Neutral Citation Number: [2019] EWHC 2621 (Comm)

Case No: CL-2015-000829

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2019

Before :

SIR MICHAEL BURTON GBE
(sitting as a High Court Judge)

- -

Between :

(1) Yukos Finance B.V. **(2) Yukos International UK B.V.** **(3) Stichting Administratiekantoor Yukos International** **(4) David Godfrey** **(5) Yukos Capital Limited** **(6) Financial Performance Holdings B.V.** **(7) Yukos Hydrocarbons Investments Limited**	**Claimants**
- and -	
(1) Stephen Lynch **(2) Stephen Jennings** **(3) Robert Reid** **(4) Richard Andrew Deitz** **(5) Robert Mark Foresman**	**Defendants**

- -

Mr Dominic Kendrick QC, Mr Jawdat Khurshid QC, Mr Frederick Alliott & Mr Daniel Corteville (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimants**
The First Defendant represented himself and appeared in person
Mr Andrew Mitchell QC & Mr Alexander Milner (instructed by **Fieldfisher**) for the **2nd & 3rd Defendants**
Mr Stephen Houseman QC & Mr Sebastian Isaac (instructed by **Clifford Chance**) for the **4th Defendant**
Mr Jonathan Adkin QC & Ms Abra Bompas (instructed by **Akin Gump Strauss Hauer & Feld**) for the **5th Defendant**

Hearing dates: 10th - 13th; 17th - 19th & 21st; 24th, 26th - 28th June & 1st - 5th; 8th - 10th; 15th - 19th July 2019

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Approved Judgment

Sir Michael Burton :

1. This has been the hearing of a claim by Yukos Finance entities, who are not differentiated but act together. They are led by the Fourth Claimant, David Godfrey, and in one way or other constitute and represent what might be called the 'old Yukos' after the ruthless elimination, because of the falling out between Mr Putin and Mr Khodorkovsky, of Yukos Oil Company ("Yukos Oil")and its subsidiaries, as a result of steps taken against it in Russia between 2004 and 2007. The claim is made against five individuals (called "the Consortium"), who are alleged to have together taken part in an unlawful auction of the shares of Yukos Finance BV, the Dutch subsidiary of Yukos Oil, in August 2007. As a result of a substantial number of legal proceedings, primarily in the Dutch courts because of Yukos Finance being a Dutch company, of which 34 are of relevance in these proceedings, the Claimants eventually recovered control of those shares. The claims now made are not therefore for loss of those shares or for their diminution in value, but for the costs and expenses which the Claimants allege they incurred in order to recover them, said to have been caused by the Defendants' unlawful participation in the August 2007 auction.

2. These claims are for the recovery of (i) the equivalent of some £23 million in costs and expenses of most of those 34 proceedings, irrecoverable in those proceedings largely because of a cap upon recovery of costs in Dutch proceedings and, (ii) losses alleged to have been suffered (said to be $12 million) by virtue of the Yukos Finance assets remaining frozen until the decision in favour of the Claimants by the Dutch Court of Appeal on 9 May 2017 ("the Transpetrol claim").

3. The Defendants are all individuals. The First Defendant, who has represented himself, is Stephen Lynch, who at the time owned and controlled a Russian company called OOO Monte Valle ("Monte Valle"). The Second, Fifth and Third Defendants, Stephen Jennings, Robert Foresman and Robert Reid, were all employees of one or more companies in the very substantial group of which the holding company was Renaissance Group Holding Limited, and without prejudice to any particular company within the group I shall refer, as have the parties, to "RenCap".

4. Mr Jennings was co-founder of RenCap, together with (among others) the Fourth Defendant, Mr Deitz, who left RenCap in 1998 to set up VR Capital Group Limited ("VR Capital"). At the material time Mr Jennings was the CEO and an indirect major shareholder of RenCap, Mr Foresman was a Deputy Chairman of RenCap's investment bank, subordinate to Mr Jennings and to, among others, Mr Richard Olphert, Mr Sascha Pertsovsky and Mr Hans Jochum Horn; and Mr Reid, now a non-practising solicitor, was a senior lawyer and Vice President in the legal and compliance department. At all times Mr Jennings, Mr Foresman and Mr Reid were acting on behalf of RenCap, but they have been sued personally, and RenCap has not been sued. None of them continue to be employed by RenCap, and indeed Mr Jennings, in events not relevant to this case, fell out with them, and was forced to flee Russia in January 2013. In circumstances which have been only very sketchily explained, the Claimants obtained from the present RenCap management in 2014 over 1 million documents, called the 'RenCap cache', some of which the Claimants have adduced in evidence in these proceedings and rely upon as an answer to the Defendants' limitation argument.

5. The Fourth Defendant was and is President of VR Capital. Again, Mr Deitz acted on behalf of VR Capital, but has been sued personally, and VR Capital has not been sued.

VR Capital and RenCap were both specialists and extremely successful in the analysis, acquisition and disposal of 'distressed assets', that is assets affected by or forming part of an insolvency process, but which appear to have the possibility of recovery or of achieving profitability.

6. The events of August 2007 have been the central concern for me, with some minimal consideration of the following years. They are now 12 years ago. The problem is how to reconstruct the events, and how to be satisfied as to what occurred, in the absence not only of many or most of the documents, but of many or most of the relevant participants, and after such a long period of time. Evidence has been given by the five Defendants, all of whom I am satisfied did their best to recollect and piece together what occurred so long ago, a passage of time more than sufficient ordinarily to lead to a limitation defence (normally 3 years in Russian law by Article 196 of the Russian Civil Code (RCC). Apart from the Defendants themselves, Mr Godfrey was, as will be seen, to an extent involved in 2007, but his main purpose in giving evidence has been to answer the limitation defence and to explain and justify the quantum of the Claimants' claim. As for other witnesses, the Claimants adduced evidence as to the history of Yukos Oil prior to August 2007 from Mr Godfrey's colleague, Mr Theede, which was not challenged, as was not that of a Mr Holiner, and from Mr Steven Hellman, who gave an account of his own role in the events of August 2007, subject to searching cross-examination. Mr Hellman was in touch with the Defendants at the time, but fell out with them, because he felt he had been excluded from participation in the Consortium.

7. As has been so regularly said by judges tasked with assessing events of many years ago, it must be the documentary evidence which is ordinarily of most assistance, if only to test the accuracy and reliability of the oral evidence. There was considerable examination and consideration of such documents as survived. The documents were to an extent derived from the Defendants, though, given that the RenCap Defendants have little or no access to RenCap documents, that has not been a very fruitful source, from the Claimants, who have obtained documents in various applications to the United States courts for discovery, pursuant to s.1782 of Title 28 of the United States Code, and from the RenCap cache, from contemporaneous publications and records, and to an extent from the depositions and other court documents relating to the Dutch and the 1782 proceedings.

8. The hearing before me lasted for 25 days, leaving aside reading and judgment time, and I have been much assisted by counsel for the Claimants and for the Second to Fifth Defendants plus their solicitors, and by Mr Lynch who ably represented himself, while occasionally assisted by Mr Adkin QC. Counsel for the Defendants, Mr Adkin, Mr Mitchell QC and Mr Houseman QC, helpfully shared out the issues among themselves, so as to avoid duplication of argument.

The Background to the Case

9. The background is the collapse of Yukos, caused by what the Claimants allege to have been a dramatic and deliberate persecution of Mr Khodorkovsky and his company, which resulted in his imprisonment for approximately ten years, the imprisonment and persecution of many of his senior employees, and the destruction of the Yukos Oil Group by the levying on it of enormous retrospective tax assessments requiring immediate payment, which Yukos, albeit an apparently immensely wealthy company,

was unable to meet. The story is told by witness statements served on behalf of the Claimants which have not been challenged by the Defendants, although they do not accept all of it. It began in October 2003 with the arrest of Mr Khodorkovsky and it ended with the bankruptcy of Yukos Oil in 2006, and the consequent series of disposals of its assets, starting with an auction in December 2004 of its most valuable corporate asset. This amounted effectively to a 'renationalisation' of the assets of Yukos Oil, declared bankrupt on 1 August 2006, with a court appointed bankruptcy receiver or administrator, Eduard Rebgun, in place. Between March and August 2007 Mr Rebgun set out on a series of auctions to dispose of Yukos Oil's assets, culminating in an auction in August 2007 of Yukos Oil's shareholding in Yukos Finance, its Dutch subsidiary, lot 19 out of 20 auctions, which has been the subject of these proceedings. At the end of the auctions the bankruptcy proceedings were concluded in November 2007, and Yukos Oil ceased to exist.

10. The management of the Dutch subsidiary had however other ideas, and commenced proceedings in the Netherlands, led by Mr Godfrey and a Mr Bruce Misamore. They brought the Dutch proceedings to challenge the legality at Dutch law of the bankruptcy and administration of Yukos Finance, having first taken steps to reorganise it by interposing two Dutch Stichtingen, to which its assets were transferred.

11. Mr Rebgun purported to dismiss Messrs Godfrey and Misamore as directors of Yukos Finance in August 2006, and a series of proceedings in the Netherlands followed, starting with claims by Rosneft, the substantial state-owned Russian oil company, which had become lead creditor in the Yukos bankruptcy, and appointor of Mr Rebgun, against Mr Godfrey and others in respect of their restructuring, and then in September 2006 a claim by Mr Godfrey and Mr Misamore seeking relief by the Dutch courts that all actions, including their own dismissal as directors, with respect to Yukos Finance, taken by Mr Rebgun were null and void, because (*inter alia*) the Russian bankruptcy violated Dutch public order, and ought not to be recognised in the Dutch courts. On 31 October 2007, Amsterdam District Court gave what has come to be called the "*Halloween Judgment*", some 12 years before our own imminent Halloween event, upholding Mr Godfrey's claim, so that the powers conferred on Mr Rebgun as administrator of Yukos Oil by the Russian bankruptcy order under Russian law could not be exercised in respect of Yukos Finance in the Netherlands. This post-dated lot 19 by some two months, and seems to have come as a surprise, at any rate to the unsuccessful parties. An appeal was lodged by the administrator, supported and funded by the Defendants, the successful bidders in lot 19. Eventually the Halloween Judgment was upheld by the Dutch Supreme Court (at its second hearing, after remitting it first to the Court of Appeal in September 2013) on 18 January 2019. Independently the European Court of Human Rights held that Russia had acted illegally against Yukos and fined it approximately $2.5 billion.

12. The Claimants, spearheaded by Mr Godfrey, have always contended that all the Yukos auctions were illegal and sham, both by virtue of the circumstances which had led to the alleged bankruptcy and by virtue of the intention to 'renationalise' the Yukos assets reflected in those auctions, but their claim in respect of lot 19, which alone is directed against these Defendants, is of specific unlawful interference at Russian law, to which I shall now turn.

13. The issue spelt out by the Claimants, alleging unlawfulness by virtue of Article 1064 of the RCC, is whether they can show that each Defendant caused or facilitated the

participation of the company acquired by them as their bidding vehicle, OOO Promneftstroy ("PNS") in the lot 19 auction, knowing and intending that it had been predetermined that such auction would be won by PNS at a pre-agreed price, of approximately US $305million and no more than US $310million, and that the only other registered bidder OOO Versar ("Versar") would stop bidding when the pre-agreed price had been reached ("Issue 1"). It is accepted by Mr Kendrick QC for the Claimants that collusion and agreed pre-arrangement are necessary. It is insufficient if the Defendants were 'tipped the wink' that they were going to win.

14. The Claimants rely as important background in the case upon the circumstances of the earlier auctions, lots 1 – 18, but, as the Defendants point out, the fact that there may have been other steps taken by Rosneft or other State authorities to discourage bidders from coming forward is only at best indicative of the sensitive and hazardous background of the auctions.

15. Mr Kendrick alleged originally that all the auctions were rigged, but was only able in the end to allege that there were '*serious question marks'* over many or all of them, though it is apparent that a tight control was kept over them by the Russian authorities. The auction rules and Russian law required that there had to be at least two registered participants in each lot, but did not require that such participants all had to bid, one bid being sufficient.

16. An internal RenCap memo of 2 October 2006 anticipated that key assets would be likely to go to Rosneft, while "*smaller/non-core assets will be sold thru real auctions*". There may well have been steps taken by the Russians to discourage people from taking part in the auctions (although Mr Godfrey and the ex-Yukos management were also doing their best to discourage participation, for different reasons). In addition, there was serious harassment in March 2007, *inter alia* by police officers, of an English barrister, Mr Holiner, who attempted to examine the auction documents for lots 1 and 2 on behalf of Mr Godfrey. However, for there to be any material relevance to lot 19, there needs to be in respect of the earlier lots an indication of price fixing or pre-determination of result. I consider each lot in turn.

Lot 1:-

17. This was an auction of Yukos Oil's holding of 9.4% of Rosneft's shares, quoted on the London Stock Exchange. There were two bidders, Rosneft itself and a BP joint venture, both through a subsidiary. There were 10 rounds of bidding, and Rosneft won, with a bid which was at a 10% discount to the quoted share price. Mr Kendrick did not feel able to allege that there was any rigging of this lot.

18. There had been some consideration by RenCap of whether to participate, as appears from some selective documents disclosed from the RenCap cache. Mr Foresman, in an email of 21 February 2007 to Mr Pertsovsky, volunteered an idea of taking part, to pull off "*the trade of our lives*" – "*to show that the auction of [*Yukos*] assets is not rigged but rather is competitive*". After further consideration by a number of senior RenCap executives, a series of discussions took place, including discussion of what was described as "*Mr Vasilkov's presentation*", a draft of what was to be distributed, before a possible approach to Rosneft, through Mr Foresman's contact with them, Mr Matthias Warnig. It seems that the draft in our papers, produced from the RenCap cache, was

probably produced on Mr Foresman's computer, but I accept that, although he had input into it, it was not his document. The draft suggested that it be proposed to Rosneft that:

> *" * We propose that we discreetly approach a limited number (15-25) of top global investment funds to bid for the Rosneft shares at a discount materially less than 20% (e.g., 10-15%). We believe demand from investors at these levels and even more expensive levels will be more than sufficient.*
>
> ** The market and media would be very surprised to see a Consortium of global investors successfully outbid state-owned Rosneft in the auction; this would set a very positive tone as the first sale of the Yukos auction process and would lead to much greater acceptance of subsequent acquisitions of Yukos assets by Rosneft (e.g., upstream, refining).*
>
> ** Rosneft would gain a very high quality shareholder base and its shares would become "super liquid" overnight, with additional positive impact on share performance going forward.*
>
> ** It would give a much stronger degree of legitimacy to the auction process and the Yukos process more generally, both from Rosneft's perspective and from a political perspective.*
>
> ** There would be no financing cost or financing risk for Rosneft, therefore positively impacting the company's credit rating for its future borrowings including its bond offerings.*
>
> ** Rosneft's debt capacity would be freed up to be used for acquiring Yukos operating assets.*
>
> ** Eliminates need for company management to spend time and attention preparing for subsequent equity offering.*
>
> ** Renaissance Capital would give Rosneft and the Government veto rights with respect to allocation to investors, as well as accept some allocation recommendations*."

