if such a submission were accepted, whereby, if the victim wanted to keep alive a contract after discovery of the existence of the puppeteer, e.g. in this case to continue with a charterparty, the puppeteer, though liable under the contract, would not be able to enforce it, so as, for example, to obtain sums due under it, but that is of course not a problem, as in such an unlikely event the puppet company could still enforce the contract, and recover any monies due.
>
> (ii) Mr Rainey did run an alternative case that the puppeteer could be said to have become a party by succession, although recognising the difficulties that it is only the obligations and not the rights under the contract to which the puppeteer would be said to have succeeded: *Gilford***,** where the company was not in existence at the time of the contract, could only be explained on that basis. He recognised however, in the course of argument, that in reality his claim in this case is put forward not by reference to any reliance upon succession, but firmly on the basis that at the date of the contract the puppeteer was, and then remained, an original party to the contract."

92. Before considering this reasoning, it is first necessary to refer to another recent decision. In *Linsen International Ltd v Humpuss Sea Transport PTE Ltd* [2011] EWHC 2339 (Comm) the claimants entered into charterparties with the Humpuss group. The first vessel was chartered to the first defendant but the market collapsed and the first defendant refused to pay. The first defendant transferred assets to the other defendants as part of a restructuring. The claimants obtained an arbitral award against the first defendant and then sought to pierce the veil and hold the third to thirteenth defendants liable under the charterparties.

93. Having cited *Ben Hashem* at [159]-[166] and [199] and *Gramsci v Stepanovs* at [18]-[19], Flaux J held:

> "18. It seems to me, on reflection that, at least in a case (of which *Gramsci* was an egregious example) where the whole purpose of the corporate structure is to perpetrate fraud, it cannot be correct that the ability to pierce the corporate veil is limited by the need that the wrongdoing is *dehors* the company. However the point does not matter in the present case since, on analysis, the relevant wrongdoing here (for reasons I will come to) was

> the transfer of assets from the first defendant to the third defendant with a view to frustrating enforcement against the first defendant. Thus the relevant wrongdoing was *dehors* the companies in respect of which the claimants seek to pierce the corporate veil.
>
> 19. For the purposes of the present case, the critical principle identified by Munby J (which is the one particularly recognised and applied in other cases to which my attention was drawn in submissions) is the fourth one that: 'if the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing.' In other words it is not enough to show that a company or a group of companies is closely controlled by an individual or a family or by a holding company. If the element of control were sufficient in itself, the English courts would have accepted the concept of the 'single economic unit' which, as I will demonstrate later in this judgment, has been consistently rejected by our courts. The claimant who wishes to pierce the corporate veil must show not only control but also impropriety, in the sense of misuse of the company or the corporate structure to conceal wrongdoing."

94. Flaux J went on to distinguish *Gramsci v Stepanovs* for the following reasons:

> "139. Superficially there is thus some similarity between the basis upon which the claimants put their case in *Gramsci* and the way in which the claimants here put their case against the third to thirteenth defendants. However, the fundamental difference is that that was a case where, (as will be clear from the summary of the facts set out above), the claimants had a good arguable case that the whole purpose of the corporate structure was to perpetrate the relevant fraud and both the chartering companies and the charterparties themselves were effectively a sham or façade from the outset: see paragraph 2 of the judgment where Burton J summarised the conclusions of Gross J and paragraphs 13 to 15 of Burton J's judgment at the end of which he said: 'The fraud was plainly *"dedans"* the company, but that was because the company was set up for that very purpose, in order to abuse the company's structure.'
>
> 140. That is the context in which Burton J reached the conclusion which he did at paragraph 26 of his judgment that the claimants had a good arguable case that the defendant as 'puppeteer' could be made liable under the puppet company's contract: …
>
> 141. Clearly the basis of that reasoning was that the contract (the charterparty) was in reality one made by the puppeteer using the puppet to disguise the fact that the contract was part of a fraud being perpetrated on the claimants. The critical

> difference in the present case is that, as I have already held above, there was nothing untoward about either the charterparties or the guarantees when they were made. The charterparties were all genuine contracts made with the first defendant, performance by which was guaranteed by the second defendant. There was and is no basis for piercing the corporate veil at the time the contracts were made. Nothing in *Gramsci* is dealing with such a case and there is nothing in Burton J's reasoning to support the claimants' proposition that abuse of the corporate structure, long after the relevant contracts were made, can lead to the corporate veil being pierced to make companies in the group or Mr Tommy Suharto liable as if they had been or had become parties to those charterparties and guarantees."

95. The claimants applied to the Court of Appeal for permission to appeal against Flaux J's decision. Curiously, the application was heard before the judge had delivered his reasoned judgment. The Court of Appeal dismissed the application ([2011] EWCA Civ 1042). Lord Neuberger of Abbotsbury MR, with whom Stanley Burnton LJ agreed, held at [11]-[12] that the claimants' case based on piercing the veil was unsustainable. The fact that the third defendants had knowingly received assets from the first defendant for the purpose of avoiding the first defendant's liability under a contract already entered into and breached by the first defendant could not justify effectively treating the third defendant liable as a contractual party. He went on at [13]:

> "In that connection, it seems to me that the reasoning of Toulson J in *Yukong Line Ltd of Korea v Rendsberg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 in this connection was correct. Furthermore, I note that Munby J in *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam) held that piercing the corporate veil was a course which the court should take if no other remedy was possible and if certain requirements were satisfied. The requirements in this case are not satisfied and, if they are, an appropriate remedy is available, namely following the assets."

96. Returning to *Gramsci v Stepanovs*, counsel for MarCap BVI criticised the decision on a number of grounds, while counsel for VTB supported it. Rather than rehearse all the arguments on each side, I will set out my conclusions. With respect to Burton J, I am unable to agree with his reasoning or the result to which it leads. My reasons are as follows.

97. First, for the reasons explained above, I do not agree with Burton J's premise at [13] that the corporate veil can be pierced whenever the conditions identified by Morritt V-C in *Trustor v Smallbone* at [23] are satisfied. In particular, I do not agree that there can be a common law claim for damages, as distinct from an equitable remedy, whenever those conditions are satisfied.

98. Secondly, again for the reasons explained above, I agree with Munby J in *Ben Hashem* at [199] and Flaux J in *Lindsay v O'Loughnane* at [137] that the true basis

upon which the courts have pierced the corporate veil is that "the company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely *dehors* the company". The expression "*dehors* the company" seems to have caused Burton J some difficulty, but as Munby J explained later in the same paragraph, what he meant by this is that there must be some "anterior or independent wrongdoing" by the controller. (Incidentally, counsel for the Defendants pointed out that Burton J had misquoted Munby J when the former said "the wrongdoing must *not* be '*dehors* the company' [emphasis added]", but I think that that was just a typographical error.) In both *Gilford v Horne* and *Jones v Lipman* the company was being used to attempt to avoid liability for an independent wrong committed by its controller, and equitable relief against the company was granted to provide a remedy to prevent that.

99. Thirdly, I agree with Toulson J in *Yukong v Rendsburg* at 308, Munby J in *Ben Hashem* at [164], Warren J in *Dadourian v Simms* at [682]-[685] and Flaux J in *Lindsay v O'Loughnane* at [130] that, where a claim of wrongdoing is made against the person controlling the company, it is (to use Flaux J's word) inappropriate to permit the corporate veil to be lifted to enable the claimant to pursue a contractual claim against that person. Counsel for VTB distinguished *Gramsci v Stepanovs* and the present case from *Yukong v Rendsburg* and *Linsen v Humpuss* on the ground that the latter cases involved wrongdoing after the relevant contracts had been entered into. It is not clear to me why that should be a relevant consideration. After all, in *Gilford v Horne* the company did not exist at the time that the contract was entered into and in *Jones v Lipman* the company was acquired by Mr Lipman after the contract was entered into, but that did not stop the courts from granting relief. In any event, *Gramsci v Stepanovs* and the present case cannot be distinguished from *Dadourian v Simms* and *Lindsay v O'Loughnane* on that basis. Counsel for VTB distinguished *Gramsci v Stepanovs* and the present case from *Dadourian v Simms* and *Lindsay v O'Loughnane* on the basis that the latter cases were decisions at trial. He supported the reasoning of Burton J that the corporate veil had not been pierced in *Dadourian v Simms* and *Lindsay v O'Loughnane* because it was an alternative remedy which was not needed once the claimants succeeded in their claims for deceit, and that was something that could only be decided at that point. He also supported the reasoning of Burton J that necessity could not be a pre-requisite for piercing the veil, because potential alternative remedies had existed in *Gilford v Horne*, *Jones v Lipman* and *Trustor v Smallbone*. For my part, despite the Master of the Rolls' apparent endorsement of the proposition in *Linsen v Humpuss*, I am prepared to accept that it may not be a pre-requisite to piercing the veil that it be necessary in the sense that no other remedy is available. It seems to me, however, that the real point made in particular by Warren J is that conferring a remedy consisting of damages for breach of contract is fundamentally inconsistent with a claim for fraud. That is particularly so where, as in *Dadourian v Simms* and in the present case, it is the claimant's case that it was induced to enter into the contract in question by the fraudulent misrepresentation.

100. Fourthly, the reasoning in *Gramsci v Stepanovs* turns on the use of the company as a façade to conceal the involvement of the wrongdoer behind it. This leads to the following anomaly: if the wrongdoer conceals his involvement in the company, then the corporate veil can be pierced; but if the wrongdoer does not conceal his involvement in the company, for example where he is a duly appointed director of the

company, then the victim will have a claim against the wrongdoer in tort (either on the basis of his own deceit or on the basis of joint liability for the company's deceit), but it will not be possible to pierce the corporate veil. Counsel for VTB sought to justify this on the basis that the vice to which piercing the veil was directed was abuse of the corporate structure, but a director of a company who causes the company to commit a fraud also abuses the corporate structure. Furthermore, I can see no justification for awarding the contractual measure of damages in the former case, but only the tortious measure in the latter case.

101. Fifthly, it seems to me that the decision in *Gramsci v Stepanovs* is not so much a decision to pierce the corporate veil as a decision to ignore privity of contract. Burton J accepted the argument he set out at [23] that there was no difference in principle between making the puppet liable under the puppeteer's contract, as in *Gilford v Horne* and *Jones v Lipman*, and making the puppeteer liable under the puppet's contract. For the reasons I have explained, however, I consider that this argument starts from a false premise. Neither in *Gilford v Horne* nor in *Jones v Lipman* were damages awarded against the puppet for breach of the puppeteer's contract. Rather, equitable relief was granted against the puppet to stop the puppeteer evading his own contractual liability. Thus the puppet was not treated as being party to the puppeteer's contract. Furthermore, attempting to make the puppeteer liable on the puppet's contract gives rise to other problems. In particular, Burton J accepted at [27(i)] that the puppeteer could not enforce the contract "as a matter of public policy", but did not explain why this was so. Counsel for VTB accepted that the puppeteer should be entitled to rely upon defences arising under the contract, such as those provided by exclusion or limitation clauses or time bars. But if so, why can the puppeteer not enforce the contract? What if, for example, the puppet has a set off or cross claim for unpaid sums due under the contract? Why should the puppeteer not be able to enforce that set off or cross claim if he is going to be treated as a party to the contract? I do not see the relevance to this of the Contract (Rights of Third Parties) Act 1999, which is a limited statutory incursion into the doctrine of privity of contract which otherwise left it intact.

102. For these reasons I decline to follow *Gramsci v Stepanovs*, and I hold that VTB's contract claim is unsustainable as a matter of law. This makes it strictly unnecessary to consider the next three issues, but I shall do so in case the conclusion I have just expressed is wrong.

Article 23(1) of the Brussels Regulation

103. Article 23(1) of Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Regulation") provides *inter alia* as follows

> "If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

…"

104. VTB contends that, if it is entitled to pierce the corporate veil so as to treat MarCap BVI, MarCap Moscow and Mr Malofeev as if they were parties to the Facility Agreement, then it follows that VTB can rely upon clause 35 of the Facility Agreement as conferring jurisdiction on the English courts pursuant to Article 23(1). Furthermore, it also follows that VTB does not require permission to serve the Claim Form out of the jurisdiction because "the defendant[s] [are]... party to an agreement conferring jurisdiction within article 23 of the Judgments Regulation" (see CPR r. 6.33(2)(b)(iii)), and it is not open to this court to decline jurisdiction on a discretionary basis applying the concept of *forum non conveniens*. In support of this contention, VTB again relies upon the decision of Burton J in *Gramsci v Stepanovs*.

105. Burton J recorded at [31]-[32] that it was common ground that national law (i.e. English law) governed the existence and interpretation of a jurisdiction clause while European law governed formality and consensus, but there was an issue before him as to which law governed the identity of the parties to the contract. On that issue, he held at [32]-[46] and [61] that English law governed this question. This conclusion has not been challenged before me.

