Neutral Citation Number: [2016] EWHC 2816 (Comm)

CL-2016-000172

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2016

Before:

THE HON. MR. JUSTICE PICKEN

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Between:

PJSC TATNEFT

Claimant

- and –

(1) GENNADIY BOGOLYUBOV
(2) IGOR KOLOMOISKY
(3) ALEXANDER YAROSLAVSKY
(4) PAVEL OVCHARENKO

Defendants

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Richard Millett QC, Paul McGrath QC, George Hayman and David Davies (instructed by **Akin Gump Strauss Hauer & Feld LLP**) for the **Claimant**
Ali Malek QC, Matthew Parker and Philip Hinks (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **First Defendant**
Jonathan Adkin QC, Ruth Den Besten and Tom Ford (instructed by **Fieldfisher LLP**) for the **Second Defendant**
Kenneth MacLean QC and Owain Draper (instructed by **Mishcon de Reya LLP**) for the **Third Defendant**
Tom Weisselberg QC (instructed by **Byrne & Partners LLP**) for the **Fourth Defendant**
Richard Morgan QC (instructed by **Pinsent Masons LLP**) for the **'Non-Cause of Action Respondents'**

Hearing dates: 7, 10, 11, 12 and 13 October 2016
(Judgment provided in draft to the parties on 2 November 2016).

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Judgment Approved

THE HON. MR. JUSTICE PICKEN:

Introduction

1. This is a very substantial case involving a significant amount of money. For the hearing which has resulted in this judgment there were over 70 (double-sided) bundles. These

included 31 bundles of chronological documents and twelve bundles of authorities, together with many witness statements and experts' reports dealing with Russian and Ukrainian law. The skeleton arguments ran to substantially over 200 pages, and the hearing itself took five days and would have taken longer had it not been for the disciplined way in which submissions were made. This was not, however, the trial of the action. On the contrary, the proceedings having only been commenced in March this year, the action is at an early stage, and it was the Defendants' position at the hearing that it should not be permitted to go further on the basis that the claim advanced by the Claimant ('Tatneft') is lacking in merit. Specifically:

(1) The First Defendant ('Mr Bogolyubov'), who is domiciled in this jurisdiction and so who has been served here without Tatneft having to obtain permission from the Court, seeks summary judgment or an order striking out the claim.

(2) The Second Defendant ('Mr Kolomoisky'), who has been served out of the jurisdiction on the basis that he is a necessary or proper party to the action brought against Mr Bogolyubov, seeks an order setting aside the order permitting service out on him on the basis that there is no 'serious issue to be tried' on the merits of the claim against him.

(3) The Third Defendant ('Mr Yaroslavsky'), in respect of whom Tatneft also obtained permission to serve out of the jurisdiction but who has submitted to the jurisdiction having been served in England, applies, like Mr Bogolyubov, for summary judgment or an order striking out the claim.

(4) The Fourth Defendant ('Mr Ovcharenko') who, like Mr Kolomoisky, has been served out of the jurisdiction, seeks an order, again like Mr Kolomoisky, setting aside the order permitting service out on him on the basis that there is no 'serious issue to be tried' on the merits of the claim against him and/or because the proceedings represent an abuse of process.

In addition, all four of the Defendants seek the discharge of a worldwide freezing order made by Teare J in March this year (the 'Worldwide Freezing Order') on the basis that Tatneft's claim does not amount to a 'good arguable case' and/or on the basis that there is an insufficient risk of dissipation. They also complain that, in obtaining the Worldwide Freezing Order, Tatneft failed properly to discharge its duty of full and frank disclosure.

2. These are all matters which I shall come on to address, after setting out, in some detail, the factual background. I should, first, however, mention there were two other applications which were before me at the hearing: an application by Tatneft to amend its Particulars of Claim (an application which I shall also come on to address), and, in addition, an application to discharge the Worldwide Freezing Order by certain other parties, collectively described as the 'Non-Cause of Action Respondents' (an application which it was agreed should only be considered after this judgment has been handed down and the outcome of the various other applications is known). The Non-Cause of Action Respondents are various companies to which the Worldwide Freezing Order obtained by Tatneft applies under the so-called ***Chabra*** jurisdiction, namely on the basis that, so Tatneft alleges, they are parties which hold assets for the benefit of and/or under the effective control of Mr Bogolyubov. Although Mr Richard Morgan

QC, on behalf of the Non-Cause of Action Respondents, came to the hearing hoping that there would be time for this further application to be argued, it was clear that this was not going to be possible and, having taken instructions at the end of the first day of the hearing, Mr Morgan QC confirmed that his clients did not oppose their discharge application being deferred. It was agreed by Tatneft that, in the circumstances, no issue estoppel or ***Henderson v Henderson*** type arguments would be advanced against the Non-Cause of Action Respondents if and when their discharge application came to be argued post-judgment.

Background and Tatneft's case

3. A number of matters are not in dispute. What follows is derived from a Case Memorandum which has been agreed between the Defendants as well as from the skeleton argument which Mr Richard Millett QC and Mr Paul McGrath QC and their juniors submitted on Tatneft's behalf. For the present, I propose to keep the description of the background relatively brief. I shall expand on particular matters to the extent necessary when, later on, addressing the submissions which the parties have made.