19. Mr Kendrick submitted that this was a suggestion that Rosneft allowed themselves to be outbid and that the auction should be rigged. However (i) in order to amount to a rigging there would have to be agreement with other participants, (ii) it seems to me wholly unlikely that unlawful price fixing was being suggested, given that it was proposed to canvas this with 15-25 global investment funds. In any event, it was not taken forward, but Rosneft, as set out above, in fact entered the auction and won. There was added in the draft proposal, in square brackets at the end, the following:

> *"[If none of the above is acceptable, we can propose that RC* [RenCap] *serve as the second bidder at the auction (which is a requirement) provided that they give us an allocation of, say, $1 billion which we can buy at the 20% discount. I don't want to*

put that in writing though. Needless to say, that would also allow for huge upside.]"

20. Mr Foresman denied any involvement in, or knowledge of, this bracketed addition, which may have been further 'outside the box thinking' by Mr Vasilkov or another, but he affirmed that it was not discussed by the senior executives of RenCap and certainly not adopted or put to Mr Warnig. I accept this.

Lot 2:-

21. This was a sale of (*inter alia*) Yukos Oil's 20% stake in the subsidiary of Gazprom, the other Russian state-owned oil entity. In the auction, Rosneft's subsidiary was outbid by two Italian energy companies, and there were two other registered participants, one of which attended. This lot does not seem capable of criticism. The Italian companies sold some or all of the assets which they had successfully acquired to Gazprom, after the auction.

Lot 3:-

22. This auction did not take place.

Lot 4:-

23. Mr Lynch, through his company Monte Valle, funded by Deutsche Bank, won this auction, defeating a Rosneft subsidiary and Versar, after 35 rounds of bidding. A company called ZAO Infina Investment was not allowed by the auction administrators to participate. Mr Horn and other senior RenCap executives were in favour of RenCap's participating, if they could get "*Kremlin backing*", but were advised by a Russian contact not to take part, and did not. As Mr Lynch proudly and regularly made clear thereafter, the auction was not rigged, he having won it after 35 rounds. Versar was a participant, as will be seen, in this lot, in lots 9, 11 and 12, and eventually in lot 19. No party in these proceedings has been able to provide any evidence as to its ownership. It plainly must have had access to substantial sums, as it was able to produce a deposit of 20% of the starting price in the lots for which it was registered. The Claimants allege that it was a vehicle for either Rosneft or Gazprom. In each of the five auctions in which it took part, other than Lot 19, a Rosneft subsidiary also participated. It was never successful. The Defendants' witnesses explain that it could have been a "bottom feeder", looking to pick up lots for which there was no serious competition, on the cheap.

Lot 5:-

24. A Rosneft subsidiary defeated two other registered bidders. No sign of rigging.

Lot 6:-

25. The auction did not take place.

Lot 7:-

26. A British company was successful against another registered bidder, seemingly neither Rosneft nor Gazprom.

Lot 8:-

27. This was won by a company called JVP Invest, after a contested auction against four others. RenCap's vehicle, Rekha Holdings, was barred from the auction, on the grounds of non-submission of the correct paperwork. This no doubt confirmed Mr Jennings' initial advice in April, "*due to high political risk*", to stay clear. But there is no indication, after RenCap was excluded, that the auction was rigged as between the other participants.

Lot 9:-

28. The auction was between three participants, a Russian company, PromRegion Holding and two others, a Rosneft subsidiary and Versar. Mr Lynch was prevented, as was another company, from participating, having paid his deposit, ostensibly because he was late in obtaining the necessary time stamp, which he described at the time as a "*technical glitch*": he said later in October 2007 "*personally I always operated on the assumption that if the Russian government didn't want bidders in the auction there were a whole host of legitimate instruments (different from reasons) to block someone*". On the face of it the auction went normally, with PromRegion winning. However, after the auction, the sale to the winning party was blocked by the Russian Anti-Monopoly Service, and the lot was sold at the auction price to Rosneft.

Lots 10 – 12:-

29. In lot 10 there were two participants, a Rosneft subsidiary and a company called Unitex, and Unitex won. In lot 11 there were again two participants, a Rosneft subsidiary and Versar, and Rosneft won. In lot 12 there were six participants and a contemporary report of "*fierce competition*": Unitex, Shell (via a subsidiary), TNK-BP via a subsidiary, the Rosneft subsidiary, PromRegion (despite what had happened in lot 9) and Versar. RenCap considered participation but did not do so. There was a heavily contested auction, and Unitex outbid Shell and BP as well as Rosneft. In the circumstances it is wholly unlikely that there was anything rigged in relation to lot 12, similarly so for lot 10, but lot 11 may have been rigged, with Versar providing token opposition.

Lot 13:-

30. In this lot, referred to in evidence by Mr Lynch, there were four participants. Prana, after 707 rounds of bidding, defeated the Rosneft subsidiary, Unitex and another company. Again, this appears not at all likely to have been rigged. Some of the assets won in the auction were sold on afterwards by Prana to Rosneft.

Lots 14, 15, 16:-

31. In lot 14, Rosneft beat two other participants, and in lot 15 there were four participants, none of them Rosneft or, so far as is known, Gazprom. Lot 16 did not take place. Again, no sign of rigging.

Lots 17, 18 and 20:-

32. Rosneft was against another company, not Versar. It is possible, though there is no evidence of it, that there was rigging.

Lot 19

33. This leaves lot 19, the lot in issue in these proceedings, in respect of the shares in Yukos Finance, but the following can be said:-

(i) Although I have not sought, or been able, to distinguish between the lots on the basis of which of them can be said to have been more significant to Rosneft, it is only in the case of a substantial minority of four lots, 11, 17, 18 and 20 that there can be said to have been any possible inference of rigging.

(ii) Rosneft took part in eight lots, including the four which were possibly rigged. In addition, in lot 9, it was able to acquire the assets after the disqualification of the winner, and it acquired some of the assets after its failure in lot 13 (Gazprom did similarly after lot 2). None of this is indicative of the rigging of those lots – indeed rather the reverse.

(iii) Some exclusion of possible bidders took place, which may have been for unjustified reasons.

34. The Claimants rely on the earlier lots (and of course the original auction in December 2004 referred to in paragraph 9 above), as grounds for an inference that there was or must have been collusion/rigging/price fixing by the Russian authorities, specifically by Rosneft in relation to lot 19, *inter alia* because lot 19 was one of the assets in which, for strategic reasons, Rosneft or the Russian state had a particular interest; this was by reference to the fact that one of the assets of Yukos Finance was a 49% shareholding in a company jointly owned with the Slovakian government, Transpetrol, which owned or operated an oil pipeline through Slovakia. I shall return later to greater detail about Transpetrol, but in any consideration of the pre-auction communication with Rosneft the following must be borne in mind:

(i) I am persuaded by the evidence of Mr Jennings and Mr Deitz, and indeed the similar view of the Claimants' witness, Mr Hellman, that caution would be required before participation in lot 19, and a good deal of investigation as to the attitude of the Russian authorities, and in particular

(ii) it would be *suicidal* – words in fact used by Mr Hellman's assistant, Alex (Nakhmanovich) - to participate in the auction without a prior agreement or understanding with Rosneft, or, as Mr Jennings put it, that it would be important to ascertain before bidding that there would be no opposition from Rosneft or the Russian authorities (fairly regularly referred to as *the Kremlin*).

35. The assets constituted by the shares for sale in lot 19 consisted of a pool of money, approximately $1.5 billion, largely being the proceeds of sale of a Lithuanian refinery, some other small assets totalling $50 million, and the 49% of Transpetrol. It was however a hornets' nest, even for those experienced in distressed assets because of (*inter alia*) the following:

(i) There were very substantial monies owed to Rosneft, protected by attachments, which on the face of them would wipe out the whole of the cash, which was the main justification for any acquisition.

(ii) There was also approximately $840 million owed to the company owned by the former shareholders of Yukos Oil, GML, represented by a Mr Tim Osborne.

(iii) There was the challenge to the validity of the bankruptcy administration of Yukos brought by the former management of Yukos Finance, Messrs Godfrey, Misamore and Theede, representing the Stichtingen referred to in paragraph 10 above, of which Mr Osborne was also a director. Very substantial PR had been arranged by Mr Godfrey and the others in order to discourage participation in the auctions, and in the event (then considered unlikely) of success by them in the Dutch proceedings the validity of the administration, and thus the acquisition of the shares, could be rendered at risk.

(iv) Transpetrol was subject, as set out above, to joint ownership with the Slovakian government, which had until April 2007 - and it seems to have been still believed to be the case in August (see paragraph 62(i) below) - a veto, or at any rate a right of approval, in relation to the transfer/sale of Yukos Finance's shareholding.

36. It was therefore essential for anyone, particularly anyone specialised as were RenCap and VR Capital in the acquisition of distressed assets, to take every possible step prior to bidding to:

(i) neutralise the position of Rosneft, which was in any event receiving the proceeds of all the auctions, thereby reducing the debts the subject of the Rosneft charges/attachments, and the Russian authorities:

(ii) resolve the position of GML, whose debt was on any basis well within the cash available to Yukos Finance, and, given that GML was on the face of it the representative of the interests of the ex-Yukos management, hopefully carrying them along too: and

(iii) decide what to do with the 49% of Transpetrol, in whose retention the purchasers would have no interest.

37. If those three positions could be sufficiently juggled, there would be on the face of it $600 million or so available in cash, if the assets could be acquired at auction, being what Mr Foresman in an email of 3 September called the *booty*. Mr Hellman too, although he had a particular interest in the Transpetrol shareholding, recognised (see paragraph 34(i) above), in relation to his own simultaneous efforts to take part in the auction, that there would need to be understanding that both major creditors would be in hand, and this became an essential prerequisite of the Investment Committee of RenCap once it met on Monday 13 August, as I am satisfied it did.

38. Turning then to the lot 19 auction, as I shall describe, the Consortium was too late to register its participation and lodge the necessary 20% deposit in roubles, and it purchased from Rosneft a vehicle which Rosneft had already registered for participation in the auction, PNS. There was one other registered participant, Versar (see paragraph 23 above), and Mr Lynch attended the auction on behalf of PNS. The auction rules provided that the starting price was to be 7,598,361,800 roubles (approximately $296million) and that there must be at least one bid, and that bidding was to be in increments of 40 million roubles. Versar bid first, and the bidding continued with five

counter bids, resulting in PNS succeeding with 7,838,361 roubles (approximately $305,398,621). By virtue of the subsequent Dutch proceedings the Consortium never received the shares they paid for in the auction, and that whole sum was lost to them.

The Relevant Russian Law

39. I set out the Articles of the RCC which are material for my consideration:-

(i) Tort and compensation

> *"**Article 1064***
>
> ***General Grounds for Liability for Causing Harm***
>
> *1. Harm caused to the person or the property of an individual as well as harm caused to the property of a legal person shall be compensated in full by the tortfeasor.*
>
> *The law may impose the responsibility to compensate for harm on a person other than the tortfeasor. The law or contract may establish responsibility of the tortfeasor to pay compensation to the injured on top of compensation for harm.*
>
> *2. The tortfeasor shall be released from compensation for harm if he proves that the harm was caused not through his fault. The law may provide compensation for harm even in the event the tortfeasor is not at fault.*
>
> *3. Harm caused by lawful actions shall be subject to compensation in cases provided by law.*
>
> *Compensation for harm may be denied, if harm was caused at the request or with the consent of the victim, and the actions of the tortfeasor do not violate the moral principles of society."*
>
> *"**Article 10***
>
> ***Limits on the Exercise of Civil Law Rights***
>
> *1. Actions by citizens and legal persons carried out solely with the intention of inflicting harm upon another person, as well as the abuse of a legal right in any form, shall not be permitted…."*
>
> *"**Article 15***
>
> ***Compensation for Damages***
>
> *1. A person whose right has been violated may demand full compensation of the damages suffered, if [the] law or contract does not provide for compensation of damages in lesser amounts.*

2. Damages mean the expenses which the person whose rights have been violated has suffered or will have to incur for restoration of the violated right, loss or damage to his property (actual losses), as well as income not received, which the person would have received under ordinary conditions of civil commerce, if his right had not been violated (lost profit).

If a person who has violated a right received income as a result of such an action, the person whose right has been violated shall have the right to demand compensation, along with other damages, of lost profit in an amount not less than such income [disgorgement damages]."

*"**Article 1080***

Liability for Harm Caused Jointly

Persons who cause harm jointly (joint tortfeasors) shall be solidarily liable to the injured."

*"**Article 1068***

Liability of a Legal Person or a Citizen for Harm Caused by its (his) Employee

1. A legal entity or a citizen shall compensate for harm inflicted by its (his) employee in the course of performing his employment (work, official) responsibilities.

For the purposes of the rules of this Chapter citizens performing work under a labour contract (fixed-term employment contract), as well as citizens performing work under a civil law contract, shall be deems employees, in the event they acted or should have acted on the instructions of the corresponding legal person or citizen and under its (his) control in matters relating to work safety.

2. Business partnerships and production cooperatives shall compensate for harm caused by their participants (members) in the course of their performance of entrepreneurial production or other activities of the partnership or cooperative."

(ii) Limitation

"***Article 195***

Concept of Statute of Limitations

The statute of limitations is the time limit for the filing of claims for the defence of right by a party whose right has been violated.

Article 196

> ***General Time Limits of Statute of Limitations***
>
> *The general time limit of the statute of limitation is set at three years."*
>
> *"**Article 200 (as amended in September 2013)***
>
> ***Start of the Running of the Time Limit of the Statute of Limitations***
>
> *1. If otherwise is not established by the law, the running of the time limit of the statute of limitations starts on the day when the person knew or should have known about the violation of his right and who must be a proper respondent in the claim to protect such right. [Exceptions to this rule are established by the present Code and by other laws].*
>
> *2. For obligations whose performance time limit is not determined or is determined by the time when a demand is made, the running of the term of statute of limitations starts from the time when the creditor presents a demand to perform the obligation, and if the debtor is granted a time limit for the performance of such claim, the computation of the statute of limitations shall begin at the completion of the time limit granted for the performance of such an obligation. At the same time, the statute of limitations in any case cannot exceed ten years from the day the obligation arises.*
>
> *3. For indemnification obligations, the running of the statute of limitations begins from the time of performance of the primary obligations."*

The Issues

Issue 1:

40. Can the Claimants establish on the balance of probabilities, bearing in mind that the claim is one of dishonesty, that the Defendants knew and intended that the result of the lot 19 auction was predetermined? This is Issue 1, as set out in paragraph 13 above. It will be apparent that the questions are ones of fact, not depending upon any material difference between the Russian and English laws of tort, so far as liability is concerned.