106. Burton J then went on to consider the question of consensus, and stated the test to be applied as follows:

> "47. It is common ground that the issue of consensus is decided by EU law. The European Court at paragraph 14 of its judgment in *Partenreederei MS Tilly Russ v V Haven & Vervoerbedrijf Nova (The Tilly Russ)* Case 71/83 [2984] ECR 2417, [1985] QB 931 stated that 'the purpose of Article [23] is to ensure that the parties have actually consented to such a clause, which derogates from the ordinary jurisdiction rules laid down in Articles 2, 5 and 6 of the Convention, and that their consent is clearly and precisely demonstrated.'
>
> 48. The question thus is whether, once English law has identified the parties to this contract (including the jurisdiction clause) as being the Claimants, the puppet companies and the puppeteer, such test is established in relation to them …"

107. He expressed his conclusion on this question as follows:

> "62. EU law then falls to be considered to consider the question as to whether there was consensus between the parties so identified. There are two formulations which I have found helpful. In *Bank of Tokyo* at paragraph 192 Lawrence Collins J stated:
>
> > 'Whether there has been a sufficient consensus so as to satisfy Article 23 as predominantly a question of fact

> for the court seised and it is to be answered without recourse to rules of national law.'
>
> This was expanded by Hamblen J in *Polskie*, expressly by reference to Lawrence Collins J wearing his academic hat in the 14th Edition of *Dicey, Morris and Collins* at 12-108, namely:
>
> > 'As to the need for agreement – the claimant must show that both the parties "clearly and precisely" consented to the alleged jurisdictional agreement. In a case, such as this, where a party alleges that it never accepted the clause, the task of the court is to determine if there was sufficient consensus between the parties as a question of fact, without recourse to any rules of national law.'
>
> 63. I am satisfied that this question is a mixed question of law and fact, and that there is a good arguable case, in the sense referred to above, that the Claimants will establish such consensus by and between the Claimants and the Defendant as puppeteer."

108. Counsel for Nutritek drew it to my attention that in *Bols Distilleries BV v Superior Yachts Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12, a case which was cited by Burton J elsewhere in his judgment, Lord Rodger of Earlsferry delivering judgment of the Privy Council held at [28] that:

> "In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate 'clearly and precisely' that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties."

Burton J's approach appears to me to be consistent with this statement.

109. Counsel for Nutritek submitted that VTB could not demonstrate consensus in circumstances where: (a) VTB did not know it was contracting with MarCap BVI, MarCap Moscow or Mr Malofeev; and (b) MarCap BVI, MarCap Moscow or Mr Malofeev did not know they were a party to the Facility Agreement. In my judgment this submission is answered by the reasoning of Burton J. If, as a matter of English law, there is a good arguable case that MarCap BVI, MarCap Moscow and Mr Malofeev are to be treated as parties to the Facility Agreement, then it follows that there is also a good arguable case that they consented to the jurisdiction clause contained in that agreement.

110. Whether there is a good arguable case that MarCap BVI, MarCap Moscow and Mr Malofeev are to be treated as parties to the Facility Agreement depends in part on the correctness of Burton J's decision with regard to piercing the corporate veil as a matter of law. It also depends, however, on the facts. Assuming for the moment that Burton J was right as a matter of law, and that I am wrong to decline to follow him, I

consider that on the evidence presently before the court VTB has a good arguable case on the facts as against MarCap Moscow and Mr Malofeev, but not as against MarCap BVI. My reasons for reaching this conclusion are set out below in the context of my consideration of whether there is a serious issue to be tried in relation to VTB's tort claims. I should make it clear in saying this that I am not ignoring the higher threshold which VTB must overcome for the purposes of Article 23(1).

The rule in Parker v Schuller

111. The Defendants contend that this court remains bound by the rule in *Parker v Schuller* (1901) 17 TLR 299, even though it was disapproved by the Supreme Court in *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 3 WLR 273, and that in consequence VTB cannot rely upon its claim in contract to sustain the order for service out of the jurisdiction. This point only arises if (a) the court concludes that VTB has a good arguable case in contract, but nevertheless (b) is not entitled to rely upon Article 23(1) of the Brussels Regulation. In that event VTB would seek to rely upon paragraph 3.1(6) of Practice Direction 6B to found jurisdiction against MarCap BVI, Marcap Moscow and Mr Malofeev. Since I have decided that (a) VTB does not have a good arguable case in contract, but if it did (b) it would be entitled to rely upon Article 23(1) at least against MarCap Moscow and Mr Malofeev, I shall deal with the point briefly.

112. The leading authority on the rule is *Metall and Rohstoff AG v Donaldson Lufkin and Jenrette* [1990] 1 QB 391, where the plaintiff sought to rely on alternative causes of action to sustain an order for service out of jurisdiction in addition to the causes of action it had relied upon to obtain leave (though based on the same facts). Slade LJ giving the judgment of the Court of Appeal said at 436D-E:

> "In our judgment, if the draftsman of a pleading intended to be served out of the jurisdiction under Ord.11, r.1(1)(f) (or indeed under any other sub-paragraph) can be reasonably understood as presenting a particular head of claim on one specific legal basis only, the plaintiff cannot thereafter, for the purpose of justifying his application under Ord. 11, r.1(1)(f), be permitted to contend that that head of claim can also be justified on another legal basis (unless, perhaps, the alternative basis has been specifically referred to in his affidavit evidence, which it was not in the present case). With this possible exception, if he specifically states in his pleading the legal result of what he has pleaded, he is in our judgment limited to what he has pleaded, for the purpose of an Order 11 application."

113. It is common ground that all the members of the Supreme Court in *NML v Argentina* disapproved of this rule, but that their disapproval was strictly obiter since they also held (albeit for different reasons) that it did not apply to the situation before the Court. Counsel for VTB nevertheless submitted that it was open to this court to give effect to the Supreme Court's disapproval of the rule. Counsel for Nutritek disputed this. In my judgment, counsel for VTB is correct for the following reasons.

114. The CPR are a new procedural code: CPR r. 1.1(1). It follows that cases decided under the RSC are not strictly binding with regard to the CPR, although they are

generally of considerable persuasive force if there is no material difference in the wording of the respective provisions. In *E D & F Man Sugar Ltd v Lendoudis* [2007] EWHC 2268 (Comm), Christopher Clarke J held at [27]-[28] that *Metal und Rohstoff* remained good law under the CPR. His decision was referred to with approval by the Court of Appeal in *Pacific International Sports Clubs Ltd v Surkis* [2010] EWCA Civ 753 at [58] (Mummery LJ). In my judgment the Court of Appeal's approval of *E D & F v Lendoudis* in *Pacific v Surkis* was obiter, however. I am therefore not bound by *Pacific v Surkis*, which means that I am free to rely upon the superior source of persuasive authority represented by *NML v Argentina*. Accordingly, I decline to follow *E D & F v Lendoudis.*

Necessary or proper party

115. If (a) VTB has a good arguable case that MarCap BVI, MarCap Moscow and Mr Malofeev are to be treated as parties to the Facility Agreement so that either (b) VTB can rely upon Article 23(1) of the Brussels Regulation as against them or (c) VTB can rely upon paragraph 3.1(6) of Practice Direction 6B as against them, the final question to be addressed in this section of the judgment is whether VTB can rely upon paragraph 3.1(3) of Practice Direction 6B to found jurisdiction against Nutritek.

116. Counsel for Nutritek argued that VTB's contract claim could only succeed if its claim in tort against MarCap BVI, MarCap Moscow and Mr Malofeev failed. If its claim in tort against those parties failed, however, then it necessarily followed that VTB's claim against Nutritek would fail. Accordingly, Nutritek was not a necessary or proper party. This argument proceeds from a premise which, in considering the law with regard to the piercing the corporate veil, I have not accepted. I therefore do not accept this argument either.

Conclusion

117. For the reasons given above, I shall refuse VTB permission to amend the Particulars of Claim to plead its contract claim against MarCap BVI, MarCap Moscow and Mr Malofeev.

<u>The Defendants' application to set aside permission to serve out</u>

118. I turn to consider the Defendants' applications to set aside Chief Master Winegarten's order granting VTB permission to serve the proceedings on them out of the jurisdiction. Since I have refused the application to amend, this involves consideration of VTB's claim as it was originally framed, namely in tort.

Applicable law

119. At the time of the hearing before me, there was controversy between the parties as to whether the applicable law fell to be determined in accordance with the European Parliament and Council Regulation 864/2007/EC of 31 July 2007 on the law applicable to non-contractual regulations ("the Rome II Regulation") or the Private International Law (Miscellaneous Provisions) Act 1995. This is because the claim relates to damage which occurred after 20 August 2007, but before 11 January 2009, and it was unclear whether the Rome II Regulation applied to such claims. This question has now been settled by the judgment of the Court of Justice of the European

Union given on 17 November 2011 in Case C-412/100 *Homawoo v GMF Assurances SA*, in which the Court ruled:

> "Articles 31 and 32 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), read in conjunction with Article 297 TFEU, must be interpreted as requiring a national court to apply the Regulation only to events giving rise to damage occurring after 11 January 2009 and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope *ratione temporis* of the Regulation."

120. It follows that the applicable law must be determined in accordance with the 1995 Act, sections 11 and 12 of which provide as follows:

> "**Choice of applicable law: the general rule.**
>
> 11.(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being:
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
>
> (3) In this section 'personal injury' includes disease or any impairment of physical or mental condition.
>
> **Choice of applicable law: displacement of general rule.**
>
> 12.(1) If it appears, in all the circumstances, from a comparison of:
>
> (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

> (b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

121. VTB contends that English law is the applicable law either under section 11(2)(c) or under section 12. The Defendants contend that Russian law is the applicable law.

122. *Section 11(2)(c).* My attention was drawn to four authorities on the application of section 11(2)(c). The first is *Morin v Bonhams & Brooks Ltd* [2003] EWCA Civ 1802, [2004] 1 Lloyd's Rep 702. In that case, the defendant (a Monegasque company) sent the claimant a catalogue for an auction which was to take place in Monaco. That brochure included an inaccurate description of a particular vintage motor car. The claimant went to Monaco and bid successfully for the car. Once he had bought the car, the claimant discovered that it suffered from defects which were inconsistent with its description in the brochure. The question for the court was where the most significant elements of the relevant tort (negligent misstatement) had occurred in circumstances where (a) the relevant representations were made to the claimant in England, (b) the initial reliance on those statements was made in England and (c) the specific transaction which caused the claimant to suffer his loss (namely his agreeing to purchase the car at the relevant auction) occurred in Monaco. The Court of Appeal concluded that Monegasque law was the applicable law of the tort under section 11(2)(c).

123. The reasons for this conclusion given by Mance LJ (as he then was) were as follows:

> "16. S.11 of the 1995 Act adopts a geographical test. … In any other case, it selects the law of the country 'in which the most significant element or elements of those events [i.e. those constituting the tort] occurred.' What is required is an analysis of all the elements constituting the tort as a matter of law, and a value judgment regarding their 'significance', in order to identify the country in which there is either one element or several elements, which taken alone or together, outweighs or outweigh in significance any element or elements to be found in any other country. The governing law under s.11(2)(c) will be the law of that country
>
> …

> 19. In the present case, elements constituting the alleged tort occurred both in England and in Monaco. But I agree with the Judge that the most significant elements occurred in Monaco. The making by [the defendant] through its catalogue in England of a negligent misstatement is of course one essential element. But the element of reliance was present in the form of a continuum of activity, starting in England, but having by far its most significant aspect in the form of [the claimant's] presence and successful bidding in Monaco. By the same token, although some loss was caused in England, the successful bid involved [the claimant] entering into a contract in Monaco, under which he bought and received the car there and became liable to pay there the price and auction premium, which he met by remittance from the Bahamas. It is his decision on the spot when making his successful bid, and his resulting commitment to buy the car and pay that price and premium, which represent by far the major elements of his reliance and of the loss caused and claimed in this case. The entering into of an adverse contractual commitment involves on its face an actionable loss, even prior to any actual financial expenditure pursuant to it (see e.g. *Forster v. Outred* [1982] 1 WLR 86, 97B-C)."

124. The second authority is *Dornoch Ltd v Mauritius Union Assurance Co Ltd*. In that case MCB was a Mauritian bank which had been the victim of large scale fraud resulting in the misappropriation of large sums of Mauritian rupees over some 11 years. MUA was a Mauritian insurance company which insured MCB. The claimants were English re-insurers of MUA. MCB claimed against MCB under its insurance policy in respect of the fraud, and MUA claimed against the claimants on the re-insurance policies. The claimants brought proceedings in England against MUA and MCB seeking declarations that the reinsurance policies had been avoided for misrepresentation and non-disclosure and that the claims even if proved fell outside the scope of the reinsurance, damages for misrepresentation against MUA and damages for deceit against MCB. The claimants obtained permission to serve the proceedings out of the jurisdiction, and the defendants applied to set that permission aside. One of the issues was whether the applicable law was English law or Mauritian law.

125. At first instance ([2005] EWHC 1887 (Comm), [2006] Lloyd's Rep IR 127) Aikens J (as he then was) held as follows:

> "105. It seems to me that there are six significant elements that make up the torts alleged in this case, ie. deceit and fraudulent or negligent misrepresentation. First there is the situation in MCB during the period 1991 to 2002 as it actually existed; were there irregularities and failures in regulation and did officers and directors of MCB know of them? That element is connected to Mauritius. Secondly, there is the completion of the Proposal Form by the directors and officers of MCB, which is said to have been done fraudulently. That was all done in

> Mauritius. Thirdly, there is the transmission of the Proposal Form to City Brokers Ltd in Mauritius and then to BRS in England, with the implication that MCB were content that the answers given should be used for presentation to the Reinsurers. That continuing representation took place in both Mauritius and England. Fourthly, there is the presentation of the Proposal Form by BRS to the Reinsurers as part of the renewal programme for 2002, with the continued implication that MCB continued to stand by the statements made in the Proposal Form. The presentation took place in England. Fifthly, there is the reliance by the Reinsurers (so it is said) on the Proposal Form, so as to conclude the Excess Reinsurance. That took place in England. Sixthly, there is any loss that the Reinsurers have suffered or will suffer as a consequence of the alleged deceit. If loss is suffered, it will be in England.
>
> 106. What is the proper 'value judgment' regarding the significance of those six elements? In considering this I think I must assume for the present that the alleged torts did occur; I cannot see how one can proceed otherwise. That is not to say that I must reach a concluded view on the law applicable to the torts; other facts may come to light at a trial which change the analysis. But, in my view the most significant elements of the torts of deceit or fraudulent misstatement are those which concern making the untrue statements in the Proposal Form (knowing them to be so), presenting the untrue statements to the other person with the intent that he should rely on it and then the actual reliance by that person on the untrue statement to his loss. Although the first of these elements starts in Mauritius, it is continued in England, because the Proposal Form, with the MCB signatures, comes to England and MCB continues to make the fraudulent misrepresentations here. The intention that the Reinsurers should rely on them continues to operate here in England where the Reinsurers receive the Proposal Form. The reliance, which is the most significant element of all, in my view, takes place in England.
>
> 107. The antecedent facts concerning the true situation in MCB are important, but it is what is done with those facts that really matters so far as the tort of fraudulent misrepresentation or deceit is concerned. In short, it is (on the assumptions I have made) MCB's decision not to tell the facts as they are and to continue to mislead that matters most, not the true facts themselves.
>
> 108. On this basis the proper law of the torts alleged will be English law, applying section 11(2)(c) of PILA."