4. Tatneft is one of the largest oil producers in Russia and is approximately 33.6% owned by the Government of Tatarstan, Russia, where its registered office is to be found. Tatneft brings the present claim as assignee, or purported assignee since the scope of the assignment (contained in a contract described as a 'Compensation Agreement' dated 22 October 2015: the '2015 Compensation Agreement') is in issue, of another Russian company, Kompaniya Suvar-Kazan LLC ('S-K'), Tatneft's 'commission agent' under a contract dated 26 January 2007 (the 'Suvar-Tatneft Commission Agreement'). It is Tatneft's case that the Defendants each took part in a dishonest scheme to misappropriate very substantial sums which should have been paid to Tatneft in respect of oil which it delivered to the Kremenchug oil refinery in Ukraine during 2007. This is a refinery which is owned by a Ukrainian company called PJSC Transnational Financial and Industrial Company 'Ukrtatnafta' ('UTN'). Specifically, although the oil was delivered to UTN's refinery by pipeline, it was not sold directly by Tatneft to UTN since there were four intermediate companies involved in what was a chain of contracts. The first such intermediate company was S-K, which contracted to on-sell the oil in its own name to a Ukrainian company, Private Multi-Sector Production- Commercial Enterprise AVTO ('Avto'). The relevant contract was entered into on 23 April 2007 (the 'Suvar-Avto Framework Contract'). In this role and as Tatneft's 'commission agent', S-K had responsibility for the logistics involved in exporting the oil from Russia, meaning that Tatneft protected itself against the legal risks associated with being responsible for bringing foreign currency into Russia. The next company in the contractual chain, Avto, itself acted as a 'commission agent'. This was for another Ukrainian company, Taiz LLC ('Taiz'), the relevant contract being dated 19 April 2007 (the 'Taiz-Avto Commission Agreement'). Taiz was party to a number of contracts with UTN, under which it agreed to sell oil to UTN (the 'Taiz-UTN Contracts), as well as being party to other sale contracts (the 'Taiz-Tekhnoprogress Contracts') with Tekhno-Progress Scientific and Production LLC ('Tekhnoprogress'), a company which on-sold to UTN under its own sale contracts with UTN (the 'Tekhnoprogress-UTN Contracts').

5. Before outlining the essentials of the dishonest scheme which Tatneft has alleged, it is necessary, first, to say something about the Defendants. Mr Bogolyubov is a Ukrainian businessman who has, since 2009, resided in London. Mr Kolomoisky is a Ukrainian-

Israeli businessman, and formerly the governor of Dnipropetrovsk Oblast, an area of south eastern Ukraine. Together, they hold a majority stake in, and Tatneft would say control, JSC CB PrivatBank ('PrivatBank'), Ukraine's largest commercial bank, along with a diverse array of companies generally referred to, for convenience only and not in a technical sense, as the 'Privat Group'. Tatneft alleges that both Mr Bogolyubov and Mr Kolomoisky have had at least some ownership interest in UTN since December 2006. Tatneft further alleges that they substantially increased that interest in mid-2009 when, through a Ukrainian company called Korsan LLC ('Korsan'), they used the proceeds of the dishonest scheme described below to fund that increase. In this regard, Tatneft relies on the fact that early the following year, in February 2010, Mr Bogolyubov and Mr Kolomoisky were elected to UTN's Supervisory Board. This was at the same time as Mr Yaroslavsky also joined UTN's Supervisory Board. Mr Yaroslavsky, another wealthy Ukrainian businessman, admits to having worked with Mr Bogolyubov and Mr Kolomoisky in relation to UTN as well as other interests. Indeed, he admits in the Defence which he has served that he acquired a 25% interest in Korsan, and thereby a substantial indirect interest in UTN, in June 2009.

6. As for Mr Ovcharenko, Tatneft's case is that neither the non-payment of the oil monies nor the dishonest scheme, if there was such a scheme, could have occurred without him since, as his counsel, Mr Tom Weisselberg QC put it when addressing the topic of limitation and, in that context, the relevant knowledge of Tatneft and S-K, Mr Ovcharenko must always have been 'front and centre' in relation to those activities. He became a member of UTN's Management Board in 2004 and has been its Chairman since 2007, when the Kremenchug refinery was seized by Mr Ovcharenko with, Tatneft alleges, the backing of Mr Bogolyubov and Mr Kolomoisky. It was, indeed, following this change of management that payment under the various contracts to which I have referred ceased. Thus, Avto having taken the stance that it would be unable to remit payments for oil previously delivered by reason of *force majeure*, on 26 November 2007, S-K began proceedings in the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the 'ICAC') against Avto in respect of its non-payment under the Suvar-Avto Framework Contract. However, given that Avto had itself not been paid, it had no funds to pay S-K. As a result, on 18 April 2008, S-K settled its claims against Avto, save for certain claims in the sum of US$17.9 million, by entering into an agreement (governed by Russian law) with Avto, Taiz and Tekhnoprogress (the '2008 Assignment Agreement'), under which the payment obligations of Avto to S-K in the amount of US$421,548,310 were terminated and Taiz's and Tekhnoprogress' payment rights against UTN (as well as Avto's payment rights against Taiz) were assigned to S-K, with amounts in Ukrainian hryvnas ('UAH') being converted as at the date of the agreement. The effect of this settlement, in short, was that S-K remained fully entitled to be paid for the oil, but directly from UTN rather than through the contractual chain (and so from Avto). This followed Tatneft having the previous month, on 24 March 2008, filed a joint criminal complaint with the Ministry of the Interior of the Republic of Tatarstan. The 2008 Assignment Agreement was, in turn, followed the next month by, on 21 May 2008, Tatneft filing a notice of arbitration in a Bilateral Investment treaty arbitration (the 'BIT Arbitration') alleging the violation of its rights by Ukraine.

7. Pursuant to the 2008 Assignment Agreement, by letter dated 7 May 2008, S-K gave notice of the assignment of Taiz and Tekhnoprogress' claims to UTN and made demand of UTN in the principal amount of UAH 2,128,818,965.50. Subsequently, on 26 May

2008, S-K commenced proceedings against UTN in the Arbitrazh Court of the Republic of Tatarstan. After making an unsuccessful jurisdictional challenge, UTN participated in the trial and argued that UTN had not provided valid consent to the assignment (as was required by the contracts between UTN and Taiz and Tekhnoprogress). The Arbitrazh Court found that UTN had, in fact, given consent to the assignment, giving a written judgment on 5 September 2008 which required UTN to pay S-K UAH 2,458,138,279.34 (the 'Tatarstan Judgment'). That decision was upheld on appeal in November 2008 and also given effect to by the ICAC Award, which determined that S-K's claims against Avto had been settled, with the relevant obligations terminated, save for payment due in respect of an additional sale and purchase agreement, and due in the sum of US$17.9 million to which I have referred.