Issue 2:

41. Do the Claimants have the standing to bring a claim for loss and/or (without prejudice to Issue 3 below) have they suffered loss recoverable as a result of an unlawful act under Article 1064:

(i) applying the 'but for' test: and

(ii) by way of direct and immediate loss;

in respect either of the legal costs of the 34 proceedings or the Transpetrol claim?

Issue 3:

42. Are legal costs and expenses incurred in (non-Russian) legal proceedings but not recoverable because (*inter alia*) of a cap upon recovery in the non-Russian courts, recoverable in at Russian law pursuant to Articles 1064 and 15?

Issue 4:

43. Does Article 1068, which otherwise exempts an employee from liability for loss incurred in the course of his employment (i) not apply when the employee's act is deliberately unlawful and/or (ii) not apply if the employee is the sole decision-maker/alter ego of the company?

Issue 5:

44. Is the claim statute barred pursuant to Articles 196 and 200, and if so should there be an extension under Article 10, and/or does the Foreign Limitation Periods Act 1984 permit the claim to be brought notwithstanding?

Issue 6:

45. If the Claimants are *prima facie* entitled to legal costs at Russian law, what sum if any is recoverable?

Issue 7:

46. Is the Transpetrol claim recoverable at Russian law on the facts?

The Events of August 2007

47. I shall now proceed to give an account of the events of August 2007, which in substantial part incorporates my conclusions as to what occurred in the light of the evidence. There is a very great deal of bitterness on both sides, because of course both have lost substantially as a result of what has occurred. The Claimants, though they have recovered the shares in Yukos Finance, as a result of the Dutch court's refusal to recognise the bankruptcy administration, and have consequently been able to recover and distribute to their shareholders and stakeholders substantial sums, have incurred the legal and other costs which they now seek to recover (paragraph 2 above). The Defendants paid and lost the approximately $310 million to acquire Yukos Finance, and incurred in the Dutch and US proceedings substantial other expenses and similar legal costs to the Claimants'. The Claimants' costs of these proceedings are indemnified, but the Defendants, sued as individuals, are entirely at risk. No compromise has been possible.

48. The allegations against the five Defendants are of dishonesty, albeit dishonesty by reference to Russian law, namely the dishonest rigging of an auction by fixing a price and ensuring that they were bound to win at that price. I have in mind the following:

(i) The difficulty of my being sure about the facts after 12 years (paragraph 6 above), and the allowance that must be made for lapse of memory or incorrect recollection after so long.

(ii) The fact that the Defendants are all professional men, as for the Second and Fourth Defendants with international reputations, dealing on a day to day basis with funds often very much larger than those involved in this case, and that the Third Defendant was a solicitor in an employed capacity involved in drafting documents relating to a deal in which he had played no part, working through the night in a hectic 36 hour period.

(iii) The fact, on the other hand, that the hot house atmosphere of the Russian commercial world, particularly in the light of what had recently occurred in relation to the destruction of Yukos Oil, may have meant that standards of propriety might have slipped, and there is the general background of some of the earlier auctions, to which I have referred.

(iv) The fact that the RenCap cache included internal communications between the Defendants, and legally privileged documents: and I have not found in any of them any admission or confession of wrongdoing, as might otherwise have been expected.

(v) All of the Defendants were impressive witnesses, and gave a very good account of themselves in very difficult circumstances, and, despite vigorous cross-examination, did not accept or indicate any dishonesty. The only witness who is effectively set against them is Mr Hellman, most of whose evidence was either unexceptional or consistent with the documents. However, when he differs from the Defendants, I prefer their evidence, and I note that Mr Kendrick did not rely on evidence which Mr Hellman 'remembered' in re-examination.

(vi) The main plank of the Claimants' case rests on interpretation of documents, to which I shall return, and upon inference that there was or must have been an agreement by each or some of the Defendants with Rosneft or *the Kremlin,* and knowledge of such agreement by the Defendants, as to the fixing of the price, and that Versar was or must have been a vehicle of Rosneft or Gazprom, primed to bid so far but no further. As will be seen, the Claimants' case entirely rests on there being a change in the Consortium's plans so as to <u>become</u> dishonest in the short period of August 13 – 15 2007.

<u>The Lead-Up to the Alleged Agreement to Rig</u>

49. There is a dispute about one particular date, which may not in the event matter. The Claimants allege that a dinner between Mr Foresman, Mr Warnig (paragraph 18 above) and their wives took place on the evening of Monday 13 August. I am satisfied that it occurred on Sunday 12 August, the end of the weekend, and that it was that dinner which then triggered the activity which took place on 13 and 14 August, leading to the auction on 15 August. On any basis the Claimants' case is that it was only after that dinner that the illegal agreement to rig, at the instance and/or with the involvement of Rosneft, took place. What had occurred prior to that was the development of plans and

preparations by the Defendants for possible entry into the auction, and indeed by Sunday a recognition that it was probably too late, as they would not be able to raise the 20% deposit in roubles, necessary to register a participant in the auction, by the last date of submission of an auction participation application, in accordance with the auction rules, at close of business on Monday 13 August.

50. There seems to have been, from the end of July/beginning of August, more or less simultaneous consideration of possible participation in lot 19 by Mr Lynch, who had been successful in lot 4 and was busy telling others that his success showed that the auctions were not rigged, and by Mr Deitz on behalf of VR Capital, and by Mr Hellman (see paragraph 6 above), an American entrepreneur who seems always to have had in mind, as a part-time adviser to the US State Department, the geopolitical importance to the US of Yukos Finance's 49% holding in Transpetrol (see paragraph 34 above). Both Mr Deitz and Mr Hellman were in contact with Mr Lynch to find out about his success in lot 4. It was Mr Lynch who approached Mr Foresman on behalf of RenCap at about the same time, but Mr Foresman did not take it any further for some days (no doubt mindful of the previous discouragement by Mr Jennings of taking part in the Yukos auctions) until he discovered that Mr Deitz was interested, when he took the idea to his superior, Mr Pertsovsky (Mr Jennings being away abroad); whereafter, having failed to contact Rosneft's CFO, who was also away, he made contact with Mr Warnig (referred to in paragraph 18 above).

51. Mr Hellman was in touch with Mr Godfrey as early as July 2007, before he contacted Mr Lynch or Mr Deitz. He drafted a memo dated 1 August 2007 (his 'one-pager') to inform potential investors and record his thoughts, which reads in material part as follows:

> "*The starting price for this lot is set at USD 299 million, and, if past experience is any guide, the lot should sell for a price near this figure.*
>
> *The Principals intend to create a special purpose vehicle (hereafter "SPV") in a jurisdiction that is recognized by the auction rules and that is suitable for tax purposes to bid for this lot and realize the value that is contained in YF. It is estimated that the net value of YF is in the range of USD 554-854 million, thereby providing a sizeable arbitrage over the expected transaction cost. SPV is seeking to recruit a team of investors (the "Group") to finance the purchase of YF. The transaction will be expected to close on or about August 18, 2007.*
>
> *The purchase of YF is fraught with financial, legal and political complications. This summary will highlight these issues, all of which will require extensive and expedient due diligence.*"

He continues with a financial summary, which assumes low and high bid ranges of $300 – 400 million, and he then summarises the assets by reference to the refinery proceeds, to which I have referred in paragraph 35 above, and, so far as Transpetrol is concerned, he notes "*according to a recent appraisal by Muse Stancil (a highly reputable US energy services company) the 49% stake is worth USD 150 million*" and said that he was "*aware of several buyers who would be willing to purchase the YF*

stake in Transpetrol for this value and has therefore used a range of USD 125 – 175 million in its underwriting". There is no mention of US state interest.

52. Mr Lynch also drafted a memo for his own use, at some stage between 5 and 10 August, which is in various forms, and, because it was supplied by Mr Foresman to Mr Warnig, who agreed on or about 8 August to take it to Rosneft's CEO, has been christened by Mr Kendrick as the *Kremlin Memo*. It includes the following:

> "….
>
> *Financing*
>
> *Multiple financing sources are standing by to assist MV in participating in the auction. The actual sources will depend upon the final amount required and the structure of the proposed transaction (see structure alternatives below). Lead bank on the proposed deal is Renaissance Capital and or its investors supplemented by private capital in the form of U.S. hedge funds active in Russia. The core group, are like Mr. Lynch, Western citizens long active in Russia.*
>
> *Bid Amount & Limit*
>
> *The bid amount is contingent upon the deal structure and conditions. It's important to note the core concepts behind MV's participation. First, MV and financing partners do not intend to make a profit from the Transpetrol asset. Whatever it can be sold for is what we will bid for it.*
>
> *As for the cash assets in Amsterdam, they clearly come with significant risks and unknowns. However, MV and financing partners are confident that through a combination of settlements and if required litigation, substantial profits might be realized. On one extreme, if our only course is litigation, we envision a multi-years, expensive legal process. This obviously would substantially lower our valuation (bid) – or even whether we want to participate in the auction. Alternatively and ideally and if acceptable to interested parties (especially the Russian state) a settlement with Claimants could be implemented in a matter of months. In this scenario we'd potentially pay more.*
>
> *That said, based upon what we know today including the value of Transpetrol (approximately $200M for the 49%) and the risks associated with the cash in the company, our total bid could be approximately $400M. This could change if we were able to determine other assets in the lot that we have not yet identified (as was the case in Lot 13).*
>
> …

Given the immediacy of the auction, if MV is to participate we will need on Friday 10 August the following:

1. Indication that the general strategy is acceptable

2. Meeting with Rosneft to:

a. agree on the mutual waiver of claims

b. Terms and conditions of "Put" sale of Transpetrol

*3. Practical assistance in opening a bank account at GazpromBank (so as [*to*] be able to both receive and pay the $60M deposit on Monday). And potentially a short term credit for the same reason.*

Alternative A: Straight Bid

MV is open to participate in the auction and will, in the event of winning, onward sell the Transpetrol asset to a buyer satisfactory to all involved (Russian and Slovakian authorities). Rosneft will waive any claims in Amsterdam and MV for Yukos Finance will waive any claims against Rosneft.

Alternative B: Joint Bid

MV participates with Rosneft (or whatever entry is interested in Transpetrol asset). Rosneft (or other) contributes X of bid (value of Transpetrol) whilst MV and financing partners take remainder.

Alternative C: Virtual Conditional Bid

MV aligns with a state entity (ex. Vneshekonombank), with MV acting as bid entity and front, whilst state entity is full or partial financing source. In the event of winning bid, MV sells Transpetrol and manages Amsterdam issues. MV and state entity split proceeds on some proportion. In effect this creates a conditional bid for the Russian state and allows them to more easily participate in potential profit in the frozen cash of Yukos Finance. Obviously this would need to be structured in such a way as to be arms-length.

Urgent Questions:

-Will Rosneft waive its claims against Yukos Finance if the bidder agrees to meet Russian conditions?

-Can we get practical assistance in meeting the bid deadlines (opening bank account, etc.), including potentially a $60M short term credit?

Other Questions:

-Is Rosneft interested in Transpetrol? If no, who is?

-Are there other assets MV is not aware of?"

53. Mr Hellman was also supplied by Mr Lynch with the *Kremlin Memo* on 10 August. By the Friday, 9 August, he began to feel he was being left out of the proposed Consortium, and his assistant Alex (see paragraph 34(ii) above) was only permitted to attend part of a meeting at RenCap that afternoon, but the Defendants persuasively explained that they felt that he was unable to provide any potential investment, which they saw as his only advantage, while both Mr Deitz and RenCap were confident of being able to supply sufficient investment if it went ahead; and in any event it is apparent from Mr Lynch's email to Mr Hellman of the following Tuesday, 14 August, that there could still even then be an opportunity for him to participate, if he could provide investment. In any event, as it turned out, Mr Hellman was in regular touch with Mr Godfrey who, (see at paragraph 12 above) was implacably hostile to there being any auctions at all, and he supplied the *Kremlin Memo* to Mr Godfrey, which Mr Godfrey described, in an email on 17 August to Mr Hellman, as "*incriminating*" - though that is not now Mr Kendrick's case (see paragraph 48(vi) above) - to which Mr Hellman replied "*Pretty good, huh?"*.

54. It is wholly clear that nothing was in position by Saturday 10 August, save that documents which would enable Monte Valle to register as a participant on the Monday had been prepared, if the 20% deposit in roubles could be funded and the decision to go ahead taken. All realised that Rosneft's support was essential, as they were very substantial creditors of Yukos Finance, and that the former Yukos management/owners, particularly the substantial creditors GML, needed to be squared. In early emails the proposition was given the rubric "*Big Easy*"; although that ceased to be its title later, it seems at the initiative of Mr Olphert of RenCap. But it was at that stage far from Easy, and insofar as it is being relied upon as indicative of dishonesty, there was no dishonesty then intended, on the Claimants' own case. Mr Foresman chased Mr Warnig on the Friday to see whether Rosneft had considered the *Kremlin Memo*, and there was no answer yet.

55. There is then what I am satisfied was the Sunday night dinner, when Mr Warnig told Mr Foresman that there could be interest by Rosneft, and gave him the name and number of Mr Sharipov, who was outside counsel for Rosneft. At the restaurant, and then later that night, Mr Foresman made a number of calls. He contacted Mr Jennings, who was on holiday in Croatia, explaining the lot 19 opportunity to him, Mr Olphert, to whom Mr Jennings told him to report in his absence, and Mr Sharipov, arranging a meeting for the next day. As from Monday things sprang into action, with three meetings during that day between representatives of the Consortium and Mr Sharipov, and the meeting of the RenCap Investment Committee (Messrs Olphert, Horn and Pertsovsky, and Mr Jennings by phone); and the start of drafting of documents began on the Monday night, supervised by Mr Reid as senior lawyer, assisted by another RenCap lawyer Mr Batulin, and with regular contact with two or three outside firms of lawyers, and contact by both Mr Deitz and Mr Jennings with potential co-investors. The RenCap Investment Committee was extremely insistent about what Mr Jennings called the *gating issues,* namely ensuring that there was no opposition either from Rosneft or

GML, and a great deal now had to be done in order to enable the Consortium to participate.

56. The deal with Rosneft, as put together in the light of Mr Foresman's approach, with the assistance of the *Kremlin Memo*, was hammered out in the course of three meetings with Mr Sharipov, adjourned for him to obtain instructions from Rosneft, during Monday 13 August. As its starting point, the Consortium would acquire PNS from Rosneft, and effectively step into Rosneft's shoes in the auction. This was on the basis of a complete waiver of the substantial claims and cross-claims existing between Rosneft and Yukos Finance, and the Consortium would have a Put option in respect of Transpetrol to an as yet unspecified buyer at a price of $105 million plus 50% of the unpaid dividends (subject to agreement by the Slovak government, which it seems both parties considered there needed to be). This was set out by Mr Lynch by way of information to Mr Hellman in his email to him of 14 August.