126. This assessment was upheld by the Court of Appeal: [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep 475 at [45]-[47] (Tuckey LJ).

127. The third authority is *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep 455, another decision of Aikens J. In that case, Kookmin was a Korean bank which had issued a letter of credit in favour of Trafigura, a Dutch company, which sold a cargo of oil to a Korean buyer. The oil was delivered without bills of lading being produced. Subsequently, the buyer became insolvent and failed to reimburse Kookmin. Kookmin brought proceedings against Trafigura in South Korea under Korean law. Trafigura commenced proceedings in England seeking a declaration of non-liability and an anti-suit injunction. A preliminary issue was ordered as to the law applicable to the question of whether Trafigura was liable to Kookmin on the claims advanced by the latter in the Korean proceedings. Although Kookmin advanced two main claims in Korea, it only relied on one in England, referred to as the "security" claim, which Aikens J held was a claim in tort. Trafigura contended that English law was applicable to that tort, while Kookmin contended for Korean law. Aikens J concluded that the most significant events relating to the security claim concerned the surrender by Trafigura of the original bills of lading and the acceptance by it of a second, claused set, which were useless as security for the cargo, which it put into the banking chain. These events had occurred in Singapore. Accordingly, under section 11(2)(c) the applicable law was the law of Singapore.

128. The fourth authority is *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm). That 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.

129. As Andrew Smith J explained at [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."

130. Andrew Smith J rejected the argument that the various schemes should be regarded as part of a single conspiracy, but continued at [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."

131. 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). 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."

132. Turning to the present case, VTB's claims have been pleaded in accordance with English law. While it is obviously necessary to be cautious about using the manner in which one system of law analyses the elements of a claim when deciding whether that law or a different law should be applied to the claim, both sides were content to argue this issue by reference to the analysis in English law. VTB's main claim is in deceit. The elements of this tort are (i) the making of fraudulent misrepresentations to a person, (ii) reliance by that person on the misrepresentations and (iii) resultant loss by that person. In addition, VTB claims in conspiracy, which adds the element of

combination between the conspirators. As indicated by Aikens J in *Dornoch*, for this purpose I shall assume that the facts alleged by VTB are true.

133. Counsel for VTB argued that the most significant elements of the deceit took place in England because: (i) irrespective of where the misrepresentations were made or to whom they were made directly, it was intended that they would be transmitted to VTB in England, and that it would rely upon them in England; (ii) VTB did rely upon the representations by crediting the relevant amount to RAP's English bank account with VTB; and (iii) accordingly the loss was suffered in England. So far as conspiracy was concerned, he argued that the unlawful means relied on was the fraudulent misrepresentations, and so again the most significant elements of the tort took place in England.

134. Counsel for the Defendants argued that the most significant elements of the deceit took place in Russia because: (i) the misrepresentations were made in Russia; (ii) for the most part the misrepresentations were received in Russia; (iii) although the misrepresentations were later relied upon in England by VTB, the most significant aspect of reliance was the approval of the loan transaction by VTB Moscow's Credit Committee; and (iv) those factors ought not to be displaced by the fact that, if VTB suffered any damage, this occurred in England. As for conspiracy, counsel for the Defendants argued that the present case was very similar to *Fiona Trust v Privalov*: (v) the combination to injure originated and was carried out in Russia through the driving force of MarCap Moscow and Mr Malofeev; (vi) the primary target of the alleged conspiracy must be regarded as VTB Moscow (to which company the misrepresentations were made and which was known by the alleged conspirators as being the company providing the funds), even if it was also intended to injure VTB; (vii) the unlawful means took place in Russia where the misrepresentations were made; and (viii) any damage in London flowed from what occurred in Russia, which was also where the ultimate financial impact was felt.

135. I find the arguments of counsel for the Defendants more persuasive. There is little dispute that the misrepresentations were made and mainly received in Russia. In my view they were primarily relied on in Russia, since it was VTB Moscow's Credit Committee and Management Board which made the essential decision to enter into the proposed transaction in reliance upon those representations. VTB's reliance was wholly secondary. While the loss suffered by VTB was sustained in England, the loss was sustained because of the inadequate security provided by assets in Russia which were the subject of the misrepresentations. Furthermore, as I shall discuss below, while the loss has been suffered in the first instance by VTB, the ultimate economic impact is felt by VTB Moscow to which VTB must account for its recoveries. Finally, it seems to me that counsel for the Defendants are right to say that the conspiracy, which seems clearly to have been hatched in Russia, is an important aspect of VTB's claims because it founds not just VTB's claim in conspiracy itself, but also its claims against MarCap Moscow and Mr Malofeev as joint tortfeasors in respect of the deceit. Accordingly, I consider that the most significant elements of the events constituting both torts occurred in Russia. It follows that the applicable law under the general rule is Russian law.

136. *Section 12*. Section 12 was also considered in each of the authorities discussed above. In *Morin v Bonhams* Mance LJ observed:

> "21. … significance under s.11 directs attention to the intrinsic nature of the element(s) of the tort — and not to the nature or closeness of any tie between those elements and the country where they occurred. The nature or closeness of any tie can, however, be very relevant on an issue arising under s.12, when considering 'factors which connect a tort' with one or another country. The embrace of 'factors connecting' a tort with a country extends potentially much wider than the "elements constituting the tort.
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> …
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> 23. The next question arising in relation to the application of s.12 would have been whether the concept of "factors which connect a tort" with a country embraces the parties' choice of the *law* of a particular country. In general terms, it would seem odd, if an express choice of law were not at least relevant to the governing law of a tort. But Adrian Briggs, in an article 'On drafting agreements on choice of law' in [2003] LMCLQ 389, points out the difficulty of the language of s.12 - adding however that 'it may not be impossible' to overcome its 'anti-commercial cast'. The law of a country is after all a feature of the country. Further, one should not forget that clause 9.1 [of the contract of sale] not only deals with governing law, but provides for submission to the non-exclusive jurisdiction of the Monegasque courts. It may be open to argument that that itself constitutes a 'factor connecting the tort' to Monaco. The judge did not decide any points relating to s.12, and, since we do not have to do so either, I prefer to leave them all open."

137. Professor Briggs' article was also the subject of comment by Aikens J in *Trafigura v Kookmin* (omitting footnotes):

> "103. With respect to Professor Briggs, in my view he adopts too narrow a construction of section 12(1) and (2). In section 12(1) the court is invited to make a comparison of the significance of the factors which connect a tort with the country whose law would be the applicable law under the 'general rule' and "the significance of any factors connecting the tort ... with another country'. I would emphasise the use of the words 'any factors' in section 12(1). In my view Professor Briggs' comments also do not give adequate scope to the breadth of section 12(2). As I have already commented, it is inclusive, not exclusive in its terms. But it does state that the court can take into account '…in particular, factors relating to the parties' as factors that might connect the tort with 'another country' for the purposes of section 12. It seems to me that the phrase 'factor relating to the parties' is broad. The factor only has to 'relate to the parties'. I would hold that the phrase can include the fact of a pre–existing relationship between the parties, whether contractual or otherwise. Another factor 'relating to the parties'

> must be, in my view, the law that the parties have expressly or impliedly chosen to govern their pre–existing contractual relationship. If that pre–existing relationship is said to give rise to events constituting the alleged tort in question, then it seems to me that the factual and contractual context in which the events took place and the law governing any related contracts must be within the phrase in section 12(2): '… relating to … any of the events which constitute the tort … in question or to any of the circumstances or consequences of those events'.
>
> 104. For my part I see no difficulty in the idea that if the governing law of a contract, or a chosen jurisdiction provision in a contract is that of country A, that may be a factor that connects the alleged tort under consideration with country A. An analogous exercise is carried out every time the court considers the impact of the applicable law of a contract when deciding whether England is the appropriate jurisdiction in a '*forum non conveniens*' case. So in my view the contractual 'matrix' in which it is said the alleged tort constituting the 'security claim' occurred is a potential 'factor' for consideration under section 12."

138. On the facts of the case he went on to conclude that English law displaced Singapore law under section 12 for the following reasons:

> "106. To my mind the first connecting factor which [counsel for Trafigura] identifies, that is, the L/C contract between Trafigura as beneficiary and Kookmin as issuing bank, is by far the most important …. The existence of the L/C contract is the reason for any kind of connection between Trafigura and Kookmin at all. The L/C was the pre–existing relationship which, at least in contract, governs the rights and obligations of Trafigura and Kookmin as, respectively, beneficiary and issuing bank under the L/C. Cooke J held that the L/C contract, as between Trafigura and Kookmin, is governed by English law …. That conclusion has not been challenged before me by Kookmin. Nor has Kookmin challenged the conclusions of Cooke J that Kookmin would have no claim against Trafigura under the L/C as a matter of contract and that the English law contracts leave no room for a claim in tort where the contracts are fulfilled …
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> ….
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> 112. Therefore it seems to me that the second important factor for the purposes of section 12 is that all but one of the relevant contractual relationships between the parties – that between the sellers (Trafigura) and buyers of the cargo; that between the sellers and the carriers; that between the issuing bank and the beneficiary under the L/C; and that between the sellers and the buyers in the LOI contract – are all governed by English law.

> All those parties' contractual rights and obligations are therefore connected with England, because, as Mance LJ said in paragraph 23 of the *Morin* case, '…the law of a country is a feature of the country'.
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> …
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> 118. Ultimately I have concluded that it is substantially more appropriate that the applicable law governing the contractual relationship between Trafigura and Kookmin for issues relating to tort should be the same as that governing their contractual relationship: viz. the law of England. That conclusion is supported by the fact, as I have stated, that all but one of the other contractual relationships between all relevant parties are governed by English law. I repeat: it would seem bizarre for all those parties' contractual relations to be governed by one applicable law, yet hold that the law of another country is to determine non – contractual rights and obligations."

139. By contrast, in *Dornoch v MUA* Aikens J held at [109]:

> "Mr Kealey appeared to rely on the fact that, as he submitted, the Excess Reinsurance is governed by Mauritius law, in order to invoke section 12 of PILA. I have held, provisionally, that the proper law of the Excess Reinsurance is English law. But even if I had concluded to the contrary, that would not help him establish that the law applicable to the torts of MCB is Mauritius law. I must confess to finding section 12(1) difficult to apply in relation to *all* the issues in this case. Section 12(1) appears to say that, if having considered the matter under section 11(2(c) you decide that the most significant elements lead to the proper law of the tort being that of country A, nevertheless, you may consider it more appropriate to conclude that the proper law should be that of country B ('the other country'), bearing in mind the factors set out in section 12(2). But, in this case at least, that involves considering precisely the same elements all over again. In any event, the fact that the fraudulent misrepresentations were made in order to induce the Reinsurers to enter the Excess Reinsurance whose proper law would be that of Mauritius seems to me to have nothing to do with the tort in question. Nor does the fact that the Proposal Form was also used in respect of the direct insurance, which is governed by Mauritius law."

140. In *Fiona Trust v Privalov* Andrew Smith J held as follows:

> "172. The claimants submitted that, nevertheless, the issues relating to the conspiracy claims are to be determined by English law because the general rule is displaced by the secondary rule in section 12 of the 1995 Act; that is to say, that it is apparent that it is substantially more appropriate for the issues to be

determined by English law if the significance of the factors that connect the tort with Russia are compared with the significance of the factors that connect the tort with England. The factors that may be considered in applying the secondary rule are not limited to where events constituting the tort occurred. The claimants relied not only upon the considerations that they invoked in relation to the general rule but also upon the fact that the contracts and arrangements with yards, purchasers of vessels, charterers and other third parties whereby the various schemes were implemented were governed by English law through the parties' express choice and in many cases had English jurisdiction or English or London arbitration provisions.

173. The law indicated by the general rule is not displaced simply because on balance, when all factors relating to a tort are considered, those that connect the tort with a different country prevail. That would emasculate the general rule. The secondary rule is applied only if it indicates that another law is substantially more appropriate. In my judgment, the considerations identified by the claimants, including the terms of the contracts implementing the schemes, are not sufficient to displace the general rule so as to have any issues relating to the conspiracy claims in the Fiona actions determined by English law. On the contrary, when the secondary rule is considered, the defendants for their part are entitled to invoke "factors relating to the parties" (see section 12(2) of the 1995 Act), and so they rely upon the facts that Sovcomflot is the parent company of a nationalised Russian group of strategic importance and that the defendants are for the most part Russian individuals or companies said to be owned or controlled by Russians. These factors seem to me of more importance than the terms of the agreements with third parties through which the schemes were implemented, and, had I not concluded that the general rule requires the application of Russian law, I would have accepted the defendants' submission that the secondary rule applies and that English or any other law is displaced in favour of Russian law.