8. In the meantime, however, UTN had brought proceedings against S-K in Ukraine, obtaining a judgment from the Economic Court of the Poltava Region of Ukraine in early September 2008 (the 'Ukrainian Judgment') declaring that the 2008 Assignment Agreement was invalid as a matter of Ukrainian law and so blocking any attempts by S-K to enforce the Tatarstan Judgment in the Ukraine, where the vast majority of UTN's assets were located. As a result, S-K's ability to recover pursuant to the Tatarstan Judgment has been limited to its recovery of US$105.3 million against UTN's assets in Russia through Enforcement Order No. 265221 issued on 3 December 2008 (the 'Russian Enforcement Order').

9. This, then, is the context in which, on Tatneft's case, the Defendants came to engage in the dishonest scheme alleged by Tatneft. This scheme, described in the Particulars of Claim which have been served as the 'Oil Payment Siphoning Scheme', was described in Mr Millett QC's and Mr McGrath QC's skeleton argument in the following way at paragraph 9:

"In bare essentials, it consisted of the Defendants acquiring control over Taiz and Tekhnoprogress in the first half of 2009, and then procuring a series of payments totalling 2.24 billion Ukrainian Hryvnia ('UAH') from UTN to those companies in June 2009. This represented purported payment for the oil by UTN. However, this UAH 2.24 billion never found its way to S-K, the seller of the oil. It was never intended to. Instead it was siphoned away in a series of sham share sale and purchase agreements whereby Taiz and Tekhnoprogress used the money purportedly to purchase at gross overvalue a series of shareholdings in worthless or fictitious 'junk' companies. The counterparties to these sham transactions were a series of Ukrainian and offshore companies of obscure ownership, although many of them are now known to be connected with D1 and D2 (as D1 now admits). Having paid away all the funds pursuant to the sham transactions, Taiz, Tekhnoprogress and Avto were then driven into bankruptcy based on minuscule debts."

This reflects the way in which the case is pleaded in the Particulars of Claim, both in its original and its draft amended form, where in paragraph 55 the same four *"basic elements"* are alleged: (i) gaining control (or participated in gaining control) over Avto, Taiz and Tekhnoprogress; (ii) causing (or participated in causing) UTN to inject the monies owed to S-K, and ultimately to Tatneft, into Taiz and Tekhnoprogress; (iii) causing (or participated in causing) Taiz and Tekhnoprogress to enter into sham share and sale transactions, only days apart, first to convert the UAH-denominated funds into US dollars, and secondly to siphon the US dollars into offshore companies which the

Defendants controlled; and (iv) subsequently procuring for Taiz, Tekhnoprogress and Avto to be put into bankruptcy.

10. There is an issue between the parties as to whether the fact that the Oil Payment Siphoning Scheme alleged by Tatneft remains the same in the draft Amended Particulars of Claim as it is in the original Particulars of Claim means that, as Mr Millett QC would have it, the proposed amendments involve no new cause of action. The Defendants' position is that, as a matter of analysis, the Oil Payment Siphoning Scheme is what Mr Ali Malek QC, Mr Bogolyubov's counsel, described as being merely *"context"*. I will address this issue when dealing with Tatneft's amendment application. What matters for immediate purposes is that, as explained in Mr Millett QC's and Mr McGrath QC's skeleton argument and again reflecting the manner in which the case has been pleaded in the Particulars of Claim, more specifically the *"key steps"* taken in performance of the alleged Oil Payment Siphoning Scheme are these:

    (1) In March 2009, a BVI company called Avallox acquired 100% of Taiz and 99.9% of Tekhnoprogress and new general directors were installed. At the same time, a Mr Dmitry Zhuchenya, an individual associated with Privat, acquired the remaining 0.1% in Tekhnoprogress and a 100% stake in Avto.

    (2) On 22 April 2009, Taiz and Tekhnoprogress opened bank accounts with PrivatBank (and shortly after that also opened share deposit accounts with FC Gambit, a company controlled by Privat).

    (3) On 23 April 2009, Taiz, Tekhnoprogress and Avto all entered into purported services agreements with a company called Optima Trade, controlled by Privat. These agreements, which Tatneft contends were obviously shams, created debts owed by Taiz, Tekhnoprogress and Avto to Optima Trade for fictional *"services"* and were, Tatneft says, a device ultimately used to secure the bankruptcy of Taiz, Tekhnoprogress and Avto later in the year.

    (4) On 12 May 2009, Tatneft's 18.296% indirect shareholding in UTN, owned through companies called AmRuz and Seagroup, was written off the depository accounts of AmRuz and Seagroup and re-registered to UTN's treasury account.

    (5) Starting on 3 June 2009, Taiz and Tekhnoprogress apparently entered into a series of sham share purchase and sale agreements under which those companies agreed to pay very substantial amounts for a large number of worthless shares in 'junk' companies. These agreements, Tatneft alleges, were nothing more than a paper device to allow money to be extracted from Taiz and Tekhnoprogress.

    (6) Between 12 and 17 June 2009, UTN paid a total of UAH 2.24 billion to Taiz and Tekhnoprogress. This corresponded exactly to the amount of debt recorded on UTN's books for the oil that UTN had received through the contractual chain. This money was then, as Tatneft puts it, siphoned out of Taiz and Tekhnoprogress through payments under the sham share purchase agreements described above.