57. Rosneft had already loaned to PNS the 20% auction deposit payable (which PNS had paid on the previous Friday); and would now loan it to the Consortium, but on terms of interest at 7.5% (effectively the "*short term credit*" which had been asked for in the *Kremlin Memo*), in the sum of $60 million, which would be repaid when they sold Transpetrol i.e., out of the proceeds of that sale. This was the *good news* that Mr Lynch emailed to Mr Deitz in the early morning of Wednesday 'while he was sleeping'. Given that the sale price of Transpetrol was now $105 million, not $200 million as per the *Kremlin Memo*, the likely bid would therefore be $300 million not the $400 million as there anticipated. What seems also to have been understood, but seemingly left unrecorded, was that, as stated by Mr Lynch in his 14 August email, and by Mr Reid to Mr Deitz on 20 August, if the transfer of the shares was ineffective, i.e. could not be notarised in Holland, the purchase price would be returned, although as the transfer was notarised (much to Mr Godfrey's later irritation) that did not arise.

58. Those aspects of the gating criteria laid down by the RenCap Investment Committee had to be resolved to Mr Olphert's satisfaction, as Mr Deitz had already expected and insisted upon if anything was to be agreed, and as indeed Mr Hellman had anticipated: hence Alex's words to Mr Hellman on 2 August ("*going into this without having a deal with Rosneft is almost suicidal*") and Mr Hellman's words in an email of 9 August to a potential investor: "*basis of understanding would be that deals with both major creditors would be in hand*". Thus, with Rosneft squared, similar steps had to be taken in relation to GML, and Mr Deitz was in contact with Mr Osborne. By late on Tuesday he told Mr Osborne that there was a 50/50 chance of resolution. Meanwhile he attempted to reach common ground with Mr Godfrey, and made a telephone call to him, but was brushed off in no uncertain terms (and subsequently by Mr Misamore by email), in circumstances which are relevant to the limitation argument, addressed below. However, agreement was confirmed by GML before the auction on the following day, and such agreement included a provision that GML would assist the Consortium in its attempts to deal with the Stichtingen, in which Mr Osborne was involved with Mr Godfrey. Thus, both the gating issues appeared to be as resolved as they could be, such as to enable the Consortium to participate in lot 19 on Wednesday 15 August.

Rigging

59. I turn to the matters relied upon by the Claimants to show that the arrangement arrived at with Mr Sharipov on behalf of Rosneft amounted to a dishonest rigging of the lot 19 auction.

60. The first matter relates to the 49% shareholding in Transpetrol, which is said to have been the bait for the deal, i.e. that the Russians made it a condition of enabling the Consortium to take part in the auction by selling them PNS that the Consortium would sell on the Transpetrol stake to a Russian buyer for $105 million plus the frozen undistributed dividends. The Defendants deny that as a matter of fact this is an accurate portrayal of what occurred, but in any event make the point that they had no wish to hang onto the 49% stake, as they were only concerned in a cash profit from the transaction; and thus that there would have been nothing improper if they had made such an arrangement. The Claimants' point is that the existence of the Transpetrol stake with its potential control over the passage of oil through Slovakia, made lot 19 of strategic importance to the Russians.

61. The evidence of Mr Hellman was that, so far as he was concerned, his interest in attempting to participate in the auction was (his profit apart) to facilitate the eventual sale on of the Transpetrol stake into friendly, non-Russian, hands. He certainly at some stage discussed with Mr Deitz that if he participated in the Consortium he would want some control personally over Transpetrol, however neither he nor the other Defendants recall Mr Hellman disclosing his interest as an agent for the American government, and it is the case that in his "one-pager", from which I have quoted in paragraph 51 above, he simply spoke of being "*aware of several buyers who would be willing to purchase*" that stake. Alex, his assistant, clearly knew of his interest in this regard, and in his email to him of 10 August, he pointed out to Mr Hellman the difficulty for Mr Hellman of juggling his desire to make money and his apparent geopolitical purpose. Alex appears to have thought that "*Transpetrol is a cornerstone of the deal with Rosneft*", but he could have only been referring to the *Kremlin Memo*, quoted in paragraph 52 above (attached to his email), because there was at that stage no agreement with Rosneft, and in that Memo the Consortium was still asking itself "*Is Rosneft interested in Transpetrol? If not, then who is*". Mr Kendrick suggested that the reason that Alex was excluded from some parts of the Consortium's meeting on the afternoon of 10 August was in order to avoid discussion as to what they intended in relation to the Transpetrol stake, but Alex had a copy of the *Kremlin Memo* in which the position is made clear, and I am entirely satisfied that his exclusion from a private part of the meeting had nothing to do with it. I accept that at that stage, and indeed thereafter, the Consortium's desire was simply to find a buyer for the Transpetrol stake in the event that they were successful in the auction (see the *Kremlin memo*). I accept Mr Foresman's evidence that they asked Rosneft whether Rosneft would be prepared to purchase it, at one of the meetings on the Monday, and Rosneft declined, but thereafter came back with the suggestion that they would be in a position to find a third-party purchaser who would be prepared to buy.

62. There is nothing to my mind which supports the case that Rosneft at any time made it a condition that the Consortium would sell the Transpetrol stake to a Russian buyer:-

(i) It is significant that at that stage everyone seems to have believed that the Slovakian government had a right of veto over the sale of the shares (see paragraph 35 (iv) above). In terms in the *Kremlin Memo* there was specific mention of the need to sell "*to a purchaser acceptable both to the Russian and the Slovak authorities*". Mr

Heller, a proposed co-investor approached by Mr Deitz, was still asking in an email to himself on 14 August ("Heller 1"– see paragraph 65(ii) below): "*What happens if Slovak authorities won't allow sale of* [Transpetrol] *to Rosneft or nominee?"*. Mr Lynch in his 14 August email to Mr Hellman, referred to in paragraph 53 above, as late as the Tuesday was stating "*Slovak government obviously needs to agree who* [the Transpetrol asset] *goes to and it's condition of the put (in any event who wants it except someone supplying Russian crude?)*".

(ii) This still remained the case in the composite side letter, subsequently replaced by two separate side letters, which formed part of the drafting exercise of 13/14 August, to be signed by Rosneft and the Consortium. This *inter alia* provided: "*Rosneft hereby undertakes, in the event that (purchaser in the auction SPA) is successful in securing the shares in* [Yukos Finance] *at the Auction…it shall procure that the Transpetrol stake held by* [Yukos Finance] *shall be acquired by an entity acceptable to the Slovakian government* [my underlining] *and Renaissance within 90 days of the Auction date for a consideration of USD 105 million [plus the 50% dividend]"*. Two things are significant, first that at that stage the Slovakian government's approval is still provided for and secondly that it is plainly a put option, facilitating the disposal of Transpetrol, which the Consortium did not wish to retain (as made clear in the *Kremlin Memo*).

(iii) When the composite side letter was split into two, in the course of the continuing drafting sessions, and a separate side letter was drafted for agreement by the Consortium and Rosneft relating to the sale of the Transpetrol stake (with the separate agreement for waiver of all claims between the parties contained in a second side letter), the provision still did not reflect the case now made by the Claimants that it was Rosneft who were insisting on the onward sale of Transpetrol, but simply recited that, in the event of a successful acquisition by PNS, "*Rosneft understands that [PNS] intends to transfer the shares in Transpetrol…to a Russian third party*". Significantly, there was an express provision providing for the event that PNS transferred the Transpetrol shares "*to a party other than the nominated party*". After the auction, when an agreement was made with Halebay Holdings Limited, who turned out to be the nominated buyer, a Cypriot company, which does appear to have had some connection with Gazprom, what was then provided was that PNS would "*procure the transfer of the shares to the nominated buyer*", for $105 million, against which would be offset the $60 million loan made to PNS to pay the auction deposit, liability for which would be transferred to Halebay. Although the Consortium made it clear to Mr Sharipov that they could have sold to some other party, they were content not to do so.

(iv) Mr Kendrick sought to argue that there was an incentive imposed by Rosneft for the Consortium to sell to a Russian buyer for $105 million, and thereby ensuring the repayment of the loan by PNS, but it is clear that the agreement with Rosneft was that the $60 million debt would only require to be repaid on the sale of the Transpetrol stake whoever purchased that stake. Whereas the final form of the side letter on 15 August did indeed provide that, pursuant to the terms of the sale and purchase agreement relating to the Transpetrol shares to the nominated party, the loan amount would be repaid by PNS "*immediately following receipt of the proceeds from the sale*", the very next provision also recited (as referred to above) that "*in the*

event that [PNS] *transfers the Transpetrol shares to a party other than the nominated party, the loan shall become immediately repayable*".

63. The other question relates to the price that was to be paid for the Transpetrol shares. Mr Hellman in his 'one-pager' had recorded the recent appraisal of share value at $150 million. It seems that he did subsequently, on 2 August, inform Mr Deitz that he had heard (from Mr Godfrey) that such appraisal valued the shares at $200 million. This was recorded in the first page of the "Investment Memorandum", a deal sheet put together on 14 August, to which I shall refer below. However the Memorandum records, as set out in paragraph 67 below, that the agreement with Rosneft would be that the Transpetrol stake would be sold to an unidentified Russian purchaser for $105 million. In a note on the last page of that Memorandum it further recorded that the Transpetrol stake "*is due to be sold for $105million to a nominated third party pursuant to a Put option. In the event that Russian Bidder does not exercise its Put option the asset could be sold for more*". Mr Deitz gave evidence that he had considered, in the course of his examining the available documents in the days leading up to the auction, various values that had been put on the shareholding, including publicly available valuations in 2006 and early 2007, ranging from $100 - $120 million. Given the advantages that the Consortium was obtaining from the agreement with Rosneft, particularly by way of the mutual waiver of debts, I do not consider that it can be said that the sale for $105 million (plus the dividends) was at a significant undervalue, and as appears from the Investment Memorandum, this led to a figure as their anticipated bid in the auction of approximately the amount which Mr Hellman had himself estimated in his 'one-pager' of approximately $300 million, rather than in the region of $400 million, as discussed in the *Kremlin Memo*.

64. I conclude that the Transpetrol stake was not in the event the significant factor indicating dishonesty which Mr Kendrick asserts, and that it does not support the Claimants' case in that regard. Transpetrol had to be dealt with, because the Defendants did not want it. Rosneft itself did not want it either, but was prepared to find, and did find, probably through Gazprom, a Russian buyer to take it off the Defendants' hands in the event of success in the auction. I am persuaded that, as Mr Lynch said in evidence, the main issue for Rosneft was putting in place the waiver of the cross-claims between Yukos Finance and Rosneft, which in the event was the subject matter of the second side letter, while facilitating the method whereby it would be repaid the $60 million loaned to PNS in respect of the auction deposit, i.e. out of the sale proceeds.

65. The Claimants' case primarily rests upon documents produced after the "*green light*" on Monday, as it was described by Mr Deitz. They are:

    i) A deal sheet put together overnight on 13 to 14 August, primarily by Mr Reid, who was summoned back into the office on the Monday evening to work through the night by way of his first involvement in the affair, to supervise and prepare the drafting. This was intended to give a summary of the proposal, which would then be shown to potential co-investors in the bid which was soon to take place on 15 August. Mr Kendrick called this the "Investment Memorandum". This was sent by Mr Olphert of RenCap to a number of potential sub-investors, including a Mr Montealegre of Sigma Equity Fund late on 14 August. The document was produced as part of the RenCap cache.

ii) Documents emanating from a potential co-investor with VR Capital, approached orally by Mr Deitz, a Mr Heller of HBK. These consist of emails which he sent to himself (Heller 1) and to his tax lawyer Mr Diepenmaat (Heller 2 and Heller 3) and to Mr Rose the managing director of HBK (Heller 4), all dated 15 August 2007. Three of these were part of the RenCap cache, and Heller 4 was obtained from HBK in the 1782 proceedings. The documents emanating from Mr Heller contained what he understood from what was, or must have been, derived from conversation with Mr Deitz, and to that extent are hearsay. It is common ground that they contain what must have been a number of errors of understanding, but the Claimants rely on their content.

iii) Finally, the Claimants refer to Mr Lynch's email to Mr Hellman of 14 August, which I have already referred to in paragraphs 53 and 62(i) above.

66. The Investment Memorandum was not seen by any of the other Defendants at the time, and they had no involvement in its drafting. It was put together by Mr Reid with the assistance of a Mr Vasilyev, who had been involved in the matter since the previous week, and derived, as Mr Reid described it, from a collegiate effort involving Mr Vasilyev and Mr Olphert, and from the information that had been put before that day's Investment Committee. Mr Kendrick accepts that there were "*lots*" of people involved in its drafting. He submits that "*anyone with brains to read it*" (obviously including the proposed co-investors) would see it as describing a rigged auction, as obviously would Mr Olphert, the managing partner of Renaissance Partners; and Mr Reid is said to have turned a 'blind eye' to it.

67. It reads as follows, headed up with the title "*Project Surplus*", which had replaced Big Easy as its title:

> "***Project Surplus***
>
> ***1. Introduction***
>
> *The fourth and final Yukos auction is due to be held on Wednesday 15th August 2007. The subject of the auction will be all the issued shares in* ***Yukos Finance B.V.***
>
> *The essence of the opportunity is that Yukos Finance B.V., has an expected surplus of liquid cash reserves over liabilities of approximately US$480 million on a conservative basis and US$650 million on an upside scenario.*
>
> *The likely auction bid price to access this surplus is $310 million.*
>
> *The current shareholder of Yukos Finance B.V. (Yukos Oil Company) has been unable to access this surplus due to various creditor actions of GML (the former owners of Yukos) and counter actions by Rosneft (the new owners of significant Yukos subsidiaries). Renaissance has obtained waiver commitments from Rosneft and has a general resolution understanding with GML regarding full settlement of their creditor rights, which should lead to unlocking of the surplus value.*

The opportunity to participate and be the likely winner has largely arisen due to very close relationships that certain Renaissance individuals enjoy with the Kremlin.

2. The Balance Sheet

*We understand that Yukos Finance B.V. (the **Target**) has the following assets/liabilities on its balance sheet (held directly and through subsidiaries):*

Assets

*(a) A 49% interest in **Transpetrol** (a company holding the Slovak oil pipeline). The remaining 51% is held by the Slovakian government. The estimated value of Yukos Finance B.V.'s interest is US$200 million;*

*(b) **US$1.25 billion** in cash frozen in Dutch bank account(s) (more detail provided below);*

*(c) **US$0.25 billion** held in Escrow against warranties on the sale of a refinery asset previously owned by Yukos Finance B.V.*

*(d) 25% of the issued shares in **Intelligent Energy** valued at US$18 million (disregarded for valuation purposes);*

*(e) **US$0.02 billion** other cash*

Liabilities

(f) US$804 million to Moravel Investment Limited, a GML subsidiary;

(g) US$250 million potential claim against the Escrow account (US$125 million in upside scenario);

(h) US$100 million other reserve ($50 min in upside scenario).