174. It is true that the schemes said to have been devised by the conspirators were played out on the international stage. They implemented their schemes in different countries according to the business and activity involved. They used companies incorporated in the BVI and elsewhere. They carried on their banking and conducted their financial dealings through Swiss banks. They dealt with sales and purchases of ships and ship financing transactions through London. Sovcomflot dealt with charters in Switzerland. Because many of the schemes concerned sales and purchases and ship financing, much of the business about which the claimants complain was done through

> London. Because the schemes concerned shipping, the contractual arrangements by which they were conducted were governed by English law, as is commonly chosen by the parties to contracts of this kind. However, the focus of the conspiracy remained Russian and the collusion was based in Russia although the schemes were played out elsewhere."

141. Counsel for VTB relied on the fact that the Facility Agreement, the ISA and the SPA all contained English law (and English jurisdiction or arbitration) clauses as showing that, analogously with *Trafigura v Kookmin*, it was substantially more appropriate for English law to apply than Russian law.

142. Counsel for the Defendants argued that there was no analogy between *Trafigura v Kookmin* and the present case. In *Trafigura v Kookmin* the letter of credit was central to the whole case, it meant that there was a direct and pre-existing contractual relationship between the parties and it formed part of a network of contracts all bar one of which were subject to English law. In the present case, by contrast, there was no pre-existing contractual relationship at all. None of the Defendants became party to the Facility Agreement, the ISA or the Participation Agreement. While Nutritek became party to the SPA, VTB did not. (Consequently VTB makes no claim either in contract or in tort concerning that agreement.) In addition, MarCap Moscow and Mr Malofeev are Russian, while Nutritek and MarCap BVI are BVI companies which VTB contends are controlled by Mr Malofeev. Accordingly, counsel for the Defendants submitted that the present case was much closer to *Dornoch v MUA* and *Fiona Trust v Privalov*.

143. Again I find the arguments of counsel for the Defendants more persuasive. While it is true that, as a result of the deceit and conspiracy, VTB was induced to enter into the Facility Agreement and the ISA which contained English law clauses, I do not see that makes it substantially more appropriate to apply English law than Russian law to the deceit and conspiracy.

Serious issue to be tried

144. In case I am wrong that Russian law is the applicable law, I must go on to consider whether, if English law is the applicable law, VTB's Particulars of Claim and supporting evidence establish that VTB has a real prospect of success in its claims for deceit and conspiracy and thus that there is a serious issue to be tried. Save in three specific respects, the Defendants do not dispute that this is so. I shall consider the three points of dispute in turn.

145. *(1) No loss*. The first point, which is taken by all three Defendants, is that VTB has no real prospect of success of establishing that it has suffered loss by reason of the matters complained of. The Defendants' case is that the only party which has suffered loss is VTB Moscow. Furthermore, the Defendants contend that this is an issue of law rather than of fact, and so the court should determine it now.

146. The basic principles are not in dispute. The starting point is the statement of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

147. In the case of claims for fraudulent misrepresentation, the position was pithily summarised by Lord Steyn in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 284D:

> "There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants."

148. The Defendants point out that, as a result of the alleged fraudulent misrepresentations, VTB entered into two agreements forming part of one overall transaction, namely the Facility Agreement and the Participation Agreement. Under the Facility Agreement VTB paid out some US$225 million to RAP, but under the Participation Agreement VTB received exactly the same sum from VTB Moscow. Accordingly, the Defendants contend, VTB suffered no loss even if one ignores the arrangement fee VTB was paid and the subsequent recoveries. Furthermore, the Defendants say that this analysis is supported both by the terms of the agreements and by the economic reality that, as the contemporaneous documents and VTB's own evidence show, it was VTB Moscow which provided all the sums lent to RAP and which assumed all of the credit risk.

149. So far as the terms of the agreements are concerned, the Defendants rely in particular on clauses 4.1.1 and 4.2.3 of the Facility Agreement (which provide that RAP may not draw down the loan until the conditions precedent are satisfied and VTB has received the funds from VTB Moscow), clauses 2.1 and 2.2 of the Participation Agreement (which require VTB Moscow to pay VTB amounts equal to sums paid to RAP under the Facility Agreement in the same currency and at the same time and place) and clause 6.3(a) of the Participation Agreement (which gives VTB Moscow the right to require an assignment or novation of VTB's rights under the Facility Agreement in the event of default).

150. So far as the contemporaneous documents are concerned, the Defendants rely upon statements such as those made in the Applications for Credit Facilities dated 13 and 15 November 2007 (see paragraphs 36 and 37 above) that VTB Moscow "will fully fund the transaction and fully undertake the credit risk under the transaction".

151. As for VTB's evidence, the Defendants rely upon statements such as the following by Leonty Chernenko (Managing Director of VTBDC) in paragraph 20(B) of his first witness statement:

> "VTB Moscow was fully funding the facility before any drawdowns were made against it pursuant to the Participation Agreement between VTB and VTB Moscow. The consequence of the Participation Agreement was that in the event of default VTB Moscow took responsibility for all the amounts due from RAP, thereby eliminating credit risk exposure for VTB for the main credit facility."

152. The Defendants put their argument in three ways. First, they say VTB simply suffered no loss at all. Secondly, and in the alternative, they say that VTB was exposed to a potential future loss which was avoided by reason of the funds it received from VTB Moscow. Thirdly, in the further alternative, they say that, if and to the extent that VTB did suffer actual loss, it received a corresponding benefit as a part of the same continuous transaction induced by the alleged misrepresentations. The Defendants go on to contend that in these circumstances the burden falls on VTB to establish an exception to the general rule articulated by Lord Steyn, and that neither the principle referred to as *res inter alios acta* nor the exception established in *The Albazero* [1977] AC 774 is applicable here.

153. VTB contends that it has suffered an actual loss, and that this is not a case of a potential future loss avoided or of a corresponding benefit having been received. I agree with this. My reasons are as follows.

154. As counsel for VTB submitted, it is necessary to focus upon the relevant transaction. VTB's case is that, as a result of the misrepresentations, it was induced to enter into the Facility Agreement. (It was also induced to enter into the ISA, but it is not necessary for present purposes to analyse that separately.) Under the Facility Agreement, the lender was VTB, and VTB Moscow was not a party to the agreement. Furthermore, the funds which VTB advanced to RAP pursuant to the Facility Agreement belonged (as the Defendants accept) to VTB, not to VTB Moscow. Thus VTB has suffered a loss consisting of the amounts lent, against which it must give credit for the net sum recovered.

155. This is not affected by the fact that VTB simultaneously entered into the Participation Agreement, to which RAP was not a party; nor by the fact that VTB received funds from VTB Moscow pursuant to the Participation Agreement equal in amount to the funds which VTB advanced to RAP. As counsel for VTB pointed out, clauses 6.1 paragraphs (a), (b), (c) and (d) of the Participation Agreement are crystal clear that the relationship of VTB and VTB Moscow is that of debtor and creditor and that VTB Moscow has no proprietary, equitable or subrogation interest in the Facility Agreement or in the funds advanced thereunder. The fact that VTB Moscow has the right under clause 6.3 to call for an assignment or novation makes no difference to this, since VTB Moscow has not exercised that right. Furthermore, clause 6.4(b) provides that VTB is to pay the proceeds of enforcement pro rata to VTB Moscow under the Participation Agreement and in discharge of VTB's own debt under the ISA.

156. The Defendants relied on the following passage in the decision of Phillips J (as he then was) in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 802g-j, a case concerning a syndicated loan:

> "The banks which joined in the loan transactions by subsequent syndication reimbursed BBL in respect of part of the loans that BBL had advanced. They became parties to the loan transaction by novation and had transferred to them a pro rata share of BBL's rights under those transactions including BBL's interests in the property securing the transactions. There was thus transferred from BBL to the syndicate banks a share of the risks inherent in the loan transactions. BBL contends that the Court should disregard this transfer of risk and assess damages as if the subsequent consequences of the transactions were borne exclusively by BBL. The principle of res inter alios acta requires the Court to disregard an indemnity received by the Plaintiff from a third party in respect of the loss caused by the Defendant. It does not require or permit the Court to assess damages on the basis of a fiction; to treat losses sustained by third parties as if they had been sustained by the Plaintiff. The intervention of the syndicate banks did not indemnify BBL in respect of consequences of entering into the loan transactions. It resulted in the syndicate banks suffering those consequences in place of BBL. The loss claimed by BBL is not loss suffered by BBL prior to syndication, but loss suffered by all the syndicate banks after syndication. The principle of res inter alios acta does not permit BBL to recover damages in respect of the losses sustained by the syndicate banks."

157. In my judgment the present case is clearly distinguishable from *Banque Bruxelles*. As can be seen from the passage quoted, in that case the banks which joined in the syndication became parties to the loan in place of BBL by novation. Thus the banks suffered the loss, and not BBL. But in the present case there has been no novation of the Facility Agreement in favour of VTB Moscow. It is immaterial that VTB Moscow would have its own cause of action for fraudulent misrepresentation or that, from a commercial or regulatory point of view, VTB Moscow assumed the credit risk.

158. Turning to the second way in which the Defendants put the argument, the Defendants relied upon *Dimond v Lovell* [2002] 1 AC 384 and *Burdis v Livesey* [2002] EWCA Civ 510, [2003] QB 36. In *Dimond v Lovell* the claimant's car was damaged by the negligence of the defendant. The claimant hired a substitute car. Her potential future loss consisting of the hire charges was, in the event, avoided because the hire contract was unenforceable under the Consumer Credit Act 1974. Accordingly, the claimant was unable to claim the cost of hiring the substitute car, or damages for the loss of use of her car, from the defendant.

159. In *Burdis v Livesey* the issue concerned the costs of repairing the claimant's vehicle, which she had financed by borrowing money from a finance company. Again, the contract was unenforceable. The Court of Appeal distinguished *Dimond v Lovell* for reasons which Aldous LJ, delivering the judgment of the Court, expressed as follows:

> "84. In our judgment a fundamental distinction must be drawn, for present purposes, between repair costs and hire charges. When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in

value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre-accident condition (see *Dimond* at page 1139G per Lord Hobhouse).

85. In *Burdis v Livesey* the general rule applied, and it was common ground that the repairs restored Miss Burdis' car to its pre-accident value. Nor was there any issue as to the reasonableness of the garage's charges. Thus at the moment when the accident occurred Miss Burdis suffered a direct and immediate loss, the measure of which was the cost of the repairs which were in fact carried out (£2,981.19). But it was not a condition precedent to the recovery of compensation for that loss that the car be repaired: Miss Burdis' cause of action for the recovery of damages representing the diminution in the value of her car caused by Mr Livesey's negligence was complete when the accident occurred: see *The Glenfinlas (Note)* [1918] P 363 and *The London Corporation* [1935] P 70. Similarly, a claimant's damages will not be affected by the fact that, in the event, the repairs are carried out at no cost to him: see *The Endeavour* (1890) 6 Asp MC 511, where the vessel was repaired but, due to the bankruptcy of the owner, the repairer was never paid.

86. By contrast, the hire charges which were sought to be recovered in *Dimond* represented a potential future loss, consequent upon the defendant's tort, which was recoverable as damages only if and when it was in fact suffered. In the language of pleading, the hire charges constituted special damage. As the judge put it in *Seddon v Tekin* [2001] GCCR 2865, 2890, in the passage quoted earlier, the hire charges are 'of the essence of the damage which is consequential loss or special damage'. Hence in *Dimond*, because the credit hire agreement was unenforceable and the hire charges were accordingly irrecoverable from the claimant, the hire charges never formed part of the claimant's loss.

87. The distinction between an immediate and direct loss on the one hand and a potential future loss on the other is of importance for present purposes because it leads to different treatment of benefits derived from a third party after the commission of the tort. In every case a claimant's recoverable loss is limited to the loss which he has actually suffered - damages in the tort of negligence are, after all, 'purely compensatory' (see per Lord Bridge in *Hunt v Severs* [1994] 2 AC 350, 357H) - but the process of determining, in the light of subsequent events, what loss the claimant has actually suffered differs according to whether the loss was suffered when the tort was committed (direct loss) or whether it was suffered subsequently (consequential loss).

> 88. In a case of direct loss, subsequent events will operate to reduce or extinguish the loss only in so far as such events are referable to the claimant's duty to mitigate his loss, and hence referable in a causative sense to the commission of the tort: see the *British Westinghouse* case [1912] AC 673 and *Koch Marine Inc v D'Amica Societa di Navigazione ARL* [1980] 1 Lloyds's Rep 75. In the *Koch Marine* case, Robert Goff J said, at p 88: 'what is alleged to constitute mitigation in law can only have that effect if there is a causative link between the wrong in respect of which damages are claimed and the action or inaction of the plaintiff.'
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> …
>
> 91. In our judgment, the authorities to which we have so far referred establish that subsequent events which are not referable in a causative sense to the commission of the tort, that is to say events which, on a true analysis, are collateral to the commission of the tort, or res inter alios acta, or too remote - we regard these expressions as interchangeable - do not affect the measure of a direct loss suffered when the tort was committed.
>
> 92. In the case of potential future losses, on the other hand, the general rule is that to the extent that such a loss is in fact avoided (for whatever reason) it is a loss which is never suffered and which is accordingly irrecoverable for that reason. … "

160. Applying this reasoning, I consider that VTB's loss when it entered into the Facility Agreement and advanced the loans to RAP was an immediate and direct loss, and not a potential future loss. VTB's cause of action was complete at the moment it credited Tranche A to RAP's account pursuant to the Facility Agreement. It suffered an immediate and direct loss at that moment, since the security it received in return under the Facility Agreement was inadequate to cover the sums lent. It is therefore immaterial that it simultaneously received money from VTB Moscow under the Participation Agreement.