    (7) Between 18 and 27 June 2009, Optima demanded payment from Taiz, Tekhnoprogress and Avto under the purported services agreements that had been signed earlier in the year. The amounts demanded were approximately US$75,000 combined. Tatneft maintains that there was no intention that Taiz,

Tekhnoprogress and Avto would pay these very modest sums demanded as those agreements had, from the start, been merely a device to secure the bankruptcy of those companies.

(8) On 21 August 2009, the Ukrainian court initiated bankruptcy proceedings against Taiz, Tekhnoprogress and Avto at Optima's request. The companies were held to be bankrupt on 1 October 2009 (and were liquidated in 2010).

(9) Meanwhile, as Tatneft puts it, the UAH 2.24 billion extracted from Taiz and Tekhnoprogress was finding its way to Korsan, the vehicle to be used by the Defendants to acquire Tatneft's former indirect shareholding in UTN. Specifically, on 15 June 2009, a date about half-way through the numerous wire transfers, it was agreed that the charter capital of Korsan would be increased by UAH 2.24 billion, exactly the same amount that UTN had paid to Taiz and Tekhnoprogress. This contribution of new capital was made by a number of companies which, Tatneft alleges, were associated with the Defendants. The Privat share of the contribution was 50%, with Mr Yaroslavsky and Mr Ovcharenko each contributing 25%. None of the Defendants could have been under any illusion, Tatneft suggests, as to where the UAH 2.24 billion had come from.

(10) On 27 June 2009, Korsan won the auction, in which it was the sole bidder, to acquire Tatneft's confiscated (indirect) 18.296% shareholding in UTN. The auction was arranged by UTN itself (under D4's control). The only other potential bidder, Naftogaz, initially filed a bid but then failed to provide the necessary deposit.

(11) On 30 June 2009, Korsan signed a sale and purchase agreement with UTN under which Korsan acquired 18.296% of UTN for a price of UAH 2.1 billion.

11. Accordingly, Tatneft argues, the end result was that the Defendants had used money that should have been paid ultimately to S-K and then on to Tatneft to acquire Tatneft's own confiscated shareholding in UTN: the money went back into UTN, leaving Korsan holding the shares in UTN previously held by Tatneft's affiliates, with the added advantage that UTN's oil money debt had been purportedly discharged by the payment to Taiz and Tekhnoprogress, so improving its balance sheet. It was, Mr Millett QC and Mr McGrath QC suggested, *"a brazen scheme"*. In doing so, they highlighted, in particular, that what they described as *"the nub of the fraud"* is not the Defendants causing UTN to withhold payment for the oil in breach of contract, rather a fraud which consisted of *"a dishonest scheme to cause UTN actually to <u>make</u> a cash payment in respect of the oil, but to do so to Taiz and Tekhnoprogress with the intention that that payment then be dishonestly siphoned off out of those entities for the Defendants' own benefit (as it was)"*. Mr Millett QC stressed also that the objective of the fraud was to achieve a situation where UTN could maintain that it had actually paid for the oil thereby discharging its contractual obligations, as they put it, *"up the chain"* and that it had no further obligation to anyone, whilst at the same time seeing to it that Taiz and Tekhnoprogress *"would have all the value stripped out of them by the fraudulent share sale transactions and [being] driven into bankruptcy with the result that anyone above them in the chain with a claim against them would find that such claim was worthless"*.

12. Tatneft's case, which is advanced exclusively under Russian law (specifically Article 1064 of the Russian Civil Code ('Article 1064')), is that the alleged actions by the Defendants involving Avto, Taiz and Tekhnoprogress were unlawful, and that by reason of their participation in these actions, each of the Defendants is liable to compensate S-K for the damage it claims thereby to have suffered. As to this, as currently (and originally) pleaded, Tatneft's case is that but for the Defendants' actions, Taiz and Tekhnoprogress would have paid Avto, and Avto would have paid S-K US$439.4 million under the Suvar-Avto Framework Contract. After giving credit for the US$105.3 million recovered by way of enforcement of the Tatarstan Judgment, damages are, accordingly, sought in the sum of US$334.1 million, plus interest amounting to US$34.3 million as at the date of the Claim Form.

The present proceedings

13. The present proceedings were commenced in March this year. Specifically, on 15 March 2016 Tatneft issued its application for the Worldwide Freezing Order and permission to serve Mr Kolomoisky, Mr Yaroslavsky and Mr Ovcharenko out of the jurisdiction. The following week, on 22 March 2016, at a without notice hearing and pending a return date on 22 April 2016, Teare J granted the Worldwide Freezing Order against the Defendants, prohibiting each of them from disposing of or dealing with their assets up to a limit of US$380 million, comprising US$334.1 million by way of damages, US$34.3 million as interest and US$11.5 million to cover incurred pre-action costs. Teare J also ordered: that, within 48 hours of service of the Worldwide Freezing Order, the Defendants should disclose all of their assets (exceeding £10,000 in value, and however held) worldwide, with such disclosure to be confirmed on affidavit within 7 days; that Tatneft was entitled to delay service and notification of the Worldwide Freezing Order until 8 April 2016 or further order of the Court in order to permit Tatneft to obtain ancillary freezing orders in other jurisdictions; and that Tatneft should have permission to serve Mr Kolomoisky, Mr Yaroslavsky and Mr Ovcharenko out of the jurisdiction. In addition, as I have previously mentioned, Teare J ordered freezing relief in the same sum as against ten other parties which are not Defendants to the claim as advanced in the proceedings, including the Non-Cause of Action Respondents represented by Mr Morgan QC.