Detail on the US$1.25 billion cash and the Escrow amount

The US$1.5 billion in frozen cash is subject to the following executory attachments: (a) GML claim for US$804 million (being an LOA arbitral award in favour of Moravel Investment Limited for US $661 million issued in 2005 plus interest); and (b) Rosneft/YNG claims for up to approximately US$200 million (being two Rosneft claims against Yukos Oil Company).

Furthermore there is a claim outstanding by PKN (Polish oil refinery owners) for breaches of warranties given in sale documentation. US$250 million of funds currently held in escrow pending resolution of this claim.

The Target is the subject of a Dutch trust structure (a stichting) which means that the shares in the Target cannot be transferred without the agreement of the disputing entities (namely GML and Rosneft/YNG).

3. The Auction

The deadline for registration of participants expired on Friday 10th August 2007. One entity OOO Promneftstroy (owned by Rosneft) was registered and has provided the relevant security deposit of US$60 million. The Renaissance Consortium has now acquired this company. Additionally it has been agreed (subject to confirmation prior to auction) that the US$60 min funding of the security deposit by Rosneft will only become payable upon the sale of TransPetrol to a Russian party.

It is anticipated that there will be two bidders OOO Promneftstroy and an unidentified third party. We understand that a bid of US$310 million should secure the Target.

4. Summary of Anticipated Upside

Two key Target assets: (a) frozen cash US$1.5 billion; and (b) shares in Transpetrol with agreement to sell the 49% to a nominated Rosneft entity for $105 million, and (c) estimated other cash of not less than $20 million.

Auction price of US$310m.

Estimated cost of the settlement of current disputes US$1.15 billion in the conservative scenario and US$0.98 billion in the upside scenario. Accordingly, there is potential frozen cash available between US$480 million and US$650 million.

Frozen cash minus costs gives a profit before costs of between US$170 million and US$340 million. The investment period in an amicable settlement could be 45 days. In a non-amicable scenario the investment period could be extended significantly.

Proposed Deal Structure

It is suggested that Renaissance puts together a Consortium to bid for the Target.

5. Key Terms of the Deal Structure:

(a) ***Ability to participate in the auction*** *- Monte Valle a private company held by Stephen Lynch acquires OOO Promneftstroy (**Russian Bidder**) on 14th August 2007 for RUR 10,000 and assumes the obligation to pay the deposit funding (US$60 million) within 6 days (although this may be extended) and obtains relevant government approvals. Note that we have*

agreed with certain Rosneft representatives that the $60 mln funding of the security deposit by Rosneft will only become payable upon the sale of TransPetrol to a Russian party. Our participation in the auction is subject to written agreement of this arrangement prior to the auction;

(b) ***Rosneft/YNG agreement*** *— the Russian Bidder enters into a settlement agreement with Rosneft/YNG whereby they agree to co-operate to assist in the unwind of the stichting to the extent possible (they are not a party to the trust but it is likely a Dutch Notary will require their agreement) and agree to settle, withdraw or, if requested by Russian Bidder to assign their claims to the Russian Bidder;*

(c) ***Governmental support to settlement with GML*** *—is provided;*

(d) ***GML agreement*** *— the Russian Bidder enters into a settlement agreement with GML pursuant to which (on the condition precedent that Rosneft/YNG have entered into an agreement to settle their claims) GML agree to co-operate to unwind the stichting, settle existing claim and bring no further claims against Target and agree to the transfer of the Target shares to the Russian Bidder for payment by the Russian Bidder of US$804 million;*

(e) ***Auction*** *— Russian Bidder participates in the auction and secures the Target for US$310 million;*

(f) ***Dutch Stichting is unwound*** *— pursuant to liaison between the Dutch notary, Russian Bidder, GML, Auction Seller and Rosneft/YNG;*

(g) ***Transpetrol dividends*** *— now will be for the sole benefit of the bidding Consortium*

(h) ***Sale of Transpetrol*** *— Russian Bidder sells Transpetrol to an identified Russian purchaser for US$105 million;*

(i) ***GML paid*** *- US$804 mln by Russian Bidder;*

(j) ***Settlement of other liabs;***

(k) ***Settlement with PKN****— for between US$125 million and US$250 million;*

(1) ***Rump assets*** *— to be disposed of by the Consortium thought to include (Petroval cash account; balance of frozen funds and Intelligent Energy);*

(m) ***Target wound up*** *— as soon as possible target to be sold to a ring fenced entity and wound up.*

2. Documentation:

(a) ***Acquisition of OOO*** *Promneftstroy – Russian governed SPA; participation interest transfer form; assumption of US$60m debt obligation; articles of association or some other document demonstrating that Renaissance has control of the decisions made by the vehicle; side letter on debt obligation deferral*

(b) ***Government Auction*** *– English law governed SPA; Deed of transfer; best endeavours side letter from seller.*

(c) ***Rosneft/YNG*** *– Assignment/Waiver of Claims against Target;*

(d) ***GML*** *– Letter confirming interest to cooperate and settle;*

(e) ***Investor*** *– Consortium agreement between Renaissance and investor (to follow – good faith negotiations).*

(f) ***Steve Lynch*** *– shareholders' agreement relating to control of Russian Bidder between SL, RD and Renaissance; engagement letter covering economics.*

(g) ***Richard Deitz*** *– investment agreement between Steve Lynch, Renaissance and Richard Deitz setting out the structure and mutual representations that no interest in claims; no side deals; we all bear our own expenses.*

3. Proposed investment amounts/economics:

(a) Renaissance invests US$150 million.

(b) Richard Dietz invests US$100 million.

(c) US$60 million debt finance (from rollover of Security Deposit)

(d) Steven Lynch receives up front "management fee" of US$1.25 million and a 10% carry on realized profit.

4. Risk factors:

(a) Agreement from GML to waive claims against Target;

(b) ***Calculation of the amount owed to GML*** *(US$804 million or more?);*

(c) ***Visibility on the frozen cash asset*** *(we have strong visibility on the US$1.5 billion);*

> *(d)* ***New claims coming out of the woodwork****;*
>
> *(e)* ***Ability to transfer the shares (Dutch law does not recognize foreign bankruptcy)****;*
>
> *(f) Legacy issue of the Target (more Steve Lynch's issue);*
>
> *(g) Tightly drafted investment agreement; and settlement agreements;*
>
> *(h) Indemnity in auction SPA (more Steve Lynch's issue); and*
>
> *(i) Clear understanding of how to unpick a stichting (we are relying on Clifford* [Chance] *and Dietz)*."

The last page anticipated an auction price of US$310 million, and looked at a potential profit (before fees) from that outlay of between US$170 and US$340 million, after the sale of Transpetrol for US$105 million.

68. As to the Heller emails, the following passages are relied upon by the Claimants:

(i) Heller 2

> "*This week, the Russian bankruptcy court is auctioning off the last package of Yukos assets… A group of which we may choose to be a member has the inside track to win the auction. The main asset we will win is a Dutch B.V. called Yukos Finance.*"

There is an erroneous reference to the sale of Transpetrol to Rosneft, though this is corrected in Heller 3 (though incorrect again in Heller 4).

(ii) Heller 3:

> "*There are all sorts of law suits that need to be dealt with before these assets can be liquidated, but we would be getting them at a very good price because only one party is bidding in the auction.*"

(iii) Heller 4 (called the "Lynchpin email"):

> "*Rosneft basically controlled the auction and decided it would clear at a certain price. Rosneft created a company to bid, put down the deposit and bid. It then decided that (1) it did not want to own the winning company and (2) it did not want to deal with the mess of the Dutch BV, except that it wants the Slovak pipeline company. Renaissance Capital, VR Group (Deitz) and Monte Valle (Steve Lynch – who is the lynchpin so to speak, in this deal, having won a previous Yukos auction in cooperation with Rosneft) struck an agreement with Rosneft to buy the bidder company for a nominal price. In exchange all Russian government entities will surrender all claims on the Dutch BV; Group will agree to sell Slovak company to Rosneft for a pre-*

> *agreed price. The Group will then work on unwinding the Dutch BV.*"

There are many factual errors in this passage, as is clear from the account I have set out above.

69. Finally, there is a passage upon which the Claimants rely in Mr Lynch's email to Mr Hellman of 14 August, from which I have already quoted in paragraph 62(i) above:

> "*The winning bid is estimated as $305M.*"

70. The matters relied upon by the Claimants fall within three categories.

71. Category is by reference to the statement in the Investment Memorandum that "*the likely auction bid price to access this surplus is $310 million*" and the statement in the Lynch email "*the winning bid is estimated at $305M*".

72. The Claimants submit that these statements support the case that the Claimants were told what to bid by Rosneft. The Defendants point to Mr Hellman's own earlier statement in his 'one-pager' to show that from the beginning it was anticipated that the lot should sell for a price near the starting price of US $299 million, and once the onward sale at US $105 million was arrived at there was a straightforward deduction from the sums in the *Kremlin Memo*, which is not suggested to have been at that stage infected by dishonesty but rather by optimism. Rosneft itself had advanced to PNS, to bid with, a loan of RUB 8 billion, which amounts to approximately US $312 million.

73. In one of the internal emails between the Defendants to which I refer in paragraph 48(iv) above as forming part of the RenCap cache, Mr Lynch commented in October 2007 to Mr Reid and Mr Foresman, by reference to the 14 August email, that "*I've re-read that email and there was nothing in there that concerns me. Indeed we estimated the winning bid at $305, we budgeted $310 and we won at $307*". In an email which Mr Foresman sent to Mr Olphert, Mr Jennings and Mr Reid (and sent on by Mr Jennings to Mr Pertsovsky) on 15 August, immediately after the auction, he wrote:

> "*Been a good day. We won the auction for 3mln less than we thought, plus Rebgun informed Lynch that he lined up a Dutch notary who would assign title to us on Sept 10, so positive developments.*"

74. There is then a further factor, in that the Consortium incorporated in their internal Investment Agreement, regulating the arrangements between themselves, signed on 15 August, an express provision by clause 3.1.2 that "*if* [PNS] *is not the only participant in the Auction which offers the starting price, the Auction Representative shall make such further Auction bids as might reasonably be expected to result in [PNS] winning the Auction, provided that the final bid of the Auction Representative shall not exceed US $310,000,000 in any circumstances*". Mr Kendrick relies on this as evidence of dishonesty, in that he submits that it is wholly unlikely that without an agreement for a fixed price (of $310M or less) they would have given up the chance of success for themselves (and fulfilling their arrangement with Rosneft), by preventing themselves

from bidding further than $310M if necessary. The Defendants do not accept this argument at all:-

(i) If there was an agreement with Rosneft to win the auction for a fixed price (involving squaring any opposition by Versar) then there was no need for the limit. A limit was necessary, as in any other speculative and risky auction (and just because there was no fixed price agreed). Mr Lynch gave persuasive evidence that he was unhappy with the limit, and, because he was the sole participant, locked in a room out of contact with his partners, he would if necessary have gone on bidding (and Mr Foresman, to whom he made this comment at the time, and who told him that in those circumstances it would be on his own head, himself agreed in evidence that he would have been uncomfortable if they had lost the bid because of the limit).

(ii) Both Mr Jennings and Mr Deitz, extremely experienced in this field, explained why a limit was essential in such an auction, to exercise discipline. Mr Deitz explained that his general practice is to start with a starting price and have a very small increment by which they are willing to improve on it:

> "*There is no example in our history… of an auction where we started, say, at 100 and wound up paying 150. This is not Sotheby's. This is not how this works…we had a price we were going to pay…and if the auction went for more than that, we were not going to win.*"

(iii) Mr Kendrick challenged the Defendants on the basis that the *Kremlin Memo* said that in certain events they expressed willingness to pay more. But that was an obvious misunderstanding, the reference being to possibly paying more out of the Yukos Finance assets to certain creditors, if they had succeeded in the auction.

75. If Versar was squared not to bid over US $310 million, then having a limit of US $310 million would be unnecessary. In the absence of such evidence about Versar, the existence of a bid limit does seem to me to be inconsistent with price fixing. Versar had never won any previous lots, and did not win this one. They made three bids, and PNS won with their third, at an equivalent of $305 million. There was still room within the $310 million limit for one more bid each. If PNS had started the bidding, there would have been room within the limit for more bids.

76. Category 2:

The Investment Memorandum:-

> "*The opportunity to participate and be the likely winner has largely arisen due to very close relationships that certain Renaissance individuals enjoy with the Kremlin.*"

Heller 2:

> "*The inside track to win this auction.*"

Heller 4:

> "*Rosneft basically controlled the auction and decided it would clear at a certain price…created a company to bid, put down the deposit and bid.*"

77. This last statement is not, in terms, that there was a fixed price, but is suggestive of it. Rosneft did not want to win, and so left the field to the Consortium. Mr Deitz denies that he said this or anything like it to Mr Heller, and of course Rosneft was not in a position to decide that the lot would clear at a certain price, without having squared the opposition, which is not said. It is any event inaccurate, because it suggests that Rosneft did bid. The other statements are relatively anodyne from the Defendants' point of view. They did indeed have the *inside track*, and, as a result of the connection made with Rosneft, the Consortium was the *likely winner*. Mr Jennings did not shy away from this position, when he said at Day 9/137:

> "*If you uniquely…could achieve…a deal with both sides you know you are…..immeasurably stronger than anybody else. Now if somebody else, Gazprom has some crazy agenda to buy, for some geopolitical reason buy a pipeline, and they are going to [pay] a crazy price, let them go for it. That is their business, but anybody who is bidding for this as a commercial opportunity is enormously handicapped relative to u*s."

and again (Day 10/37):

> "*This isn't a situation where you have…two bidders with the same information and the same advantages and disadvantages. This is a situation where, by virtue of getting those mutual agreements, one bidder has put themselves well, not just in a vastly better position, we are in a position where it is actually untenable for somebody else to bid, unless they are bidding for non-financial reasons*".

Mr Deitz agreed, and added (Day 12/118):

> "*We certainly thought we had the inside track to win the auction because we had done the homework that no one else had done or had been able to do.*"

78. Nevertheless, as Mr Lynch said in the 14 August email, still not confident:

"*There are several issues outstanding before I know if we bid to win or bid to lose tomorrow.*"

79. Category 3:

The Investment Memorandum:

> "*It is anticipated that there will be two bidders* [PNS] *and an unidentified third party.*"

Heller 3:

"*Only one party is bidding in the auction.*"

The latter statement in Heller 3 is not accurate, and Versar did bid. As for the statement in the Investment Memorandum, that is accurate, the "*unidentified third party*" being Versar. It gives no indication that the other party will or will not bid or has been in some way neutralised. Mr Kendrick submits that the only way that the Defendants could have known at that stage that there was one other unidentified third party would be if Rosneft had told them. He points to a press report of 13 August, in which Mr Rebgun "*declined to comment on how many bidders would take part in the sale, but said the auction, which must have at least two bidders to be valid, was very likely to happen on Wednesday as scheduled*".