161. Turning to the third way in which the Defendants put the argument, the Defendants relied upon *Primavera v Allied Dunbar Assurance plc* [2002] EWCA Civ 1327, [2003] PNLR 12. In that case the claimant had been given negligent pensions advice. The negligence involved two misrepresentations by the defendant relating to the payments needed to be made by the claimant to realise a tax-free fund. The first misrepresentation was made in 1987, and discovered in 1995. If that misrepresentation had not been made, the claimant would have made larger payments than he did, which would have resulted in a larger tax-free fund becoming available to him in 1995 than was the case. The second misrepresentation was made at the time of the discovery of the first misrepresentation in 1995, and discovered in 1997. This meant the claimant took no action until 1997. As a result of the discovery in 1997, the claimant then made extra payments which resulted in a larger tax-free fund becoming available to him in 2000. The claimant claimed various heads of loss. The defendant

contended that the overall effect of the negligence was, in the events which had happened, to lead to the claimant making a substantial gain rather than a loss. In simple terms, the difference between the parties was as to the date as at which the loss should be assessed. The claimant contended that it should be assessed as at 1995, with the consequence that he had a fund which was then worth £101,000 less than it should have been. The defendant contended that it should be assessed as at 2000, with the consequence that he then had a larger fund due to intervening gains in the market.

162. All three members of the Court of Appeal held that it was appropriate to adopt the approach taken by Mustill LJ (as he then was) in *Hussey v Eels* [1990] 2 QB 227 at 241 and to ask, as Simon Brown LJ (as he then was) put it at [20]:

> ""Did the negligence which caused the damage also cause the profit"? Was the increased value of the fund consequent on its retention "part of a continuous transaction of which [the appellants' negligence] was the inception"? Or did the negligence merely provide the opportunity for the respondent to gain the benefit and not itself cause it?"

On the facts, the Court held that the loss should be assessed as at 1995, since the gain realised by the claimant after 1995 was caused by the claimant's own actions (and the advice of subsequent advisors) from 1997 onwards rather than by the defendant's negligent misrepresentations, albeit that the latter had provided the opportunity to make the gain.

163. Counsel for VTB submitted that *Primavera v Allied Dunbar* was to be distinguished from the present case because it concerned a situation in which the claimant knew about the misrepresentations at the time he took the steps which led to the gain, whereas in the present case VTB did not know about the misrepresentations at the time it entered into the Participation Agreement. While this is factually accurate, and germane to VTB's argument based on *res inter alios acta*, it does not appear to me to be significant with regard to the test applied by the Court of Appeal in that case. If one applies that test to the facts of the present case, however, the conclusion I reach is that profit which VTB made under the Participation Agreement was not part of the same transaction for this purpose as the loss it suffered under the Facility Agreement. Rather, it was a separate, independent transaction between different parties on different terms, albeit forming part of one overall transaction together with other agreements.

164. Another route to the same conclusion is the principle of *res inter alios acta* invoked by VTB. In this connection, VTB relied upon *Interallianz Finance AG v Independent Insurance Co Ltd* (unreported, Thomas J, 4 June 1997). In that case Interallianz claimed for losses it made on a loan to a company called Iris as a result of the negligence of the defendant surveyors Allsop. Allsop contended that Interallianz's damages should be limited to 12.56% of the amount claimed because, after the loan had been drawn down, it had entered into sub-participation agreements with five other banks. The effect of the sub-participation agreements was that Interallianz only had to find 12.56% of the sum lent from its own resources. Each of the sub-participation agreements provided that the relationship between Interallianz and the bank was that of debtor and creditor and that Interallianz was entitled to receive all principal,

interest and other monies payable under the loan agreement. Interallianz remained the only party in a contractual relationship with Iris.

165. Interallianz contended that it had suffered loss representing the difference between the valuation given by the defendant and a correct valuation and that the sub-participation agreements made no difference either because the sub-participation agreements were *res inter alios acta* or because the claimant was under a duty to account to the other banks for their respective shares of the recovery. Thomas J accepted both these contentions.

166. So far as the first contention is concerned, he expressed his reasons at p. 73 of the transcript as follows:

> "Taking into account the important consideration that the sub-participation agreements were made at a time when Interallianz had no knowledge of Allsop's breach of duty or of any damage flowing from it and thus did not arise out of the breach of duty or the loss but were wholly independent of it, I do not consider that the sub-participation agreements should be brought into account to reduce the damages that Allsop would otherwise have to pay. The sole relationship that Allsop had was with Interallianz and the sole relationship that Iris had was with Interallianz. They in fact obtained security for their loan to Iris of a value less than they had been told by Allsop; they suffered that loss on draw down. The fact that they entered into independent arrangements with others which had the consequence that loans to them by the sub-participants do not have to be repaid is a matter that is in my judgment collateral and does not have to be brought into account. There is nothing unjust or unreasonable in that conclusion."

He went on to distinguish the *Banque Bruxelles* case on the ground that in that case there had been a novation as discussed above.

167. I agree with counsel for VTB that this reasoning is equally applicable to the present case. The Defendants argued that the present case was to be distinguished from *Interallianz* on the ground that the Facility Agreement and the Participation Agreement were not independent transactions, but formed part of the same transaction, and that upon VTB's own evidence both agreements had been induced by the same misrepresentations. The key point to my mind, however, is that in both cases the relationship between the lender (VTB or Interallianz) and the participant(s) (VTB Moscow or the other banks) was one of debtor and creditor and thus was legally independent from the relationship between the lender and the borrower (RAP or Iris). In both cases the consequence was that the lender suffered a loss on the loan even though it also received money from the participant(s).

168. Thomas J went on to hold that Interallianz were under a duty to account to the other banks from their shares of the sums recovered by Interallianz from Allsop on the basis that this was an implied term of the sub-participation agreements, although he rejected Interallianz's argument that this was expressly provided for in the sub-participation agreements. Similarly in this case, VTB contends that it is under a duty to account to

VTB Moscow either by virtue of clause 3.2 of the Participation Agreement or by virtue of an implied term. Subject to the fact that I consider that the relevant term of the Participation Agreement is clause 6.4(b) rather than clause 3.2, I accept VTB's contention that it is under an express duty to account to VTB Moscow. If I am wrong about that, I would hold that it was necessary to imply a term to that effect to give the Participation Agreement business efficacy notwithstanding the detailed and apparently carefully drafted nature of the express terms.

169. In these circumstances it is not necessary to say much about *The Albazero*. Counsel for VTB accepted that, as the law stood, this exception only applied to claims in contract and not tortious claims such as the present one. In my judgment there is no basis for extending this exception to the present case.

170. *(2) No joint liability of MarCap BVI.* MarCap BVI contends that VTB has no real prospect of establishing either that MarCap BVI is jointly liable in respect of the deceit alleged or that it participated in the alleged conspiracy. It is common ground that the question whether a person is party to a conspiracy is essentially the same as whether he is liable as a joint tortfeasor by reason of having participated in a common design: see *Clerk & Lindsell on Torts* (20th ed) at §24-94. It is not necessary to show that that person himself committed the tort: see *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 601 at [84] (Arden LJ).

171. VTB's pleaded case against MarCap BVI is as follows. In paragraph 67(a) of the Particulars of Claim VTB alleges that all of the Defendants acted in concert pursuant to a common design to induce VTB to enter into the Facility Agreement. In paragraph 68 VTB pleads the matters it relies upon in support of its claim that MarCap BVI, MarCap Moscow and Mr Malofeev were parties to the conspiracy as follows:

> "a. Marcap [defined previously to mean 'the Marshall Capital group of companies'], through MarCap BVI, had de facto control of and beneficially owned in part Nutritek at the time of the Facility Agreement and SPA.
>
> b. Marcap stood to benefit from the deceit on VTB.
>
> c. Marcap was heavily involved in the negotiations leading to the Facility Agreement and SPA and the provision of information in relation thereto as explained in detail above.
>
> d. The whole transaction under which VTB was defrauded was co-ordinated by Marcap.
>
> e. The whole transaction was introduced to VTB/ VTB (Moscow) by Mr Malofeev and it is clear from the discussions he had with Mr Tulupov that Mr Malofeev was closely involved in the then proposed transaction.
>
> f. Further, it is apparent from the matters set out in section A above that Mr Malofeev exercises substantial control over the affairs of Marcap.

> g. Given the fraudulent nature of the scheme to extract funds from VTB, it is inconceivable that it would have taken place without Mr Malofeev's approval and encouragement."

172. VTB then alleges in paragraph 69:

> "The only inference that can reasonably be drawn is that Marcap group and Mr Malofeev were party to a conspiracy with Nutritek to defraud VTB. Further, it is reasonable to infer that the Marcap companies involved included not only Marcap Moscow (which was directly involved in the negotiations) but also by Marcap BVI which owned at least a little under half of Nutritek."

173. Counsel for MarCap BVI submitted that there was simply no basis in either the pleading or VTB's evidence for the inference sought to be drawn in the second sentence of paragraph 69. In summary, he argued that the claim against MarCap BVI depended on the attribution to it of the acts of one or more human beings: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506B-507B (Lord Hoffmann). The only human being referred to in paragraphs 67-69 of the Particulars of Claim was Mr Malofeev. It was not alleged that Mr Malofeev had express authority or ostensible authority to act on behalf of MarCap BVI. At best, the allegation was one of implied authority. On the most generous reading of the Particulars of Claim, the only pleaded bases for that allegation were that (i) MarCap BVI was one of the companies in the chain of ownership of Nutritek, (ii) to that extent MarCap BVI stood to benefit from the proposed transaction and (iii) MarCap BVI was substantially controlled by Mr Malofeev. That was not a sufficient basis for the implication of authority since it was no more consistent with Mr Malofeev having acted as agent for MarCap BVI than with his not having done so: see *The Aramis* [1989] 1 Lloyd's Rep 213 at 224 (Bingham LJ, as he then was).

174. No doubt recognising the force of this argument, counsel for VTB sought to rely on various unpleaded matters to bolster VTB's case against MarCap BVI. Some of these matters related to MarCap Moscow, such as the role of Mr Leonov. As such they do not advance VTB's case against MarCap BVI at all. More significantly, counsel also relied on evidence concerning one of the two directors of MarCap BVI at the time of the Facility Agreement, a Swiss lawyer called Phillipe Houman. Under clause 21.23 of the Facility Agreement, RAP was required to obtain the balance of the purchase price payable under the SPA by way of subordinated loan. As noted in paragraph 43 above, on 26 November 2007 Leskata entered into a loan facility agreement with Migifa and at around the same time Leskata may have entered into a loan agreement with Migifa. Counsel pointed out that the former document was signed on behalf of Leskata by Mr Houman and that the signatory named on behalf of Leskata on the latter document (although he had not actually signed it) was again Mr Houman. Counsel also pointed out that Mr Houman had signed another loan agreement between Madinter and RAP dated 28 January 2009 and that he had been involved in executing documents in September 2011 when Mr Malofeev had attempted to get the WFO discharged by providing certain undertakings in respect of his interest in Rostelecom shares (as to which, see below).

175. In my judgment these additional matters do not support the pleaded case against MarCap BVI. All they show is that Mr Houman had authority to sign documents on behalf of other companies which are, or appear to be, connected to Mr Malofeev. Furthermore, the execution of documents in January 2009 and September 2011 occurred well after it is alleged by VTB was fraudulently induced to enter into the Facility Agreement.

176. As for the pleaded case, I accept the submissions of counsel for MarCap BVI summarised above. I therefore conclude that there is no serious issue to be tried between VTB and MarCap BVI.

177. *(3) No joint liability of Mr Malofeev*. Mr Malofeev contends that VTB has no real prospect of establishing either that he is jointly liable in respect of the deceit alleged or that he participated in the alleged conspiracy. I have set out VTB's pleaded case against Mr Malofeev above.

178. Counsel for Mr Malofeev's argument proceeded in two stages, as follows. First, he submitted that VTB had no real prospect of success in establishing the misrepresentation as to the absence of common control. To this end, he undertook a root and branch attack on VTB's case that the representation had been made, or if made relied upon by VTB, although he also argued that in any event there was no evidence of Mr Malofeev's involvement in any such misrepresentation. Secondly, he submitted that, in the absence of any case on the misrepresentation as to the absence of common control, VTB had no real prospect of successfully establishing that Mr Malofeev was jointly liable in respect of the misrepresentation as to the value of the Dairy Companies.

179. The first stage of counsel's submission involved a detailed analysis of the evidence concerning the alleged representation and VTB's alleged reliance thereon. In my view, this exercise amounted to a mini-trial on the documentary material before the court without the benefit of disclosure or cross-examination. I do not propose to lengthen this judgment still further by repeating the exercise. It suffices to say that, having considered all the evidence, I am quite satisfied that VTB has a real prospect of establishing that the representation was made and relied upon. I will nevertheless comment on two of the main points counsel made.

180. The first concerns the emails dated 6 and 8 November 2007 (see paragraphs 29-30 above). Counsel submitted that there was no evidence as to the source of the ownership information contained in the 6 November email and no evidence to confirm that the source of the ownership information in the 8 November email was Nutritek. I am unimpressed by this submission. It is fair to say that in his witness statement Mr Tulupov appears simply to rely upon the emails themselves. Nevertheless the 8 November email clearly attributes the information contained to "Nutritek management". As for the 6 November email, it is reasonable to infer that the information emanated either from Nutritek or MarCap Moscow. In any event, those two emails do not stand alone. On the contrary, they form but a part of the evidence relied upon by VTB as establishing that the representation was made.