14. In the event, Tatneft's Claim Form was issued on 23 March 2016. This was subsequently served (together with the Particulars of Claim): on Mr Bogolyubov within the jurisdiction on 12 April 2016; on Mr Kolomoisky on 7 September 2016 when alternative service was effected on his solicitors pursuant to consensual arrangements set out in a consent order dated 9 August 2016, without prejudice to Mr Kolomoisky's rights to challenge jurisdiction; on Mr Yaroslavsky within the jurisdiction; and on Mr Ovcharenko on 19 May 2016. Mr Bogolyubov and Mr Yaroslavsky thereafter each served Defences.

The parties' positions on the applications in outline

15. In their skeleton argument, Mr Millett QC and Mr McGrath QC contrasted what they described as *"the wholesale nature of the challenges made by the various Defendants"* in the form of the various applications which are before me with what they characterised as the Defendants being *"conspicuously silent as to the factual circumstances of the Oil Payment Siphoning Scheme"*. Specifically, they highlighted the fact that none of the

Defendants has suggested that there is an innocent explanation for what happened and why, in particular, it should have been the case that monies were paid to Taiz and Tekhnoprogress at all. This, it was pointed out, applies to all of the Defendants, none of whom has provided a witness statement himself, and despite the fact that, in the case of Mr Bogolyubov and Mr Yaroslavsky, Defences have been served. Instead, Mr Millett QC and Mr McGrath QC submitted, having not served any evidence personally and having not challenged that the alleged fraud took place, the Defendants' focus has been on technical defences designed, so it was suggested, to avoid the proceedings going forward to trial. In these circumstances, Tatneft's position was that the Court should not allow itself to be blinded to the realities of the Defendants' applications, which Mr Millett QC and Mr McGrath QC submitted entailed no 'killer point' which would justify the proceedings being stopped at this preliminary stage.

16. In this respect, Mr Millett QC and Mr McGrath QC warned against the applications leading to a 'mini-trial'. They pointed, in particular, to the fact that not only do each of the Defendants deploy expert evidence on Russian law but that the *"battery of Russian law experts do not even speak with one voice and take differing views on many of the complex Russian law issues"*. They suggested that, in such circumstances and in view of the fact that Tatneft's own Russian law expert, Professor Boris Karabelnikov, a Professor of Law at the Moscow School of Social and Economic Sciences, gives evidence which is supportive of Tatneft's position, the Court should not attempt to resolve contested issues of Russian law at this stage. They submitted, in addition, that in relation to the limitation issue which arises there is a significant factual dispute concerning what S-K knew or should be taken as knowing concerning the circumstances giving rise to the claims which are now brought. These are not matters which, it was suggested, can properly be the subject of summary determination. All in all, it was Tatneft's position that it is not possible at this early stage to conclude that it has no real (as opposed to fanciful) prospect of succeeding at trial and that, on the contrary, there can be confidence that it has at least a 'good arguable case' so as to justify the imposition of the Worldwide Freezing Order and, therefore, also meet the (lower) 'serious prospect of success' standard which applies when considering the jurisdictional and summary judgment/strike-out applications. That, Mr Millett QC and Mr McGrath QC submitted, applies both to the existing claim as pleaded in the Particulars of Claim and to the draft Amended Particulars of Claim. They insisted in this context that the proposed amendments consist merely of particulars of the existing case. On that basis, they argued, permission to amend should be granted and the applications made by the Defendants dismissed.

17. The Defendants adopted the opposite position, not only in relation to Tatneft's amendment application but (unsurprisingly) also in relation to their own applications. As to the former, their contention was that the proposed amendments seek to introduce a new cause of action. They, therefore, disputed the suggestion that the draft amendments merely particularise the existing cause of action. Moreover, since, on any view, the relevant limitation period has expired (a point not disputed by Tatneft), the Defendants submitted, primarily through Mr Jonathan Adkin QC, counsel for Mr Kolomoisky, that the proposed amendments have no 'real prospect of success' and should not be allowed. They further submitted that, in any event, even putting the issue of time-bar to one side, the case sought to be advanced in the draft Amended Particulars of Claim has no 'real prospect of success' and should be refused because, like the case as originally pleaded, the new cause of action is misconceived as a matter of Russian

law. As to that existing case, and so in relation to the Defendants' various jurisdictional and summary judgment/strike-out applications, the Defendants contend: (i) that Tatneft has no standing to bring the present proceedings because the 2015 Compensation Agreement did not assign to Tatneft the claims against the Defendants which it now brings under Article 1064; (ii) that Tatneft is not entitled to recover damages for economic loss as claimed under Article 1064 and Article 1064 does not permit a claim against a third party where that third party is alleged to have caused a debtor not to pay its debt to a creditor; (iii) that Tatneft's claim fails to make out the necessary ingredients for the bringing of a claim under Article 1064 since it entails Tatneft alleging wrongful interference with contractual obligations during the course of 2009 when those contractual obligations (on the part of Taiz, Tekhnoprogress and Avto) had been terminated as a result of the 2008 Assignment Agreement; and (iv) that Tatneft's claim is time-barred in that S-K either knew or should have known of its claims more than three years prior to the issue of the Claim Form in March 2016.

Structure of this judgment

18. Having set out the background, I turn to deal with the issues which arise. I propose, in dealing with those issues, to focus on the main points, and not necessarily to address every point which was made. To do otherwise would lengthen this judgment unnecessarily and would not be desirable. Nor would it be practicable in view of the need to provide the parties with a decision in a sensible timescale. It is inevitable, in the circumstances, that I shall not, in particular, deal with every authority which appears in the twelve bundles of authorities. The fact that I am adopting this approach should not, however, be regarded as indicating that I have omitted to consider a particular point or a particular authority. That is not the position as I can confirm that I have taken everything which was submitted to me into account when arriving at my decision on the various applications.