80. The sentence is followed in the Investment Memorandum by: "*We understand that a bid of US $310 million should secure the target*", which of itself adds nothing to Categories 1 and 2 discussed above, but Mr Kendrick submits that the Consortium could only *understand* this from Rosneft. Mr Lynch thought that he had heard the name Versar over the weekend at a well-attended wedding, and Mr Deitz recollects at some stage searching Versar to see if he could find out anything about them, so that the name must have become available in some way to him. But the inference is that Rosneft told them that there was another bidder and, in that context, led them to understand that US$310 million should secure the target, that the unidentified third party would not be in a position to overtop that figure. That is the inference. The Defendants do not however appear to have gained the confidence that they were bound to win:

(i) Mr Deitz told Mr Osborne and others late on the 14th:

"*I would give us a 50/50 chance of getting there.*"

(ii) Mr Foresman sent an email on the 15th itself to Mr Deitz and Mr Olphert indicating some nervousness, given his last contact with Mr Lynch before Mr Lynch went into the closed room: "*There are two groups and he had to hang up before I could ask him if he meant two groups including us*". Mr Deitz responded: "*May the force be with him*". There was excited celebration amongst all those, including Mr Pertsovsky, Mr Olphert and the various lawyers, that they had succeeded, so that (by reference to Mr Lynch's email of 14 August referred to above) they had bid in the event to win rather than bid to lose.

81. To set against the inferences as to the existence of a corrupt agreement which Mr Kendrick seeks to draw from the documents, and to put it in context with what I have already found to be impressive oral evidence from the five Defendants, there are the following factors to add:-

(i) If conspiracy there was, it was a conspiracy between the Russians, Mr Sharipov, formerly of Chadbourne & Parke, and the senior management of Rosneft, and Westerners whom, apart from the relationship between Mr Warnig and Mr Foresman, they did not know, and whose loyalty and confidentiality they could not secure.

(ii) The contents of the Investment Memorandum said to record the conspiracy, so that anyone with *brains to read* would have recognised an unlawful conspiracy to rig an auction, was not limited in its distribution. It spread the knowledge of an involvement in what is said to have been an unlawful conspiracy much wider than the five Defendants: certainly the two very experienced senior executives Mr Olphert and Mr

Pertsovsky, and probably Mr Horn, but to all the other parties to whom it was distributed – including Mr Montealegre of Sigma Fund, but others too whose participation was being invited. The Consortium did not keep this allegedly dishonest opportunity to themselves, but they took substantial steps to syndicate it.

(iii) There was plainly good reason for Rosneft to reach an agreement with the Consortium, not least if, for the reasons actually set out by Mr Heller, they did not want themselves to win the auction. They would achieve waiver of what on any basis were very substantial claims and cross-claims between Rosneft and Yukos Finance, the subject of the second side letter, while also, as Mr Lynch described (Day 14/45), recovering the loan made to the Consortium as against a price for Transpetrol which was "*exactly the number that previous companies had agreed to buy Transpetrol for. That was just a no-brainer deal.*".

(iv) The fact that 8 billion roubles had been loaned by Rosneft to PNS when PNS was to be Rosneft's vehicle is consistent either with their expectation (similarly to Mr Hellman) that that was about the sum expected to be needed to bid and with the fixing of a price even before the Claimants came on the scene, but the former seems to me more likely.

(v) I have previously recorded what seem to me to be two important points made by the Defendants:-

(a) The absence of any 'smoking gun' in the internal communications revealed in the RenCap cache, which they can never have thought would see the light of day.

(b) The seeming inconsistency between the imposition of an express limit on the Consortium's bid with the suggestion that the price had been rigged.

82. Having weighed up all the above, I do not conclude that there was a breach of Article 1064 by the Defendants: I am not persuaded that there was an unlawful agreement to rig the Lot 19 auction between Rosneft and the Consortium. Accordingly, the claim against the Defendants is dismissed. Even if I had so concluded in relation to the other Defendants, I find it very difficult to find any justification for having included as a Defendant Mr Jennings, who was out of the country for most of the material time, and in particular no justification whatsoever for the pursuit of the solicitor Mr Reid, who was involved in 36 hours of drafting, at his employers' instance.

The Other Issues

83. In the circumstances, the Claimants' case in any event therefore cannot succeed, but I deal with the other Issues set out in paragraphs 41 to 46, because they have been so thoroughly argued, though not in exactly the same order. All of them depend to some extent on my resolution of issues of Russian law, on which there has been dispute between the experts, Dr Gladyshev for the Claimants and Mr Kulkov for the Defendants. For the most part such disagreements have been few, though they will appear clear from my conclusions below. Although both are extremely eminent, and I was greatly helped by both of them, where they differed I preferred the views of Mr Kulkov. He seemed to me to be the more objective, and to deliver his evidence more

calmly than Dr Gladyshev, who not only did not persuade me of all his views, but in some respects put forward theories which were not adopted or pursued by Mr Kendrick, and he was equally enthusiastic about all his arguments, including the less good ones.

Limitation (Issue 5)

84. I turn to the case put forward by the Claimants to seek to persuade me that their claims in respect of these events of 12 years ago are not statute barred, whether by August 2010, the 3 year period, provided by Article 196 of the RCC, set out in paragraph 39 above, as from the August 15 auction or, as the Claimants would assert, October 2010, being the relevant date said by them to be when loss was first suffered. The Claimants claim that they can rely upon one or more means to extend time beyond 2010 by reference to the insufficiency of their knowledge by those dates. They rely upon their case that they only had sufficient knowledge once they received, in October 2014, the RenCap cache, containing the Information Memorandum and Heller 2 and 3, and were able by February 2015 to assimilate and analyse it, whereafter their proceedings were issued in November 2015. In essence, the Defendants say that the Claimants had enough from Mr Godfrey's communications with Mr Hellman, including receipt of Mr Lynch's email of 14 August (e.g. paragraph 69 above), and his conversation with Mr Deitz, in August 2007, and, if necessary, the receipt of Heller 4 in April 2009.

85. The Claimants face considerable difficulties in this regard. The first is that they bear the onus. The second relates specifically to the evidence in this case. They are left to juggle between the rival demands of establishing liability and escaping limitation. Mr Kendrick does not rely (see paragraph 48(vi)), for establishing liability, on Mr Godfrey's receipt of the "*incriminating*" *Kremlin Memo* from Mr Hellman in August 2007 (paragraph 53), but, as will be seen, Mr Kendrick had greater difficulty in seeking to avoid the consequences of Mr Deitz' telephone conversation with Mr Godfrey on August 2007 (paragraph 58 above), to which I shall return.

86. There is little, if any, dispute between the experts as to whether there is any difference between the English and Russian law on limitation, save for the period being 3 years rather than 6. Dr Gladyshev speaks of the time when a claimant acquires actionable knowledge of the unlawful act (and some harm done). Mr Kendrick refers to two Russian decisions for the proposition that time runs once there has been knowledge of the facts, investigation of the facts and a conclusion formed as to the violation of the right which is sufficient to issue a properly detailed claim. Dr Gladyshev accepts that good grounds are sufficient, enough to start a claim but not necessarily to win it. He points to the Russian Court's reliance upon documentary evidence, although Mr Kulkov did not agree that that altered its approach as to the need for *actionable knowledge,* but, as Mr Kendrick acknowledged, in a case of fraud an English Court too will be looking for documentary support. Mr Kulkov agrees that the relevant date is when the injured party acquires knowledge, which is not to be equated with mere suspicion. It is common ground that the test is objective. It seems clear to me that, in both Russian and English law, the appropriate question is when a claimant can issue a pleadable claim. Apart from the question of concealment, which arises under both English and (by virtue of Article 10 of RCC) Russian law, that is the issue.

87. As in other areas, cases were run by Dr Gladyshev which Mr Kendrick did not adopt, or at any rate did not pursue with vigour. He ran a case by reference to an interpretation of the September 2013 amendment of Article 200(2), with which Mr Kulkov

persuasively disagreed, which would, if correct, have extended the limitation period, but Mr Kendrick conceded that the limitation defence is not affected by those transitional provisions. He also suggested that if losses were suffered after the expiry of the original limitation period, e.g. the later legal costs, or some of the Transpetrol claim, unlike in English law they would trigger their own limitation period. Again, in the light of the persuasive contentions of Mr Kulkov, this suggestion was not pursued. One issue remains, as to the liability of individual Defendants, to which I shall return in paragraph 94 below.

88. In the Memorandum by the US lawyers, and in one of the US lawyers' own affidavits in the October 2017 1782 proceedings, the Claimants relied heavily on the evidence of Mr Godfrey and Mr Feldman, another representative of the Claimants at the time, as to conversations they had had, respectively with Mr Deitz and Mr Foresman, to the effect that the Consortium "*had an arrangement with Rosneft and Rebgun whereby* [the Consortium] *would win the Yukos Finance auction*", as being a clear admission by the Defendants of their participating in the rigging of the auction. Mr Godfrey himself, in a declaration dated October 18 2007, sworn under penalty of perjury, deposed that on 13 August 2007 Mr Deitz had stated to him in a telephone call (the call I have referred to in paragraph 58 above) that "*he and his business partners had an agreement with Rosneft and Edward Rebgun to buy Yukos Finance at the auction*". In an email dated 29 August 2007 to Ms Davidson, the Claimants' PR consultant, he stated "*Deitz called me and told me that they were planning to win the auction, that they had an agreement with Rosneft to do so*".

89. In Mr Godfrey's witness statement in these proceedings, at paragraph 68, he repeated what he had said in the US declaration, in slightly different terms, omitting reference to Mr Rebgun, as he had done in his email to Ms Davidson. In an October 2007 internal email produced as part of the RenCap cache, after he had seen Mr Godfrey's evidence in his sworn declaration in the US, Mr Deitz said to his lawyers and to Messrs Foresman, Lynch and Reid: "*what I most vehemently object to is Godfrey's declaration in regard to my call with him. I never represented to him that we had an agreement with Rebgun and Rosneft that we would win the auction. I did tell him that we were interested to take part and hoped that we would be able to win*." When Mr Godfrey gave evidence before me, he said, in terms, that Mr Deitz did say to him, in that telephone conversation, that he had an agreement with Rosneft to win the auction, and that he had then believed from what he said, and still believed, that the Consortium had conspired with Rosneft and Rebgun to buy Yukos Finance in a rigged auction.

90. When Mr Kendrick came to cross-examine Mr Deitz, he did not put to him that he had said to Mr Godfrey in that conversation that they had made a deal with Rosneft to win the auction by rigging it, and he accepted that he was thereby not challenging Mr Deitz on it. This was plainly an attempt by Mr Kendrick to downgrade Mr Godfrey's declaration so as not to rely upon it for the purpose of liability, and to seek to avoid the obvious difficulties to his case on limitation. But he cannot avoid the fact that that is what Mr Godfrey and his colleagues believed (and deposed) had been admitted at the time - in August 2007, over 8 years before these proceedings were issued – and it is that of course which is and remains significant for limitation purposes. It was far more than suspicion, but rather an admission, and it founded the case as to rigging which they made in the 1782 proceedings.

91. Mr Godfrey, in his email of 29 September 2007 to Mr Misamore, Mr Osborne and Mr Theede, stated his belief that Consortium had conspired with the Russians and Mr Rebgun to rig an illegal auction, a belief plainly fortified by his conversation with Mr Deitz, and no doubt by Mr Foresman's conversation with Mr Feldman, and the information that he had been supplied by Mr Hellman. His contact with Mr Hellman had started as early as 27 July, when Mr Hellman forwarded to Mr Godfrey an internal VR Capital email, and on 4 August Mr Hellman informed Mr Godfrey that the proposed Consortium was waiting for feedback from Rosneft, and he also put Mr Godfrey in email touch with Mr Lynch. As Mr Godfrey confirmed in evidence, he was keen to "*get his hands on any incriminating or other illuminating information*" and, since he was in constant touch with Mr Godfrey, Mr Hellman supplied him with all relevant information. Thus, he knew of the involvement of RenCap in the Consortium and specifically received, as he accepted, Alex's email to Mr Hellman of 10 August 2007 (paragraph 61 above), and in particular the attached *Kremlin Memo,* to which he memorably responded (paragraph 53 above). Mr Godfrey disseminated such information to others on the Claimants' side, and it seems also to the Slovakian Government, at a meeting on 22 August 2007, when the minutes of that meeting, between the Claimants' representatives and the Slovakian Government, record the Claimants' allegations of collusion between the Consortium and Rosneft (and Rebgun). I am satisfied that he also received from Mr Hellman at the time Mr Lynch's email of 14 August 2007 (paragraph 69 above).

92. The position was made *crystal clear* to the Claimants by their receipt in April 2009 from Mr Heller of the Lynchpin email, Heller 4, quoted at length in paragraph 68(iii) above. Mr Kendrick sought to say that the effect of this was palliated by the declaration sworn in the Dutch proceedings by Mr Heller, in which he put forward an explanation of it, but it is plain that the Claimants did not believe the explanation. They described it in their pleaded defence in the Dutch proceedings dated 14 July 2009 as "*incredible*", stating that it was "*crystal-clear from the [*Lynchpin*] email that the auction had a predetermined outcome*."

93. What was "*crystal clear*" to the Claimants, and pleaded in the Dutch proceedings in July 2009, must have been pleadable also in proceedings in this Court, well within the limitation period, and even if the limitation period did not start until April 2009, it is long expired. They received the RenCap cache thereafter, which plainly strengthened their case (with the Investment Memorandum and Heller 2 and 3), but in my judgment it is quite clear that they had sufficient evidence to plead and commence their case without it, which, to avoid the expiry of limitation in relation to the events of 2007, they should have done.

94. There was an interesting dispute between the experts as to the effect of the introduction into Article 200(1) of the RCC in September 2013 after "*knew or should have known about the violation of his right*" of the words "*and who must be a proper respondent in the claim to protect such right."* There were powerful rival contentions, each by reference to authority, which the other expert doubted or distinguished, as to whether this was clarificatory and hence retrospective, or only prospective. The significance in this case is limited, because Dr Gladyshev did not contend that this would mean that a claimant did not have to commence a claim against anyone until he knew of all defendants, and it is common ground that the limitation period is separately calculated in respect of each defendant, even in an Article 1080 joint liability case.