181. The second concerns the issue of reliance. Counsel pointed out (among other things) that the first and second draft term sheets (see paragraphs 14-15 above) identified MarCap Moscow as the beneficiary of the borrower and that there was no evidence of

any due diligence having been carried out in relation to Mr Alginin. Counsel submitted that these points showed that VTB Moscow, and hence VTB, didn't care who owned RAP. Again, I am unimpressed by this. The term sheets were early drafts. Mr Tulupov says that at this stage all he meant to indicate was that US$50 million would come from someone other than VTB Moscow. In any event, the third draft differed in this respect. As for Mr Alginin, it may be the case that VTB Moscow could and should have done more to investigate his involvement; but it does not necessarily follow that it did not rely on the representations made about him. Mr Tulupov's evidence is that VTB Moscow did rely on them.

182. Since I do not accept the first stage of counsel's argument, it is not necessary to address the second stage. Nevertheless, I have considered whether the evidence establishes that VTB has a real prospect of establishing that Mr Malofeev was jointly liable for each of the two fraudulent misrepresentations. In my judgment, it does.

183. I therefore conclude that there is a serious issue to be tried between VTB and Mr Malofeev.

The gateway

184. VTB relies upon paragraph 3.1(9)(i) of Practice Direction 6B as founding jurisdiction for its tort claim. The Defendants dispute that VTB has a good arguable case that it has sustained damage within the jurisdiction, but only on the ground that, as a matter of law, VTB has suffered no loss at all. I have already considered and rejected that contention.

Forum non conveniens

185. Even if VTB establishes that there is a serious issue to be tried on the merits and that it has a good arguable case that the claim falls within of the one of the classes of case in which permission to serve out may be granted, it must also 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.

186. *Stage 1*. The factors that may be taken into account in determining which is the natural forum for the action include: (a) the personal connections which the parties have to the countries in question; (b) the factual connections which the events relevant to the claim have with those countries; (c) factors affecting convenience or expense such as the location of the witnesses or documents; and (d) the applicable law.

187. Counsel for VTB submitted that England was the natural forum because (i) VTB is English, (ii) the misrepresentations were relied upon in England, (iii) the money was lent and the loss sustained in England, (iv) the Facility Agreement, ISA, the Participation Agreement and the SPA contain English law and English jurisdiction or

arbitration clauses and (v) the applicable law is English law. I do not consider that any of these factors points strongly to England being the natural forum in the present case. So far as (i) is concerned, VTB is controlled by VTB Moscow. As to (ii), as explained above, it seems to me that VTB's reliance was wholly secondary to that of VTB Moscow. In relation to factor (iii), the loss was sustained because Russian assets provided inadequate security. As to (iv) and (v), the English law clauses are immaterial once it is concluded, as I have, that the law applicable to the tort is Russian law. The English jurisdiction and arbitration clauses are a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim.

188. Counsel for the Defendants submitted that the following factors pointed to Russia being the natural forum. First, the connections of the parties to Russia. VTB is controlled by VTB Moscow, which is Russian. Furthermore, the litigation is being managed by VTBDC, which is also Russian. MarCap Moscow and Mr Malofeev are Russian. It is common ground that Nutritek was managed from Russia, and VTB's case is that Mr Malofeev controls both Nutritek and MarCap BVI. Furthermore, it is VTB's case that Mr Malofeev orchestrated the fraud, primarily through MarCap Moscow.

189. Secondly, the connections of the events constituting the torts to Russia. The transaction was introduced to VTB Moscow at meetings between Russian individuals in Russia. The negotiations mainly took place in Russia. The misrepresentations were made and mainly received in Russia. The more important misrepresentation concerned the performance of the Dairy Companies, which are Russian companies. The 2007 E&Y Valuation was a valuation by Ernst & Young's Moscow office and was based on information provided by Nutritek's Russian management. The misrepresentations were primarily relied upon by VTB Moscow acting through its Credit Committee and Management Board in Russia. It was VTB Moscow and VTBDC which primarily dealt with RAP's default and enforcing the security. The secured assets were in Russia. The discovery of the fraud took place in Russia. Although the loss was sustained by VTB in England, as discussed above the ultimate economic impact is in Russia.

190. Thirdly, most of the witnesses are Russian and many of the documents are in Russian and located in Russia. So far as the witnesses are concerned, there are a considerable number of relevant Russian witnesses from VTB Moscow, VTBDC, Ernst & Young, Nutritek (Mr Skuratov and the managers of the Dairy Companies), MarCap Moscow (Mr Leonov, Mr Provotorov, Ms Tyurina and Mr Popov as well as Mr Malofeev) and RAP (Ms Kremneva and Mr Pankov). Other potential Russian witnesses include Mr Sazhinov and Mr Alginin. By contrast, there are relatively few material witnesses from VTB. The two most important ones appear to be Ms Bragina and Mr Ryzhkov. Both have left VTB (as has Mr Thunem). It appears that Mr Ryzhkov is in Russia, while VTB's evidence is that Ms Bragina is "believed to be" in England. Although Mr Ryzhkov has been contacted about the matter, it does not appear that Ms Bragina had been.

191. As counsel for the Defendants pointed out, it is striking that all of VTB's witness statements in support of its application for permission to serve out, other than one from its solicitor, were made by Russian witnesses. In addition to the statements of Mr Tulupov and Mr Chernenko, these consisted of:

i) a statement made by Andrey Puchkov, Deputy Chairman of VTB Moscow, which among other matters dealt with VTB Moscow's reliance on the misrepresentations alleged, Mr Puchkov having been present at the Management Board meeting on 13 November 2007 at which the transaction was approved;

ii) a statement made by Vadim Muraviev, Head of the Division of Distressed Debt Settlements at VTB Moscow, who gave evidence as to VTB's reliance on the misrepresentations alleged based on interviews with four English employees of VTB including Mr Magee and Mr Pasek; and

iii) a statement made by Denis Zemlyakov, General Director of VTBDC, who gave evidence concerning RAP's default and the enforcement of the security.

192. In addition, VTB relied on two draft statements from Alexander Buryan and Irina Leonova, who were employed by RAP as Vice-President and Chief Accountant. Furthermore, since then a number of statements have been made by Arthur Klaos of VTBDC, in the most recent of which Mr Klaos relays information provided to him by (among others) Mr Ryzhkov and Alexander Yastrib (at the time Senior Vice President of VTB Moscow and now a board member of the Bank of Moscow).

193. While the four VTB employees interviewed by Mr Muraviev are evidently material witnesses to VTB's claim (although Mr Magee and Mr Yates appear to have had more involvement in the transaction than Mr Pasek or the fourth employee Julia Ferris), it is clear that they are of secondary importance compared to Ms Bragina and Mr Ryzhkov, let alone Mr Tulupov and his colleagues in Moscow. If the claim is tried in England, witnesses located in Russia will not be compellable except by means of letters rogatory. Even if they are prepared to give evidence voluntarily, they may not be prepared to come in person, necessitating evidence being given by videolink. Even if they are prepared to come in person, they are likely to require interpreters. As for the documents, many of these have required or will require translation. It is true that the agreements are mainly in English, and that these are important documents, but these and other documents in English form a relatively small proportion of the relevant documents even at this stage of the proceedings.

194. Fourthly, counsel for the Defendants submitted that the applicable law was not a strong factor in favour of England even if it was English law. It is clear from the expert evidence before the court (as to which, see below) that the Russian courts can receive expert evidence as to English law. Furthermore, the key issues in the case are likely to be factual rather than legal. In the event, of course, I have concluded that the applicable law is Russian law, which supports the conclusion that Russia is the natural forum.

195. In my judgment, taking all the factors considered above into account, the natural forum is Russia.

196. *Stage 2*. The House of Lords made it clear in *Amin Rasheed v Kuwait Insurance Co* [1984] AC 50 that, in exercising its discretion, it is not normally appropriate for the court to compare the quality of justice obtainable in a foreign forum which adopts a different procedural system (such as that of the civil law) with that obtainable in a similar case conducted in an English court. As Lord Wilberforce said at 72D, "It is

not appropriate … to embark upon a comparison of the procedures, or methods, or reputation or standing of the courts of one country as compared with those of another".

197. Although earlier cases had suggested that it was relevant to enquire whether or not a stay or refusal of permission to serve out would deprive the claimant of a "legitimate personal or juridical advantage", the correct approach to this question was explained by Lord Goff in *Spiliada v Cansulex* at 482D-F:

> "…as Oliver L.J. [1985] 2 Lloyd's Rep. 116, 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in *Sim v. Robinow*, 19 R. 665, 668.
>
> The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried 'suitably for the interests of all the parties and for the ends of justice.' Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum."

198. Lord Goff returned to this point in *Connelly v R.T.Z. Corporation plc (No 2)* [1998] AC 854 at 872G – 873A:

> "From the discussion [in *Spiliada v Cansulex*], a general principle may be derived, which is that, if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence, applicable in the foreign forum. This may display many features which distinguish it from ours, and which English lawyers might think render it less advantageous to the plaintiff. Such a result may in particular be true of those jurisdictions, of which there are many in the world, which are smaller than our own, and are in consequence lacking in financial resources compared with our

> own. But that is not of itself enough to refuse a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay …"

199. Examples of factors that are generally ignored include:

i) the comparative level of disclosure: see *Spiliada v Cansulex* at 482E-G;

ii) different rules of evidence or provision for cross-examination: see *RTZ v Connelly* 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);

iii) 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];

iv) 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, *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [2002] 3 All ER 17 and *Ceskoslovenska v Nomura*;

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

200. On the other hand, 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 v Kyrgyz* at [91]-[95] and *Pacific v Surkis* at [31]-[35].

201. In the present case VTB relies on certain features of Russian law and procedure as meaning that it either will not or may not be able to obtain substantial justice in Russia. The parties have adduced a considerable quantity of expert evidence directed to this question. This reveals certain conflicts of evidence between the parties' respective experts. To my surprise, counsel were unable to direct me to any authority as to the correct approach to such conflicts on an application such as the present. Obviously, I cannot resolve the conflicts without cross-examination. Nor is it necessary for me to do so given that it is sufficient for VTB to establish that there is a real risk that it will not be able to obtain substantial justice in Russia. Nevertheless, counsel were, I think, more or less agreed by the end of the hearing that I was both entitled and obliged 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 upon to support it.

202. VTB relied upon the evidence of two experts. The first is Professor Peter Maggs. He is a Professor of Law and the holder of the Clifford M and Bette A Carney Chair at the University of Illinois College of Law, specialising in Russian law, law of the other Soviet republics and law of the former Soviet Union. He has taught these subjects at the University of Illinois since 1964. He is author, co-author, co-editor, translator or

co-translators of a dozen books and numerous articles on Soviet and Russian law, including a translation of the Russian Civil Code and a book entitled *Law and Legal System of the Russian Federation*. It is clear that he has extensive academic knowledge of the Russian legal system, but he has little practical experience of litigating in Russian courts.

203. The second expert is Mikhail Rozenberg. He is a qualified Russian lawyer. He has been practicing law in Russia for over 30 years. He is now Senior Partner of the Moscow office of Chadbourne & Parke LLP. His experience includes both civil and criminal cases in Russia.

204. Nutritek's expert is Professor Vladimir Yarkov. He has held the Chair of Civil Procedure at the Urals State Law Academy and been a Professor in the Russian School of Private Law since 1996. He has been a Visiting Professor at Université Paris Ouest Nanterre La Défense since 1998. Among his other positions, he is editor-in-chief of the journal Arbitration and Civil Procedure and of a yearbook of civil and arbitration process. He has authored over 500 publications, including contributions to over 40 books. Among these are the 7th edition of the textbook *Civil Procedure* and the 3rd edition of *Comments on the Russian Civil Code*. It does not appear that Professor Yarkov has practical experience of litigating in Russian courts, but nevertheless it is clear that he has considerable expertise in civil procedure.

205. MarCap BVI's and Mr Malofeev's expert is Dr Alexander Muranov. He is a qualified Russian lawyer. He has practised for 17 years, and has been managing partner of Muranov, Cherkyakov and Partners Law Firm since 2003. He has also been a Professor of the Russian School of Private Law since 2009, specialising in conflicts of laws, international civil litigation, international commercial arbitration and international trade law. He is the author of over 90 articles and several books.

206. Although a considerable number of issues were canvassed in the expert reports, in his submissions counsel for VTB concentrated on three points. I will consider these in turn.

207. *Competition of claims and the need for the contract to be invalidated first*. It is common ground between the experts that under Russian law claims equivalent to VTB's claims in deceit and conspiracy would fall under Article 1064 of the Russian Civil Code. It is also common ground between the experts that there is a principle of Russian law which prohibits what is referred to as "competition between claims". VTB contends, in reliance upon the evidence of Mr Rozenberg, that: (1) as a result of the principle of competition of claims, it would be necessary for VTB to have the Facility Agreement declared invalid under Article 179 of the Russian Civil Code before it could bring a claim under Article 1064; but (2) it is not possible for VTB now to have the Facility Agreement declared invalid because it has affirmed the agreement by obtaining judgments based on it.

208. Article 1064 provides (in the second revised edition of a translation by Professor Maggs and a colleague):

> "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 play 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 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 mark 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."

209. Article 179 provides:

> "1. A transaction made under the influence of fraud, duress, threat, an ill-intentioned agreement of the representative of one party with another party, and also a transaction that a person was compelled to make as a result of the confluence of harsh circumstances on conditions extremely unfavourable for himself that the other party used (an oppressive transaction) may be declared invalid by a court on suit of the victim.
>
> 2. If a transaction is declared invalid by a court on one of the bases indicated in paragraph 1 of the present Article, then the other party shall return to the victim everything it received under the transaction and, if it is impossible to return it in kind, its value in money shall be compensated. Property received under the transaction by the victim from the other party and also due to it in compensation for that transaction shall be transferred to the income of the Russian Federation. If it is impossible to the transfer the property to the income of the state in kind, its value in money shall be taken. In addition the victim shall be compensated by the other party for the actual damage caused to him."