19. I shall begin by addressing the parties' merits-related submissions, which arise in the context of the various jurisdictional challenges and Mr Bogolyubov's and Mr Yaroslavsky's summary judgment/strike-out applications. In doing so, my focus will be on the Defendants' attack on the proceedings as a whole, rather than on their applications to discharge the Worldwide Freezing Order, although clearly the merits-related issues are relevant to the discharge applications also. I propose, in addition, to consider Tatneft's amendment application in this context, but separately and so only after considering the Defendants' applications in relation to the case as originally advanced. I shall, then, again in the context of the jurisdictional challenges and the summary judgment/strike-out application, briefly address the abuse of process issue on which Mr Weisselberg QC, on behalf of Mr Ovcharenko, took the lead in the course of oral submissions. I shall, lastly, consider the applications to discharge the Worldwide Freezing Order. In that context, I will revisit, briefly, the merits-related issues (albeit by reference to the 'good arguable case' issue as opposed to the 'serious issue to be tried' and 'real prospect of success' issues which arise in the context of the jurisdictional and summary judgment/strike-out applications), and then will deal with the Defendants' allegations that Tatneft failed to comply with its duty to be full and frank when applying, without notice, for the Worldwide Freezing Order, as well as with other relevant matters such as risk of dissipation, delay, discretion and quantum.

The jurisdictional challenges and the summary judgment/strike-out application: the merits-related issues

The law

20. As I have explained and leaving aside for the present the discharge applications, the merits-related issues arise in the context of the summary judgment/strike-out applications which are made by Mr Bogolyubov and Mr Yaroslavsky, as well as in the context of the jurisdictional challenges which are made by Mr Kolomoisky and Mr Ovcharenko. They also arise in relation to Tatneft's application to amend the Particulars of Claim, which I shall come on to address. It is necessary to explain why this is the position by reference to relevant authority, beginning with the law as it concerns summary judgment/strike-out. I can take this from a helpful document described as 'The Defendants' Agreed Legal Principles', with which Mr Millett QC, who dealt with this matter on behalf of Tatneft at the hearing, took no real issue.

21. It is clear that the Court may strike out a statement of case if it *"discloses no reasonable grounds for bringing ... the claim"* or if it is an abuse of process or otherwise *"likely to obstruct the just disposal of the proceedings"* or if there has been a failure to comply with a rule or practice direction: CPR Rule 3.4(2). Furthermore, the Court may grant a defendant summary judgment, on the whole claim or on a particular issue, if it considers that the claimant has no real prospect of succeeding on the claim or issue: CPR Rule 24.2. In this regard, in ***AC Ward Ltd v Catlin (Five) Ltd*** [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301, at [24], the Court of Appeal approved the summary of the principles applicable on a summary judgment application given by Lewison J (as he then was) in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15] as follows:

"i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than

is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

22. In ***Three Rivers District Council v Bank of England*** *(No. 3)* [2003] 2 AC 1 at [161], Lord Hobhouse emphasised the importance of analysing carefully the claimant's pleading, especially where allegations of dishonesty are relied upon:

"The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show that the party's case is hopeless. ... The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden - the balance of probabilities - but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out ... It is normally to be assumed that a party's pleaded case is the best case he can make (or wishes to make)... ."

23. Lewison LJ recently, in ***Calland v Financial Conduct Authority*** [2015] EWCA Civ 192 at [28]-[29], re-emphasised the need for the Court to carry out a *"critical examination of the raw material"* to determine whether a claim does have a 'real prospect of success', noting that *"The fact that some factual or legal questions may be disputed does not absolve the judge"* from the *"duty to make an assessment of the claimant's prospects of success"*. The position is no different where the factual dispute

relates to the content of foreign law. In that circumstance, as part of determining whether the claim has a 'real prospect of success', the court must consider the evidence provided in the expert reports, having regard to, amongst other things, the cogency of the experts' reasoning: see ***OJSC TNK-BP Holding v Beppler & Jacobson Ltd & Others*** [2012] EWHC 3286 (Ch) at [123] to [125].

24. This, then, is the position as far as the summary judgment/strike-out applications are concerned. Turning to the jurisdictional challenges, in relation to these the issue is whether there is a 'serious issue to be tried'. However, as the Defendants point out in their 'Agreed Legal Principles' document, the test is the same as it is when what is being considered is an application for summary judgment. In this regard, the Defendants draw on what Lord Collins had to say in ***Altimo Holdings & Investment Limited v Kyrgyz Mobil Tel Limited*** [2011] UKPC 7, [2012] 1 WLR 1804 at [71], and summarise the position, accurately as I see it, as follows:

    (1) The claimant must satisfy the Court that, in relation to the foreign defendant, there is a 'serious issue to be tried' on the merits. This is the same as the test for summary judgment, namely whether there is 'a real prospect of success'.

    (2) The claimant must satisfy the Court that there is a 'good arguable case' that the claim falls within one or more classes of case in which permission to serve out may be given, which in this context connotes that one side has a much better argument than the other on that point.

    (3) The claimant must satisfy the Court that, in all the circumstances, England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the Court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

25. As regards (2), I should explain that I shall deal separately later on with the requirement that a claimant has a 'good arguable case' when seeking freezing order relief. What matters for present purposes is that, as Mr Millett QC emphasised, as Lord Collins made clear in the ***Altimo Holdings*** case at [71], in a passage to which I have already referred, the 'serious issue to be tried' test is the same test as for summary judgment, *"namely whether there is a real (as opposed to a fanciful) prospect of success"*.