95. However, even if there must be actionable knowledge in respect of each of the Defendants before the limitation period in respect of that Defendant commences, a dispute at Russian law which I do not in the circumstances need to resolve, it does not avail the Claimants in this case. If the general limitation argument is resolved against the Claimants, there can be no argument in this respect about Messrs Lynch, Deitz and Foresman. As to the others, I have already concluded that the case alleging involvement of Mr Jennings and Mr Reid is weak, as now brought in these proceedings. However, insofar as there were a case to be pleaded alleging unlawful acts by the Consortium, so far as Mr Jennings is concerned, Mr Godfrey accepted in evidence that, in the light of an email exchange of 22 and 23 August 2007 ("*no less a personage than STEPHEN JENNINGS will be wanting to meet with* [Mr Misamore])", he believed that Mr Jennings was involved. The full affidavit by Mr Jennings disclosing that he was party to the approval of the transaction, filed in the Dutch proceedings on 23 August 2010, within 3 years on the Claimants' case, did not prompt any proceedings in this Court, and any fresh limitation period would also be long expired.

96. As for Mr Reid, he was named by the Claimants as a party in the Dutch proceedings in 2007, was at a meeting between the Consortium and the Claimants to attempt a resolution in August 2008, when Mr Godfrey accepts that he was told by Mr Foresman that Mr Reid had been involved in the transaction prior to the auction, and his role was specifically addressed by the Claimants in the Dutch proceedings in July 2009.

97. Even if paying regard to Dr Gladyshev's view of the *"peculiarly documentary*" approach of Russian law means that it was necessary for there to be documentary evidence in the Claimants' hands from which inferences could be drawn, the Claimants plainly had enough to plead a case by July 2009, as they in fact did in the Dutch proceedings: and, insofar as separate consideration is required in respect to each Defendant, they had such a case by then, or at the latest by August 2010. The limitation period expired long before November 2015.

Other limitation arguments

98. The concealment case appears to me unarguable. At Russian law, as at English law, denials by a potential Defendant are not sufficient (particularly when they are not believed, as Mr Godfrey accepts he did not believe) and indeed those denials continue to date. No acts of concealment are identified, the denials apart, and I have already concluded that the Claimants had sufficient to plead a claim within the limitation period.

99. The UK Foreign Limitation Periods Act 1984 provides in s.1 for the application of foreign limitation law in cases such as this, and then s.2 sets out exceptions where that provision is disapplied; by s.2(1) it does not apply to the extent that its application would conflict with public policy, and by s.2(2) it shall conflict with public policy "*to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings*". It is not suggested that the fact the Russian limitation period is 3 years, as opposed to the English 6 years, amounts to a conflict with public policy. What is relied upon by the Claimants is the undue hardship provision, which must be read in the light of my conclusion that they could and should have brought proceedings within the Russian limitation period (and indeed within 6 years of August 2007, if the UK period applies). The case as to undue hardship has been pleaded at some length in the Reply; but it is really now slimmed down to (1) the fact

that the Claimants had other priorities, such as pursuing or resisting the Dutch proceedings and (2) difficulty of serving proceedings on the Defendants.

100. As to (1) clear guidance is given by Longmore LJ in **Bank St Petersburg v Arkhangelsky** [2014] 1 WLR 4360 at [19] namely that the Claimants are required to establish at a minimum that "*the time period prescribed by the [foreign] limitation provision is such that its application would deprive the claimant of his claim in circumstances where he did not have a reasonable opportunity to pursue it if acting with reasonable diligence and with knowledge of its potential application*". That is an overwhelmingly difficult target for the Claimants in this case, given the resources available to them. Mr Godfrey effectively disowned the suggestion in evidence, accepting that the Claimants would have and could have brought proceedings, as he put it, as soon as they considered that they could win them – not of course the test.

101. As to (2), I am satisfied on the evidence that, although issuing and serving in Russia would plainly not have been an option, it would have been perfectly feasible for them to bring proceedings in England and Wales, by reference to the presence here (known or capable of being known by them, both by virtue of the continuing contact through the Dutch proceedings and the resources spent by the Claimants on investigation) from 2008 to 2009 onwards of Mr Jennings and between 2008 and 2010 of Mr Reid, as the anchors, enabling joinder of all the other Defendants. If necessary, notwithstanding the Claimants' lack of success in relation to serving 1782 proceedings against them, Messrs Lynch, Foresman and Deitz were in the USA; and there could also be recourse against or via Mr Heller in the USA and/or VR Capital in the Cayman Islands and RenCap in Bermuda. I would not have found undue hardship established.

102. In any event, even if the undue hardship exception might apply, there would then be an issue as to whether the effect of s.2(2) of the Act is that the English limitation period would apply (in which case the Claimants would still be significantly out of time) or that there would be no limitation period at all, as the Claimants assert, unlikely as that would seem. This is an issue which I do not resolve, since it does not arise. The Defendants rely on the dicta of Bingham LJ in **The Komninos S** [1991] 1 Lloyd's Rep 370 (CA) at 377 and in particular of Nourse LJ, following **The Komninos S** in **Arab Monetary Fund v Hashim** [1996] 1 Lloyd's Rep 589 at 600, while the Claimants refer to the dicta of Leggatt J in **Alseran v Ministry of Defence** [2017] EWHC 3289, an *obiter* statement by the judge, to whom the two Court of Appeal authorities do not appear to have been cited.

103. If I had not found that the Claimants' claim failed, I would have been satisfied that it was statute barred against all Defendants.

Issue 2

104. None of the other issues set out in paragraphs 40 to 46 therefore arise, but I shall deal with them, notwithstanding my conclusions above, and most of them depend on an analysis of Russian law. There are two questions contained within Issue 2, which are intertwined, and there is not a great deal of dispute between the Russian experts. The first of those questions relates to what has occasionally been called 'standing', namely who is entitled to allege that he is a victim of the unlawful act the subject of Article 1064, i.e. can the Claimants claim that they have suffered loss by virtue of the violation of their civil law rights as a result of the unlawful act. As I said in paragraph 1 above,

this is not a case in which the Claimants claim to have suffered loss by deprivation or diminution in value of the shareholding in Yukos Finance acquired by the Consortium allegedly as a result of unlawful rigging of the auction. The claim that is made relates to the legal costs of the 34 proceedings (and the Transpetrol claim), and the 'standing' question interrelates with the second question, namely whether they can surmount the problem of causation.

105. As to the first question, there is some degree of dispute between the experts as to the impact of Article 1064. As to the second, there is no dispute between them as to the test at Russian law in relation to causation. It is common ground that a claim must first satisfy the 'but for' test, which is entirely analogous with English law, and there is then a further test as to whether the Claimants can show a direct and immediate connection between the loss and the unlawful act. This second test only arises if the first test is satisfied. The other dispute between the experts (Issue 3) relates to whether, in the event that the 'standing' and 'but for' tests are satisfied, the Claimants can in any event recover what has been called their "top up costs", namely the amount expended by them on the 34 proceedings, over and above that which by virtue of the limited recovery of litigation costs permitted under Dutch law, they have not been able to recover.

106. So far as 'standing' is concerned, the Defendants emphasise that a claim under Article 1064 is in respect of the violation of a personal right, and for restitution of that right. They submit that there is no such claim here. The Claimants lost their interest in/management of Yukos Finance by virtue of the bankruptcy administration, eventually found at the end of the Dutch proceedings to have been unlawful, and not as a result of any allegedly unlawful auction, the issues as to which, though raised in the Dutch proceedings, were left unresolved. There is a Russian law claim which can be made in respect of an allegedly invalid or unlawful auction under Article 449 of the RCC, and the experts discussed whether the Claimants would have fallen within such provision, for which they were in any event out of time, but the Claimants point out that the experts agree in any event that the category of those who can claim under Article 1064 is wider than under Article 449.

107. The judgment of the Supreme Arbitrazh Court in the case of **Fridom Ay Limited** of 17 December 2013 No 9837/13 shows that Russian legal costs in resisting violation of anti-monopoly law are recoverable by the victim as damages or compensation. I can for myself see that Article 1064 is *prima facie* broad enough to extend wider than the straightforward claims of diminution or loss of a shareholding resulting from an unlawful act said to cause loss to a victim; but in this case the Defendants rely upon causation to prevent recovery.

108. As to causation, as set out above, the Claimants must surmount two hurdles, the 'but for' test and then the 'direct and immediate' test. The Defendants contend that the Claimants fail at the first hurdle. The most appropriate authority in Russian law, illustrating the concept of 'but for' in a way which is very familiar to an English lawyer, is the judgment of the Orenburg Region Arbitrazh Court of December 2015 in **Krestyanskoye Delo Limited v Military Insurance Company** 47-4311/2014. It is quite apparent from that decision that if, as was concluded to be the case there, the loss would have occurred in any event, then the claim fails. In this case the Defendants submit that it is wholly apparent from all the evidence, both the steps taken by the Claimants to discourage participation by anybody in the auction and then the deliberation by Mr Godfrey and his colleagues to question and challenge every action

by Mr Rebgun as administrator, including all the 'sham auctions', as they always described them (paragraph 12 above), that the Claimants would have fought tooth and nail against any purchaser of Yukos Finance.

109. The Dutch proceedings were already in existence with that end in Holland in September 2006, nearly a year before the lot 19 auction, to declare invalid any action by the administrator. I am satisfied that proceedings would have been pursued to the end to challenge the entitlement of any purchaser, whether at a lawful or unlawful lot 19 auction or indeed on the basis of any other acquisition from the administrator, and, such proceedings would, as they were in the event, have been costly but successful. To my mind, it does not matter that the Defendants joined in the 2006 proceedings once they acquired the shares in Yukos Finance, and funded them. There was little if any consideration before me of what might or might not have happened as an alternative counterfactual hypothesis, but it seems to me clear that if the Defendants had not taken part in the auction, the same result would have occurred in respect of any purchaser, and this is not a question, as hypothesised by Mr Kendrick, of an alternative tortfeasor committing the same or similar tort, but of any purchaser, lawful or unlawful. It seems to me likely that if the Defendants had not taken part, the purchaser would have been either Rosneft or Gazprom (or Versar, in the unlikely event that it was not a vehicle for one or other of those companies); and certainly either Rosneft or Gazprom would have been even more motivated, and at least equally well funded, to fight all the way in the Dutch proceedings. Dr Gladyshev accepted that there was no case that he could show in which a Russian court had found causation where the loss would have occurred in any event, and I am satisfied that this is such a case, or at any rate that the Claimants cannot show it was not.

110. The 'but for' test renders it in my judgment wholly impossible for the Claimants to recover the legal costs of the 34 proceedings, many of which were even further removed from the auction, such as the proceedings to discipline the notary who had notarised the purchase (referred to in paragraph 57 above). It also applies to the Transpetrol claim, which relates to the fact that when the Claimants sought to sell the Transpetrol stake to the Slovakian government, there was plainly an issue as to whether they had title to do so given that the administrator had passed title to the Defendants, and it was inevitable by virtue of the dispute of title that the proceeds would be paid into escrow, where they remained until the eventual success of the Claimants in the Amsterdam Court of Appeal, in sufficiently establishing the invalidity of the bankruptcy administration. This would in my judgment have occurred in relation to any purchaser of Yukos Finance, lawful or unlawful, because of the challenge to the administration.

111. I am satisfied that the Claimants fail at the first hurdle of causation. Their difficulty would be even greater in my judgment in respect of the 'direct and immediate' test which they would also need to have met, particularly in relation to the 34 sets of proceedings, but this does not arise.

Recovery of Legal Costs (Issue 3)

112. Even without the Claimants' problem on causation they would have faced a formidable difficulty in their way with the legal costs claim. It is, as must be recognised:

(i) a claim for recovery of costs over and above those only allowed and ordered by the relevant court: and

(ii) in Dutch proceedings, not Russian domestic proceedings.

113. It is common ground that there is no Russian case, nor any Russian academic authority, in which such a course has been taken or suggested. What there is, which is of course the basis of the Claimants' case, is authority from two significant cases, the **Bolshevik Factory** case in the Constitutional Court in February 2002, 2002 N-22O, and **Eurotruck Limited** 13456/08 March 3 2009 in the Russian Supreme Arbitrazh Court. This is authority that where a Russian court had no power, in the absence of any procedural code or otherwise, to award costs at all, and had not done so, the result of such a lacuna, being the absence of <u>any</u> recovery of costs by a successful party was unconstitutional, and such costs could be recovered as compensation by reference to Article 15, coupled in the **Bolshevik** Factory case with Article 1069, being the equivalent in the case of a tort by the Government of 1064 - though 1069, unlike 1064, does not include the words upon which, as will be seen, Mr Kendrick relies, of provision for *full compensation*.

114. Clearly the Constitutional Court could, as it did in **Bolshevik Factory**, find domestic costs rules unconstitutional, where there was no recovery of costs by a successful party, and the Arbitrazh court could plug that gap by awarding the missing costs as compensation pursuant to Article 15 (and/or, where appropriate, Article 1064). The real issue is however, as emphasised by the Claimants, that Article 1064 provides that the victim shall be "*compensated in full by the tortfeasor*", and Article 15 speaks of *full compensation*, but this falls to be set against Article 15(1) which, as set out in paragraph 39 above, provides for *full compensation* specifically <u>subject to the proviso</u> "*if…law* [there is a translation dispute as to whether this is or should be **the** law or **a** law or simply law] *or contract does not provide for compensation of damages in lesser amounts*". It is quite apparent that in the **Bolshevik Factory** case, the relevant law did not provide for *lesser amounts* in respect of costs, but made no provision for costs at all, which lacuna the court plugged. Can that apply where Article 15 is specifically addressing a case where some, but less than all, costs are ordered?

115. Mr Kendrick submits:-

(i) that the proviso in Article 15(1) is a reference only to a provision of the Russian Civil Code (and he produced some example provisions of the Code which contain a limitation on damages) and not to (i) law generally or (ii) a foreign law, including a procedural law (although it is not clear that the Dutch costs rules are simply procedural and not substantive). There is however no support in Russian law for this proposition, either as to the restricting, or the limiting of their ambit to other provisions of the Code, of the clear words of Article 15, however translated, and it is not supported by the expert evidence.

(ii) that Article 15 is trumped by the provision for full compensation in Article 1064. Again, there is no support for this suggestion, which is not supported by the expert evidence, and it is not derivable from **Bolshevik Factory** (in which in any event it is Article 1069 not 1064 which features).

116. The Defendants submit that Mr Kulkov must be right that Article 15(1) applies equally to a foreign law. They point out further that if Article 1064 could, despite Article 15(1), override (foreign or domestic) provisions for capped costs, it must logically also override any (foreign or domestic) costs order providing for less than full compensation,

e.g. one limiting it to reasonable costs, or where such a court had, after argument, disallowed certain costs. This seems wholly unlikely.