210. Counsel for the Defendants submitted that, on analysis, Mr Rozenberg's own evidence shows that the principle of competition between claims does not apply in the present circumstances. In paragraph 38 of his report, Mr Rozenberg describes the principle as follows: "where the law prescribes a specific cause of action, the claimant, in order to succeed, should proceed with this specific cause of action". As he accepts in paragraph 52 of his report, "a claim against a third party (i.e. not RAP) would need to be brought under Article 1064". Thus Mr Rozenberg accepts that Article 179 would not provide the basis for VTB to bring a claim against the Defendants. Counsel for the Defendants submitted that it followed that there was no

competition between a claim by VTB against RAP for a declaration that the Facility Agreement was invalid under Article 179 and a claim in tort by VTB against the Defendants under Article 1064.

211. As counsel for the Defendants pointed out, the evidence of both Professor Yarkov and Dr Muranov supports this analysis. As Professor Yarkov put it in paragraph 18 of his third report, "Whether the Facility Agreement has been invalidated against the counterparty, RAP, [under Article 179] is irrelevant to whether compensation can be obtained from third parties, such as the respondents, under Article 1064."

212. Furthermore, this point was not advanced by Professor Maggs in his first report on behalf of VTB. Indeed, he did not refer to Article 179 or the principle of competition of actions. Although Professor Maggs did refer to the point in paragraph 57 of his second report, he dealt with it very cursorily. Moreover, Professor Maggs disagrees with other aspects of Mr Rozenberg's evidence.

213. In my judgment the points made by counsel for the Defendants are cogent. I am not satisfied that there is a real risk that VTB will not be able to obtain substantial justice in Russia for this reason.

214. *The need for a criminal prosecution first*. VTB contend, again in reliance on the evidence of Mr Rozenberg, that a civil claim for fraud by VTB could not succeed without a prior criminal conviction of the Defendants.

215. Counsel for the Defendants submitted that this proposition was unsustainable for four reasons. First, Mr Rozenberg's evidence is internally inconsistent with regard to this point. In paragraph 63 of his report, he says that "a civil claim based on allegations of fraud … *cannot succeed* unless a Russian court in criminal proceedings has found … that a crime has been committed [emphasis added]". By contrast, in paragraph 57 he merely says that "in the absence of criminal findings courts are *reluctant* to rule in favour of claimants in such disputes [emphasis added]". Furthermore, in paragraph 78, he says that "an independent civil claim alleging fraud may only be successfully be granted by a court in the absence of any finding or court's verdict under criminal case in the following cases: … (ii) clear evidence confirming the elements of the tort claim were submitted to the court." As counsel pointed out, this clearly acknowledges that it is possible to succeed in a civil claim without a prior criminal conviction if clear evidence is submitted. One might say that the approach of the English civil courts to fraud claims is not dissimilar.

216. Secondly, Mr Rozenberg's more extreme view is not supported by Professor Maggs. Professor Maggs' opinion, as expressed in paragraph 18 of his second report, is that "a civil court would be reluctant to make a finding" of intentional fraud in the absence of a criminal conviction.

217. Thirdly, Mr Rozenberg's more extreme view is contradicted by Professor Yarkov and Dr Muranov, both of whom opine that it is not necessary to obtain a criminal conviction in order to succeed in a civil fraud claim.

218. Fourthly, Professor Yarkov and Dr Muranov's opinion is supported by decided cases in which Russian civil courts have found fraud without prior criminal convictions.

Indeed, two such cases are cited by Mr Rozenberg himself, one of them in a footnote to paragraph 78(ii).

219. In my judgment the points made by counsel for the Defendants are again cogent. I am not satisfied that there is a real risk that VTB will not be able to obtain substantial justice in Russia for this reason.

220. It is therefore not necessary for me to consider the further points made by counsel for the Defendants that there is nothing to stop VTB initiating a criminal investigation anyway, and that that would not lead to such an excessive delay as to amount to a denial of substantial justice.

221. *Uncertainty*. Finally, counsel for VTB submitted that the evidence showed that there was uncertainty in a number of respects as to what would happen if VTB brought a claim in Russia. In particular, he submitted that it was uncertain which law would be applied (English or Russian), which courts would have jurisdiction (the specialist Arbitrazh courts or the general civil courts), how much disclosure could be obtained and how easily any judgment could be enforced, particularly in countries like Cyprus.

222. I am unimpressed by these points. Neither individually nor cumulatively do I consider that VTB has shown that there is a real risk that it will not obtain substantial justice as result of these uncertainties.

Conclusion

223. For the reasons set out above I will set aside Chief Master Winegarten's order and refuse VTB permission to serve the claim outside the jurisdiction.

The WFO

224. In case I am wrong in the conclusion I have just reached, I will consider the applications relating to the WFO on the footing that VTB is to be permitted to serve its tort claim (but not its contract claim) out of the jurisdiction.

225. This is the first occasion on which there has been an effective contested consideration of VTB's entitlement to a WFO against Mr Malofeev, since Vos J was only concerned with the question of whether the undertakings offered by Mr Malofeev provided VTB with sufficient protection to obviate the need for a freezing order. Accordingly, VTB must demonstrate that this is a proper case for a WFO. The basic requirements are that VTB has a good arguable case against Mr Malofeev and that there is a real risk that Mr Malofeev will dissipate his assets otherwise than through ordinary business or living expenses. Mr Malofeev disputes that either requirement is satisfied. In addition, Mr Malofeev submits that the WFO should be discharged on the ground of material non-disclosure by VTB on the without notice application to Roth J.

Good arguable case

226. Counsel for Mr Malofeev submitted that VTB had not established that it has a good arguable case against Mr Malofeev since (i) VTB has suffered no loss and (ii) there is no serious issue to be tried with regard to the allegations against Mr Malofeev. I do not accept those submissions for the reasons given above.

Risk of dissipation of assets

227. There is no dispute as to the applicable principles. The basic test remains that stated by Kerr LJ delivering the judgment of the Court of Appeal in *Ninemia Maritime Corp v Trave Schiffartgesellschaft GmbH* [1983] 1 WLR 1412 at 1422H:

> "In our view the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a *Mareva* injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."

228. As HHJ Waksman QC pointed out in *Cherney v Neuman* [2009] EWHC 1743 (Ch):

> "70. In order to consider that risk, the applicant is often said to have to show a risk of 'dissipation' of the Defendant's assets. But a risk that the assets will be hidden or otherwise dealt with so as to make any judgment nugatory will suffice as well. See *Derby v Weldon* [1990] Ch 48 per Parker LJ at p 57. There needs to be 'solid evidence' of this risk. See *Thane v Tomlinson* [2003] EWCA Civ 1272 per Gibson LJ at paragraph 21. The context there was a without notice application but there is no reason why the same stringency should not apply to a 'with notice' application.
>
> 71. The ultimate 'risk' to be guarded against is that of an unsatisfied judgment. The reason why emphasis is placed on the risk of dissipation is because what has to be shown is the risk of an unsatisfied judgment by reason of the dissipation or secretion of assets. Thus, the freezing injunction is not to be used simply to provide security for the claim. So if in truth the risk that the judgment may not be fruitful is because the Defendant happens to live in some remote location or because he does not have much by way of assets anyway, it is not appropriate to grant it. See the judgment of Colman J in *Laemthong v Artis* [2005] 1 Lloyds Rep 100 at paragraph 54. Hence the standard of proof of the risk of dissipation is 'relatively high': see paragraph 61."

229. Evidence of dishonesty is often relied on this context. In this regard it is important to bear in mind the salutary warning of Peter Gibson LJ in *Thane Investments Ltd v Tomlinson* [2003] EWCA 1272 at [28]:

> "Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to

> have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted."

230. As counsel for Mr Malofeev submitted, in considering whether there is a real risk of dissipation in the present case, it is important to appreciate two points at the outset. First, VTB did not seek a freezing order either when it commenced the proceedings on 23 December 2010 or when it applied for permission to serve the proceedings outside the jurisdiction on 11 May 2011. When VTB applied for the WFO, its solicitor Mr Riem stated in paragraph 62(A) of his (first) affidavit in support of the application that "At the date of the application for permission … VTB considered that further evidence of risk of dissipation was required coupled with evidence of Mr Malofeev's assets". It follows that VTB accepts that the evidence it relied upon to obtain permission to serve the proceedings outside the jurisdiction did not establish a sufficient risk of dissipation. Secondly, VTB's own evidence is that Mr Malofeev became aware of the proceedings on or very shortly after 28 May 2011. Thus he had had over two months in which to dissipate his assets by the time that the application for the WFO was made, if he was likely to do so.

231. On the application before Roth J, VTB relied on the following matters as showing the risk of dissipation:

i) the fact that, if VTB's claims were correct, Mr Malofeev had been engaged in a major fraud;

ii) the fact that Mr Malofeev operated "a complex web of companies in a number of jurisdictions", particularly Cyprus, the BVI and the Cayman Islands, which both enabled him to commit the fraud and made it difficult for VTB to enforce any judgment;

iii) "most significantly", evidence that Mr Malofeev was actively seeking to dispose of or diminish the value of the most substantial asset which VTB had identified Mr Malofeev as having a direct or indirect interest in, namely shares in OJSC Rostelecom, a leading Russian telecommunications company, by selling them in small parcels of US$15 million each;

iv) a draft report concerning the Nutritek group of companies prepared by Ernst & Young (CIS) BV dated 26 February 2010 ("the E&Y 2010 Report"), a copy of which VTB had obtained, was said to provide "strong evidence that Mr Malofeev and others have operated a web of companies both in Russia and offshore through which they have concealed the true financial position of the Nutritek Group to investors and creditors and which they have used to misappropriate monies of the Nutritek Group";

v) the fact that Mr Malofeev's business activities were attracting increasing adverse publicity in Russia, which was said to provide an incentive for him to liquidate his assets and secret them in jurisdictions around the world.

232. It appears from the judgment of Roth J that he was persuaded to grant the WFO by the combination of points (i)-(iv) listed above, and particularly (i)-(iii). So far as point (v)

was concerned, Roth J was not persuaded that Mr Malofeev was under particular pressure, let alone mounting pressure. I agree with that assessment.

233. So far as points (i) and (ii) are concerned, VTB had all the evidence it needed in relation to these at the time of the application for permission to serve outside the jurisdiction. It follows that, by its own admission, these points did not establish a sufficient risk of dissipation. I would add that, while point (ii) is relevant, it is not my judgment a strong pointer towards a risk of dissipation. It is not uncommon for international businessmen, and indeed quoted UK companies, to use offshore vehicles for their operations, particularly for tax reasons. This may make it difficult to enforce a judgment. But in that respect claimants such as VTB have to take defendants such as Mr Malofeev as they find them. More is required before the court will conclude that there is a risk of dissipation.

234. So far as point (iii) is concerned, counsel for VTB accepted before me that, in the light of the evidence now before the court, VTB was unable to continue to contend that Mr Malofeev had been seeking to dispose or diminish the value of his interest in Rostelecom. On the contrary, Mr Malofeev increased the value of his interest by an acquisition in August 2011. It follows that the most significant plank of VTB's application before Roth J has now fallen away.

235. As to point (iv), counsel for Mr Malofeev submitted that, in the light of the evidence now before the court, it could not bear even the limited weight which Roth J placed upon it. In this regard he made two main points. First, the unchallenged evidence of Mr Malofeev's solicitor Mr Michaelson is that he has been told by Ivan Ryutov, the partner responsible for preparing the E&Y 2010 Report, that Mr Malofeev himself (as Deputy Chairman of Nutrinvestholding) commissioned the report and instructed Ernst & Young to conduct a forensic examination of the accounting practices and transactions taking place within the Nutritek Group. Secondly, the E&Y 2010 Report does not implicate Mr Malofeev in wrongdoing. Indeed, it barely mentions him. Furthermore, Mr Ryutov told Mr Michaelson that the witnesses Ernst & Young spoke to were not able to provide any specific information about Mr Malofeev's role. I accept this submission.

236. In my judgment it follows that, in the light of the evidence now before the court, the points which VTB relied upon before Roth J do not establish a sufficient risk of dissipation to justify the WFO.

237. No doubt anticipating this conclusion, counsel for VTB sought to rely upon a series of further points as showing that there was a risk of dissipation. It is important to note that all of these concern Mr Malofeev's responses to the WFO. Thus none of these points would have been available to VTB if the WFO had not been granted by Roth J, which in the light of the evidence now available it ought not to have been. This does not mean that VTB cannot rely upon such points, but in my view it does mean that they need to be carefully scrutinised to see if they do establish a risk of dissipation.