26. Mr Millett QC also prayed in aid the following summary of the relevant principles by Males J in ***Standard Bank v EFAD Real Estate*** [2014] EWHC 1834 at [5]:

> *"The Supreme Court has recently made clear the correct approach to the question whether there is a serious issue to be tried. Thus hearings on jurisdictional issues should not 'involve masses of documents, long witness statements, detailed analysis of the issues, and long argument': VTB Capital Plc v Nutritek International Corpn [2013] UKSC 5, [2013] 2 WLR 398 at [82] and [83]. Even more recently, Flaux J has spoken of the need for a defendant challenging jurisdiction on the basis that the claim has no real prospect of success to identify 'some "killer point" which demonstrated that [the claimant's] case on the facts was unsustainable', without which 'the expending of so much time and energy on a full-scale evidential challenge is a fruitless exercise': Erste Group Bank AG v JSC "VMZ Red October" [2013] EWHC 2926 (Comm) at [11] (reversed on other grounds)."*

27. It is with these principles in mind, both as regards the jurisdictional challenges which are made by Mr Kolomoisky and Mr Ovcharenko and as regards the summary judgment/strike-out applications which are made by Mr Bogolyubov and Mr Yaroslavsky, that I turn now to consider the merits-related issues which arise on those applications, starting with the 2015 Compensation Agreement and then dealing with Tatneft's reliance on Article 1064, and addressing first the position in relation to the existing case and then the position in relation to the proposed amendments.

The 2015 Compensation Agreement

28. As has previously been made clear, Tatneft brings the present proceedings as S-K's assignee, and so in reliance on the 2015 Compensation Agreement which Tatneft entered into with S-K. It is the Defendants' position, however, that the 2015 Compensation Agreement does not entitle Tatneft to bring the proceedings, whether the existing claim or the proposed amended claim. This is a submission which the Defendants make, with Mr Weisselberg QC taking the lead in terms of the submissions which were made, by reference to what is stated in the 2015 Compensation Agreement, and so as a matter of the proper construction of that agreement. Although in the lead-up to the hearing before me there was some suggestion on the part of the Defendants, or at least the expert on Russian law instructed by Mr Kolomoisky (Professor Butler), that the 2015 Compensation Agreement is to be regarded as invalid as a matter of Russian law, its governing law, this was not a matter which was pressed in oral submissions. This was presumably in recognition of the fact that such a point is not susceptible to summary determination, rather than because the Defendants consider that there is a lack of merit in it. Either way, I need say no more about it for present purposes and focus, instead, on the construction issue which arises. I should add that at this stage I propose also to leave to one side the Defendants' submission, again advanced through Mr Weisselberg QC, that Tatneft's invocation of the 2015 Compensation Agreement in order to bring an assigned claim represents an abuse of process which should not be sanctioned by the Court; I shall deal with this matter separately later.

29. The 2015 Compensation Agreement describes S-K (which by 2015 had changed its name to Fenix) as the *"Debtor"* and Tatneft as the *"Creditor"*. The recital, in its second bullet point, states as follows:

> *"The Debtor [S-K] has claims against Closed Joint Stock Company Transnational Financial and Industrial Oil Company Ukrtatnafta (according to the company's official website, in 2010 it changed its name for Public Joint Stock Company Transnational Financial and Industrial Oil Company Ukrtatnafta …, registered under the laws of Ukraine, state registration No. 00152307, with its registered office at: Ukraine, 39609, Poltava Region, Kremenchug, UI. Svishtovskaya, 3 (hereinafter 'TFIOC UTN'), in the amount of one billion six hundred fifteen million eight hundred fourteen thousand nine hundred seventy-six Ukrainian Hryvnas (UAH 1,615,814,976) in principal, plus all interest accrued and subject to accrual in the future (hereinafter, the 'Claims')."*

The operative part of the agreement then provides as follows in Clauses 1.1, 1.2, 1.3 and 1.4:

> *"1.1 In partial discharge of the obligations owing to the Creditor and referred to in clause 1.2.1 hereof the Debtor shall provide compensation to the Creditor*

pursuant to Article 409 of the Russian Civil Code and on the terms set forth herein.

1.2 Details of the Debtor's obligations to the Creditor:

1.2.1 the aggregate amount of the outstanding monetary obligations of the Debtor owing to the Creditor is eighteen billion one hundred twenty-three million six hundred forty-one thousand six hundred sixty-two Rubles 89 kopecks (RUB 18,123,641,662.89) (hereinafter, the 'Obligations');

1.2.2 the Obligations arise under the Commission Agency Agreement and the Assignment Agreement;

1.2.3 part of Obligations in respect of which the compensation is provided, amounts to one hundred twenty-eight million seven hundred seventy-one thousand nine hundred fourteen Rubles 42 kopecks (RUB 128, 771,914.42), including:

- *One hundred twenty-eight million seven hundred sixty-one thousand six hundred twelve Rubles 67 kopecks (RUB 128,761,612.67) as part of the obligations arising out of the Commission Agency Agreement;*

- *Ten thousand three hundred one Rubles 75 kopecks (RUB 10,301.75) as part of the obligation arising out of the Assignment Agreement.*

The Debtor's Obligations to the Creditor shall be discharged pro rata to the amount of the Obligations.

1.3 In discharge of part of the Obligations the Debtor on the date hereof shall transfer compensation to the Creditor, and the Creditor shall accept such compensation being the Debtor's Claim against TFIOC UTN in the amount of one billion six hundred fifteen million eight hundred fourteen thousand nine hundred seventy-six Ukrainian Hryvnas (UAH 1,615,814,976) in principal, plus all interest accrued and which may continue to accrue, arising under the following documents:

1.3.1 Deed of Assignment dated 18 April 2008 between LLC 'Kompaniya 'Suvar-Kazan' (currently LLC 'Kompaniya 'Fenix'), Private Multi-Industry Production and Commercial Enterprise Avto, registered in accordance with the Ukrainian laws (state registration number 13951872), Limited Liability Company TAIZ, registered in accordance with the Ukrainian laws (state registration number 32635669), and Research and Development and Manufacturing Limited Liability Company TEKHNO-PROGRESS, registered in accordance with the Ukrainian laws (state registration number 30601617);