117. I am satisfied that the Defendants' case is right that Article 1064 and Article 15 work together (as is clear from a schedule of a number of Russian authorities put together by them). Article 1064 provides the right, and Article 15 the remedy, and the limitation in Article 15(1) to the extent necessary trumps or qualifies Article 1064. In any event, there is nothing in any Russian case which supports the proposition that where there is a capped order for costs (even by a domestic court) the balance of the costs can be recovered as damages. Although, while sitting as an English judge endeavouring to find on the balance of proof what a Russian court would decide, I could be in the position to make 'new Russian law', I am not persuaded there is a sufficient basis for it, and I do not accept the Claimants' case.

Quantum

118. In the light of all my conclusions above, this does not arise, but I deal shortly with each of the two heads of allegedly recoverable loss.

Transpetrol Proceeds (Issue 7)

119. I do not in the circumstances need to resolve the claim of the Claimants to recover their lost investment costs in respect of the Transpetrol proceeds. This claim was only made at all by a late amendment, and it was then sought to be presented by the Claimants, in opening, as consequential upon a further alleged unlawful act, or series of unlawful acts, subsequent to the auction, a case which, if made, was, after objection by the Defendants, abandoned during the hearing. Such alleged losses were, after that, only sought to be recovered by reference to being consequential upon the allegation, now unsuccessful, of an unlawful lot 19 auction. The Claimants claim loss of investment income from April 2009 to May 2017. The difficulty of establishing that this loss was consequential upon the lot 19 auction is exacerbated on its facts:

    i) It is accepted that the Slovakian government insisted on the proceeds of sale of the 49% Transpetrol shareholding paid by it, when it acquired it from the Claimants in March 2009, being placed in an escrow account with the Fortis Bank, which was agreed with the Claimants as a term of the purchase agreement. It is plain that this was because the validity of the sale was in dispute, given the absence of resolution at that stage of the challenge to the validity of the bankruptcy administration. A freezing order had been granted by the Dutch Court in respect of the assets of Yukos Finance, and this order remained in place, upheld by the Amsterdam Court of Appeal in February 2009, now to include the Transpetrol proceeds. When this freezing order was lifted by the Dutch Supreme Court in January 2011, notwithstanding that those proceeds remained in the agreed escrow account, the Claimants sought from the Dutch Court an order, which in English terms would be equivalent to an application for damages on the cross-undertaking, against the Defendants and in particular against Mr Lynch as an individual, for payment of the losses said to be caused by the freezing order prior to its discharge. Strangely, the existence of the escrow account, which would have prevented the release of the proceeds in any event, does not appear to have been drawn to the attention of the Dutch Court. The claim for losses suffered by the Claimants was put, on the basis of the case

presented to the Dutch Court in 2011 by Mr Godfrey, that the frozen assets (thus including the Transpetrol proceeds) would have been invested in gold. This case was rejected by the Dutch Court, as was the claim against Mr Lynch personally, and the balance of the issue seems to have been adjourned. This does not redound to the credibility of the claim which is now put differently, and claimed in these proceedings.

(ii) There is a defence put forward by reference to failure to mitigate, in the light of the offers made by the Defendants in 2008, but not taken up by the Claimants, to invest the monies differently. The Claimants submit that, if valid at all, this factual contention would need to count as contributory negligence, which by Russian law in Article 1083 requires to be gross negligence if it is to be of impact.

In the light of my decisions above, I do not need to resolve the issue as to Transpetrol costs.

Legal costs (Issue 6)

120. The same goes for the legal costs claim in respect of the 34 sets of proceedings, which are contained in lengthy schedules served by the Claimants, separated into Schedule 1 proceedings, in relation to which 100% of the costs are claimed, and Schedule 2 proceedings, where the claim is for either 85% or 15%, by reference to unexplained apportionments. The task of presenting this claim was delegated by Mr Kendrick to Mr Khurshid QC who was faced with a barrage of very powerful points, eventually contained in 86 paragraphs of the Defendants' joint closing submissions (paragraphs 427 – 438 and 470 – 543), as supplemented by oral submissions, detailing the Defendants' case that the Claimants have not begun to serve any evidence which enables the Court to find any sum in favour of the Claimants. Mr Khurshid responded in 48 paragraphs of written closing submissions.

121. Mr Houseman carried the brunt of the Defendants' attack:-

(i) The status, role and entitlement of the seven Claimants (particularly the Third Claimant), not all of which were involved in all, or indeed in some cases any, of the 34 proceedings, and the exposition of liability of the five Defendants, again not involved in all, or in some cases any, of the proceedings, are left entirely unclear. The Claimants expressly abjured any claim against the Defendants as third party funders, but, as set out above, allege that all the costs claimed were said to derive from legal proceedings relating to the ownership and control of Yukos Finance and related companies, and consequently recoverable as consequential losses derived from the alleged lot 19 unlawful act by the Defendants.

(ii) Wholly inadequate explanation, or certainly evidence, has been put forward as to the allocation, in whole or in part, or assessment of the costs incurred in the 34 proceedings. There is insufficient direct or admissible evidence provided from the parties incurring the costs and expenses. Although letters have been provided, and, served under a Civil Evidence Act notice, from some of the relevant lawyers, the individuals making the assertion as to either expenditure or allocation are not identified. There is no or inadequate information as to how

asserted estimates were made, and the Defendants have been provided with no documentary evidence against which to test such process; and to make it worse most of the invoices or fee notes rendered by the Dutch lawyers have been redacted in the light of legal privilege, which at Dutch law is that of the lawyers.

(iii) There are said by Mr Houseman to be serious inconsistencies and numerous errors, some of them specifically identified, bedevilling many of the schedules, and doubt is cast on the propriety or appropriateness of a number of the expenses.

(iv) Some at least of the proceedings in respect of which costs are claimed relate to applications or appeals in which the Claimants were unsuccessful.

122. The Claimants sought to rely upon Russian law evidence as to the approach of the Russian courts, although even in that regard I prefer the evidence of Mr Kulkov that the primary burden of proof lies with the claimant, which must lead evidence to prove both that the damages claimed were incurred and caused by the alleged wrongdoing and that they were reasonable in quantum. However, in the event Mr Kendrick accepted that Mr Houseman was right to assert that the question of recovery of damages in an English court falls to be decided by reference to the *lex fori*, i.e. in this case English law.

123. As to this, Mr Kendrick relies upon three propositions:-

(i) An English court has frequently to take a broad brush view in relation to costs e.g. on a summary assessment.

(ii) Mr Khurshid drew my attention to **McGregor on Damages (20th Ed.)** at paragraph 10-002, and to **Zabihi v Janzemini** [2009] EWCA Civ 851 and **Experience Hendrix v The Times** [2010] EWHC 1986, by which the English court in adjudging damages is urged and expected to "*roll up its sleeves and do its best*".

(iii) He refers to evidence given by Mr Deitz in an arbitration in 2016 that already by that stage the Defendants themselves had incurred some US $35 million.

124. Mr Houseman rejects any suggestion that the judge assessing damages in a case of this kind can adopt a summary costs assessment procedure, which is in any event governed by statutory and procedural rules and principles, as a shortcut, particularly where such steps can only be taken on the basis of very well regulated solicitors' rules, and the provision of fee notes wholly different from the documentation partially provided in this case. Similarly, it is often the case that in summary assessments it is helpful to compare the costs incurred by an applicant for costs with the costs incurred by the other side. This is however a claim for damages, and the encouragement to roll up sleeves is only apt where the expenditure of such elbow grease is justified simply by hard work on documents in any event produced. The case that the Defendants make here is that no degree of hard work enables an understanding of what has been produced. In any event the encouragement of an English judge to draw his or her own conclusions or to split the difference usually applies in relation to attempts to assess future loss, not to make good lacunae in relation to alleged past losses.

125. If, contrary to my conclusions, I had been required to arrive at a figure in respect of the topping up of the Dutch or Luxembourg court orders, with reference to costs and expenses which I could be sure had been expended and were justifiable or reasonably calculated or assessed, and were consequential upon the Defendants' role resulting from lot 19, a great many sleeves would have had to have been rolled up, and indeed down, before I could have arrived at a figure in respect of which I would be satisfied that the Claimants had proved their case.

Article 1068

126. I turn to the last Issue (Issue 4), as to the applicability of Article 1068, which I have set out in paragraph 39 above. It is a particular aspect of Russian law that, if a tort is committed by an employee in the course of his employment then, whereas at English common law that makes the employer additionally vicariously liable, at Russian law liability is 'transferred' to the employer with the effect that the employee is rendered exempt. There are two issues between the parties:

(i) Does it apply if the act committed by the employee was deliberately unlawful?

(ii) Does it apply if the employee in question is the sole director and decision-maker of the company, or the alter ego? It is plain that Messrs Jennings, Foresman and Reid are all employees of RenCap. Although Mr Kendrick sought to put forward an argument that Mr Deitz fell into this position in respect of VR Capital, I am entirely satisfied that, in relation to such a very large organisation, with worldwide offices, even though he had no written contract of employment (an implied contract being acceptable in Russian law), even if he was the driving force of VR, he cannot possibly be said to be its alter ego or even sole decision-maker. However, the issue falls to be addressed in respect of Mr Lynch.

Other alleged exceptions to Article 1068 upon which Dr Gladyshev relied, such as an asserted limitation to domestic Russian employment contracts, and to employees who were also shareholders, were rightly not pursued by Mr Kendrick.

127. As to the first such issue, the Claimants submit that Article 1068 does not entitle an employee who deliberately commits an unlawful act to rely upon Article 1068, but they also asserted, relying in substantial part upon the oral evidence of Mr Kulkov, that if the company and the employee were party to a deliberately unlawful act, they could be jointly liable under Article 1080. The Defendants submit that these suggested glosses are incorrect, and that if they were correct it would undermine the whole principle of Article 1068, for Article 1068 only applies if the employee's act is tortious. They point to the Claimants' own opening submissions that "*as an exception to Article 1064, an employee may shift the liability for harm he has caused onto his employer under Article 1068, if he can establish that the tort occurred in the course of performing his employment responsibilities*".

128. The starting point for the Defendants is the judgment of Andrew Smith J in **Fiona Trust v Privalov** [2010] EWHC 3199 (Comm), particularly at paragraphs 106-108, where he carefully considers the opinions of the two Russian law experts before him. His conclusion has been served in this case under a Civil Evidence Act notice by reference to s.4(2) of the 1972 Act, but, in any event, it would be helpful to me, because the two experts whose opinion he recites in those paragraphs are addressing Article 1068, and

the same questions as are before me. He prefers the opinion that acts by an employee can be in the course of employment, and thus within Article 1068, even if they are criminal or fraudulent. Both experts before him accepted that "*unlawful and criminal acts can be done within the performance of labour duties within Article 1068"* and refer to the ruling of the Military Panel of 23 May 2003, which is in fact before me in the shape of a definitive "Review of Court Practice of the Supreme Court of the Russian Federation for the first Quarter of 2004", by reference to the **Shenyakin** case.

129. I see no distinction in the Russian cases put before me between deliberate criminal torts and negligent torts, as to whether they are or are not within the course of employment. **Shenyakin** illustrates the former, whereas **Adidas**, a decision in the Moscow Arbitrazh Court of 25 April 2018, 040/20190/2017 illustrates the latter. It seems to me that in all the Russian decisions relied upon by both sides the question is still whether the act of the employee was in the course of employment. In **Minbank,** a decision of the Arbitrazh Court of the Central Okrug dated 11 November 2015 F10-3897/2015, there were criminal actions by an employee which were held not to fall within his job duties or official duties, and were "*against the will and interests of the employer, and done for mercenary purposes and in bad faith… outside the scope of conferred authority*". Whereas in **Sberbank** in the Nalchik City Court, dated 1 August 2017 Case No 2-2988/2017, a bank was held liable for the actions of its employee who embezzled money from a private bank account, so that Article 1068 was applicable, the opposite was the case in relation to two employees who acted jointly to steal a valuable package of scrap jewellery from an airport warehouse where they worked in **SPSR Express**, a decision of the Russian Supreme Arbitrazh Court dated 17 March 2014 Case No BAC-2286/14, so that Article 1068 did not transfer liability to the employer or exempt the employee.

130. It seems to me that the acts of the RenCap and VR Capital Defendants in this case were plainly in the course of their employment, whether acting on instructions or at any rate acting within the scope of the performance of their duties, and, insofar as it is relevant, by reference to some of the cases I have seen, they were not stealing money or diverting an opportunity from their employers, but involved in making money for their employers, even if, by way of bonus or otherwise, also likely indirectly to benefit. I have no doubt that Mr Kulkov is right when he said, at paragraph 27 of his first Report, that "*Article 1068 has the effect that where a tort is committed by an employee… in the course of his employment, the Claimant is entitled to bring a claim only against the employer and not against the employee personally*". Any distinction between deliberate, criminal and other acts is only relevant for the purpose of weighing up the issue of course of employment.

131. However, I was concerned by one aspect, which appeared to throw doubt upon the agreed effect of Article 1068 of transferring liability from the employee to the employer. In the course of his cross-examination, Mr Kulkov did appear to accept that there were circumstances in which both the employer and the employee could be liable, though he reconsidered and corrected that view in re-examination. Not surprisingly, Mr Kendrick relied upon this, and he referred in his closing submissions to an example of what he himself, in those submissions, called the "*rare situation*" where liability of both employer and employee arose, namely a decision of the Orenberg Regional Court of 22 May 2013 Case No 33- 2720/2013, **StroylesKontrakt**. This case is the only one produced or referred to in which the 'transfer' of liability was not effected, and both

employer and employee were found liable. Both Dr Gladyshev and Mr Kulkov however explained that this arose because of the fact that there is special legislation in respect of environmental harm.

132. Had the Claimants' case been otherwise established, I would have found that the RenCap and VR Capital Defendants escaped liability by reference to Article 1068. However, that would have put the spotlight on the position of Mr Lynch. There was some discussion as to which company would have been relevant for the purposes of transfer of liability under Article 1068, Monte Valle, his personal company, or PNS, which was acquired by Monte Valle and gave him a Power of Attorney just before, and for the purposes of, the auction. Whichever it is, that company was a one-man company, and indeed in the case of PNS was still nominally in the name of Russian transferors unknown to Mr Lynch, who had no involvement in giving him instructions. He was plainly sole decision-maker of both companies. Mr Kulkov accepted, in the light of a case called **Spetsavtokhosvaistvo** (Supreme Court of the Republic of Mordovia dated 13 September 2012 Case No 33-1579/57), that Article 1068 should not apply where a Defendant was "*the sole director and decision -making body of the company*". Had the Claimants' claim against Mr Lynch otherwise succeeded, he would have been in the unenviable position of being the only one of the Defendants found liable to the Claimants. In the event he is not left in that situation.

Conclusion

133. For all the reasons I have given, the Claimants' claim against all five Defendants fails.