238. The first is Mr Malofeev's delay in giving disclosure of his assets. Paragraph 8 of Roth J's order required Mr Malofeev to disclose all his assets worldwide exceeding £30,000 in value whether in his own name or not and whether solely or jointly owned by 11 September 2011, a week after the return date of 5 September 2011. On 19 August 2011 those dates were altered by Floyd J to 19 September 2011 and 12

September 2011 because VTB was having difficulties effecting service. On 12 September 2011 Mr Malofeev applied to Vos J to have the WFO discharged by giving undertakings intended, to put it shortly, to preserve his interest in Rostelecom to the extent of at least US$200 millions' worth, and thus provide protection for VTB in that way. If that application had been successful, of course, it would have obviated the need for Mr Malofeev to give disclosure. Vos J adjourned the matter to 14 September 2011, when he refused to discharge the WFO and continued it until after the disposal of the applications to set aside permission to serve out which are now before me. By paragraph 7(1) of his order, Vos J required Mr Malofeev to give disclosure by 26 September 2011. On 26 September 2011 Mr Malofeev applied once again to Norris J to have the injunction discharged upon the giving of undertakings. Norris J adjourned this application to be heard as an application by order. (Subsequently it fell away because Mr Malofeev ceased to be in a position to offer the undertakings in question.) In the meantime Mr Malofeev sought an extension of time for disclosure of his assets. Norris J granted a very short extension to 27 September 2011, with permission to Mr Malofeev to file a supplemental or corrective affidavit by 3 October 2011. Mr Malofeev then sought permission to appeal against Norris J's order. On 27 September 2011 Aikens LJ granted permission and a stay. On 4 October 2011 the Court of Appeal (Carnwath and Jackson LJJ) dismissed the appeal: [2011] EWCA Civ 1252. Only then did Mr Malofeev give disclosure of his assets. Counsel for VTB invited me to view this history as a determined attempt on the part of Mr Malofeev to avoid having to give disclosure of his assets. I am prepared to accept that characterisation of Mr Malofeev's conduct, but I cannot see that it is evidence of a risk of dissipation. As Jackson LJ said in his judgment at [49], "A worldwide freezing order and an order for disclosure are indeed harmful to a person in Mr Malofeev's position". He was entitled to attempt to have the WFO discharged by providing security. It was not unreasonable that he should wish to avoid having to give disclosure until after his applications to discharge the WFO had been determined, as all three members of the Court of Appeal accepted.

239. The second is an incorrect statement by Mr Malofeev in paragraph 3 of a witness statement made by Mr Malofeev on 13 September 2011 in support of his first discharge application and in response to a request for information made on behalf of VTB on 12 September 2011 that he had "no assets in England and Wales held directly or indirectly". There is no dispute that, in fact, Mr Malofeev is the ultimate beneficial owner of Gilroy Trading Ltd ("Gilroy"), a company incorporated in the BVI, which has two bank accounts with JPMorgan Chase Bank NA London ("JPMorgan"). The way in which this came to light was that on 4 October 2011 Mr Malofeev's solicitors wrote to VTB's solicitors stating that Mr Malofeev wished to make various ordinary course of business payments and that he proposed to do so from the JPMorgan accounts. Mr Malofeev has apologised for the error in his first witness statement. His explanation is to the effect that he did not appreciate that Gilroy had accounts in London at the time he made his witness statement, and this only came to light when information for his asset disclosure affidavit was being gathered. While I do not minimise the seriousness of Mr Malofeev having made an inaccurate statement in his witness statement, this seems to me to be a plausible explanation. Moreover, the key point is that it was Mr Malofeev himself who revealed the existence of the JPMorgan accounts. Accordingly, I do not consider that this episode constitutes evidence of a real risk of dissipation.

240. It is convenient to deal with the third, fourth and fifth points together. These are that Mr Malofeev gave information about his interest in Rostelecom piecemeal on his application to discharge the WFO, that his interest turned out to involve certain repurchase agreements, and that he effected a share transfer on 13 September 2011. These points all stem from the rather complicated manner in which Mr Malofeev held his interest in Rostelecom prior to 13 September 2011. In my view it is neither necessary nor appropriate to go into great detail concerning this. The essential points are as follows. Mr Malofeev held his interest via a Cayman Island fund called Universal Telecom Investment Strategies Fund SPC ("the Fund"). The Fund is managed by Universal Telecom Management ("the Fund Manager"), another Cayman Island company. The Fund and the Fund Manager are owned and controlled by Gazprombank, the largest non-state-owned bank in Russia. Prior to 13 September 2011, Mr Malofeev indirectly owned 100% of the participating non-voting redeemable shares in the Fund via, first, a BVI company called Marshall Capital Group Ltd ("MCG"), and secondly, a BVI company called Tarsara Portfolio Corp ("Tarsara"). On 13 September 2011 Mr Malofeev arranged for the shares in Tarsara to be transferred from MCG to himself. The evidence filed on his behalf is to the effect that this was done in order to simplify the chain of ownership and thus make it easier for Mr Malofeev to arrange for undertakings to be offered by the relevant parties. On 22 September 2011 Mr Malofeev's solicitors revealed for the first time that the Rostelecom shares owned by the Fund are divided into those that are pledged and those that are not pledged. The pledged shares are security for finance provided by Gazprombank to the Fund under repurchase agreements with two companies incorporated in Cyprus which are controlled by Gazprombank. Repurchase agreements are a way of providing a secured loan to a borrower using stock as collateral. In this instance the Fund is the borrower and the lender is the Cypriot company. The repurchase agreement has two parts to it. In the first part, the borrower sells stock to the bank for a purchase price which constitutes the loan. In the second part, the bank sells the stock back for a price which represents the loan plus interest.

241. In my view there is justification for VTB's complaint that the information about these various arrangements was provided in a piecemeal and unsatisfactory manner. In particular, I consider that VTB is right to say that it should have been told about the repurchase agreements sooner than it was. Nevertheless, one must not lose sight of why the information was being provided by Mr Malofeev. It was being provided voluntarily by Mr Malofeev in order to attempt to show that he had an unencumbered asset available, dealings in which could be restricted by means of undertakings so as to provide VTB with protection, and thereby obtain discharge of the WFO. In those circumstances it clearly behoved Mr Malofeev to provide accurate and transparent information about the arrangements in a timely manner. It is understandable that he nevertheless wished not to provide more information than was necessary for the purpose at hand. The result was that he failed to do what he needed to do, and he paid the price, which was that Vos J refused his first discharge application and he had to withdraw the second discharge application because by then Gazprombank was no longer willing to cooperate with him. Furthermore, I am not persuaded that there is anything about these arrangements which is sinister. They are undoubtedly complex, and they are plainly designed to ensure that little or no tax is paid by those involved. But, regrettably, both those comments apply to many financial instruments these days. Similarly, I see nothing sinister in the transfer which was effected on 13 September 2011. Again, Mr Malofeev undertook this as part of his application to discharge the

WFO. The evidence filed on his behalf was open that this had been done, and explained why it had been done. No doubt it confirms, if confirmation were needed, that Mr Malofeev is able to re-arrange the manner in which his assets are held at short notice; but it goes no further than that. Thus I do not consider these points constitute evidence of a real risk of dissipation.

242. The sixth point relied upon by VTB is a complaint that, even now, Mr Malofeev has given incomplete disclosure of his assets. There is no dispute that Mr Malofeev has not provided all the information sought by VTB, but he contends that VTB's requests for information go well beyond what is required by the court orders and are disproportionate. It is not appropriate to try to resolve this dispute. It suffices to say that I do not regard Mr Malofeev's failure to answer all the questions VTB has raised about his assets as demonstrating a real risk of dissipation.

243. Having considered all of the points relied on by VTB individually, it remains necessary to stand back and consider the position as a whole. I am conscious that, as Vos J pointed out in his judgment of 14 September 2011 at [73], the court should not engage in salami-slicing of the evidence. Even if each individual point relied on by VTB does not demonstrate a real risk of dissipation when considered in isolation, what matters is the overall impact of the evidence. I have not found this easy to assess. In the end, however, I am not persuaded that, even considered as a whole, the evidence establishes a real risk of dissipation on the part of Mr Malofeev.

Material non-disclosure

244. Mr Malofeev contends that the WFO should in any event be discharged for material non-disclosure by VTB on the without notice application before Roth J. Again, there is no dispute as to the applicable principles. The leading case is *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, in which Ralph Gibson LJ said at 1356F-1357F:

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, *per* Scrutton L.J.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231 , 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.
>
> (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87.

> The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38 ; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92–93.
>
> (5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:' see *per* Donaldson L.J. in *Bank Mellat v. Nikpour*, at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 486, 509.
>
> (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:' *per* Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. 'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:' *per* Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp. 1343H–1344A."

245. Slade LJ said in the same case at 1359C-E:

> "By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v Kensington Income Tax Commissioners [1917] 1 KB 486 principle as a *tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

246. So far as the question of the court's discretion to continue or re-grant an injunction even if there has been a material non-disclosure is concerned, the applicable principles were summarised by Alan Boyle QC sitting as a Deputy High Court Judge in *Arena Corp Ltd v Schroeder* [2003] EWHC 1089 (Ch) at [213]:

> "(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."

247. Counsel for Mr Malofeev submitted that there had been material non-disclosure by VTB in two areas.

248. *Failure to disclose details of the loan transaction*. Counsel advanced two main complaints under this heading. The first is that VTB did not disclose the first, second or third draft term sheets (see paragraphs 14-15 and17 above), and in particular the fact that they provided for the VTB Group to have a 30% equity stake (first draft) and a 15% equity stake (second and third drafts) respectively. So far as this point is concerned, VTB's evidence is that it did not disclose these documents for the simple reason that it had not found them despite extensive searches. Mr Tulupov didn't mention them in his first witness statement because he had left VTB Moscow in October 2008, he had not himself retained any documents relating to the transaction and so he had relied on the documents provided to him by VTB for the purpose of making his statement, and he had not remembered the first-third draft term sheets. In any event, as counsel for VTB pointed out, the first-third draft term sheets do not accurately reflect what was finally agreed. For those reasons I do not consider that there was any material non-disclosure by VTB in this respect.

249. The second point concerns the role of Dalford. Here, the position is rather different. The only information relating to Dalford that was disclosed by VTB on the application before Roth J was contained in a statement for RAP's account with VTB dated 30 November 2007. This document was amongst those exhibited to the first witness statement of Mr Chernenko. The statement shows a payment of US$3.5 million to Dalford on 28 November 2007. No mention was made of this in Mr Chernenko's statement, however. Indeed, there was no reference to Dalford's role at all in any of VTB's witness statements or affidavits by the time of the application to Roth J. Furthermore, VTB's evidence represented it to be the position that, as part of the transaction, VTB would receive (i) an arrangement fee of US$5 million pursuant to the Fee Letter referred to in the Facility Agreement and (ii) an equity fee of 5% pursuant to the share warrant deed dated 23 November 2007.

250. It is now apparent that VTB Moscow received via Dalford (i) an additional fee or contribution to transaction costs (it is not clear which, since Mr Chernenko says it was an arrangement fee whereas Mr Klaos says it was transaction costs) of US$3.5 million

pursuant to the consultancy agreement dated 1 November 2007 and (ii) an additional equity fee of 10% pursuant to the undated share warrant deed (see paragraphs 27, 43 and 45 above). As I have explained, VTB accepts that no services were provided or intended to be provided pursuant to the consultancy agreement, the true purpose of which was to avoid tax. None of this was revealed to Roth J.

251. The explanation given for this in paragraph 8 of Mr Chernenko's third witness statement is as follows:

> "The reason why there was no explicit reference to the payment to Dalford was because, as the payment raised issues of tax optimisation, this was a sensitive issue and therefore embarrassing to raise before the Court. This form of arrangement is common. VTB did not intend to mislead, and did not believe that it was misleading, the Court. VTB apologises to the Court for not bringing the matter to its attention."

Thus Mr Chernenko admits that the role of Dalford was deliberately concealed from the court because VTB did not want to reveal the fact that VTB Moscow had entered into a sham contract in order to avoid tax. I do not understand his suggestion that this form of arrangement is common. If it was common, there would be no need to hide it.

252. Counsel for VTB accepted that VTB had failed to disclose the role of Dalford, but submitted that the non-disclosure was not material. I do not accept that submission. In my judgment the non-disclosure was material for the following reasons. First, the information now available shows that VTB Group's equity stake in the transaction was 15%, not 5%. In my view that is relevant to the issue of reliance, and in particular reliance on the representation as to the absence of common control. It may or may not make a difference at the end of the day, but it raises a question mark over VTB's evidence on that issue. Secondly, and perhaps more importantly, VTB Moscow's use of a company incorporated in Belize and a sham contract in order to avoid tax, and Mr Chernenko's defence of this as a common form of arrangement, puts its case on the risk of dissipation by Mr Malofeev, and in particular its reliance upon his use of offshore vehicles, in a rather different light.

253. *Failure to disclose that information had been obtained in breach of confidence etc.* Counsel for Mr Malofeev complained that VTB has failed to disclose the fact that information concerning Mr Malofeev's dealings in Rostelecom shares relied upon by VTB had been obtained in breach of confidence and that VTB had not disclosed the source of some of the information. I do not propose to discuss these complaints in any detail. In my view there was no material non-disclosure by VTB in these respects. Counsel for Mr Malofeev also made a rather different point under this heading, namely that the information had turned out to be incorrect. In this regard, he submitted that VTB had failed to make proper enquiries. In my view this point has more force, but in the end I am not persuaded that VTB made a material non-disclosure. It put such information as it had before the court, and was reasonably open about the limits and possible unreliability of that information. I do not consider that it was under a duty to test the accuracy of the information in the manner suggested by counsel for Mr Malofeev.

254. *Should the injunction be continued or re-granted?* Having concluded that there was a material non-disclosure by VTB, it is necessary to consider whether, if I was satisfied that this was otherwise a case in which it would be appropriate to continue the WFO, the WFO should be discharged on that ground or whether it should nevertheless be continued or re-granted. In my judgment the WFO should be discharged for the following reasons. First, the non-disclosure was deliberate. Secondly, I consider that the facts which were suppressed were significant with regard to the application for the WFO. Thirdly, I consider that, even if (contrary to the conclusion I have reached above) there is a real risk of dissipation, VTB's case for a WFO is not a strong one given that (as discussed above) the main plank of that case has fallen away.

Result

255. For the reasons given above:

i) I shall refuse VTB permission to amend the Particulars of Claim;

ii) I shall set aside the order of Chief Master Winegarten and refuse VTB permission to serve the proceedings outside the jurisdiction;

iii) even if I were willing to give VTB permission to serve the proceedings outside the jurisdiction, I would not continue the WFO until trial;

iv) even if I were otherwise prepared to continue the WFO, I would discharge the WFO for material non-disclosure by VTB.