1.3.2 Judgment of the Arbitration Court of the Republic of Tatarstan issued on 05 September 2008 in case No. A65-9070/2008-sg2-4;

1.3.3 Enforcement Order No.265221 issued on 03 December 2008.

> *1.4 The Claims transferred by Debtor to Creditor as compensation under the Agreement also include all other rights available to Debtor as of the time of execution of the Agreement and associated with and/or arising from the Claims and/or directly or indirectly related in any way to the non-payment of sums owed to the Debtor under any or all of the documents set forth in Clauses 1.3.1 to 1.3.3 hereof, including, but not limited to: (1) the Debtor's right to require TFIOC UTN and/or any third parties to make any payments: (a) by way of indemnification and/or liquidated damages (fines, penalties) caused by a default, delay or another undue performance; (b) in the form of interest payable for unlawful use of other people's money, (c) by way of reimbursement of litigation costs and other expenses related to the lawsuit; (2) the Debtor's claims against TFIOC UTN and/or third parties arising from damages caused and/or unjust enrichment; and (3) the Debtor's right to sue TFIOC UTN and/or third parties, and the Debtor's right to seek enforcement of obligations before competent authorities and/or file a criminal complaint against TFIOC UTN and/or third parties."*

30. Mr Weisselberg QC's submission was straightforward. It was that, on the proper construction of the 2015 Compensation Agreement, S-K assigned only its claims against UTN and/or third parties which arose under the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order. This, Mr Weisselberg QC submitted, is made clear by Clauses 1.3 and 1.4, which are premised, and only premised, on the 2008 Assignment Agreement having had the effect that the previous chain of contracts no longer operated. There is no scope, in such circumstances, Mr Weisselberg QC argued, to read the assignment as also covering a claim on the part of S-K based on a failure of the intermediary companies to pay monies up a contractual chain which had fallen away.

31. In seeking to meet the Defendants' case in relation to the 2015 Compensation Agreement, Mr Millett QC observed that, if the Defendants are right, then, since S-K has now been liquidated and struck off the Russian Companies Register, the result is that S-K's claim has been lost for good. This is not a submission which, however, I consider really assists me in seeking to construe the 2015 Compensation Agreement. Nor do I derive any assistance from the submission that, as Mr Millett QC put it in Tatneft's skeleton argument, *"the Defendants' argument is utterly lacking in commercial merit"* since there *"is, in reality, no doubt or uncertainty about what was being assigned and no doubt as whether the claims that are now being brought under Article 1064 fall within the wording in the Compensation Agreement (which they clearly do)"*. This is little more than assertion. A more substantive submission entailed Mr Millett QC pointing to what was described as the wide language of the 2015 Compensation Agreement and suggesting that this is typical of agreements where the intention of the parties is that every possible claim available to the assignor is caught within the wording of the assignment. The contention was that what was intended by Tatneft and S-K when entering into the 2015 Compensation Agreement was obvious: S-K was assigning all claims which it might have against third parties in relation to the non-payment for the oil to Tatneft. The language of *"causation of harm and/or unjust enrichment*" in Clause 1.4, it was submitted, makes it abundantly clear that this includes tortious claims against third parties. So, too, Mr Millett QC submitted orally, does the introductory language of the same provision, with its reference to the *"Claims"* being transferred *"also"* including *"all other rights available to Debtor as of the time of execution of the Agreement and associated with and/or arising from the Claims and/or*

directly or indirectly related in any way to the non-payment of sums owed to the Debtor … including, but not limited to". These are, as Mr Millett QC put it, *"words of expansion"*. Indeed, it was argued, no reasonable reader could have thought that the assignment was somehow intended to be limited to contractual claims against third parties since claims against third parties were inherently more likely to arise on a non-contractual basis.

32. This submission was combined with reliance on a rule of contractual interpretation in Russian law contained in Article 431 of the Russian Civil Code (*"Interpretation of a Contract"*). This provides (in translation):

"In the interpretation of the terms of the contract, the court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a term of the contract, in the case the term is not clear, shall be established by comparison with other terms and with the sense of the contract as a whole.

If the rules contained in the first part of this Article do not allow the determination of the content of the contract, the real common will of the parties must be ascertained taking into account the purpose of the contract. All the corresponding circumstances shall be taken into account, including negotiations and correspondence preceding the conclusion of the contract, the practice in the mutual relationships of the parties, the customs, and the subsequent conduct of the parties."

Accordingly, under this provision, the primary rule of interpretation is the literal meaning of the words but, if that is unclear, it is permissible to refer to all the surrounding circumstances, including negotiating history and subjective intent. Arguing that it is appropriate in the present case to look beyond the literal meaning of the words used, Mr Millett QC pointed to the evidence which was before me concerned with what Tatneft intended when entering into the 2015 Compensation Agreement. Particular emphasis was placed on a witness statement from Mr Nurislam Syubaev, a member of Tatneft's Management Board, in which this is stated at paragraph 94:

"In October 2015 as part of the bankruptcy proceedings Tatneft and S-K entered into the compensation agreement whereby S-K assigned to Tatneft all its claims relating directly or indirectly to non-payment of any amounts owed to S-K in connection with oil supplies to UTN in August-October 2007, including all non-contractual claims. Clause 1.4 of the agreement expressly provided for assignment from S-K to Tatneft of claims against UTN and/or third parties arising in tort and/or from unjust enrichment. On Tatneft's part the draft of the compensation agreement was negotiated by our lawyers, and I personally confirmed inclusion of that clause into the agreement. While I was not involved in the actual drafting of corresponding documents I was part of the decision-making process at Tatneft and, thus, I am perfectly aware that the parties intended, in particular, to assign to Tatneft S-K's claims against Kolomoisky, Bogolyubov, Yaroslavsky and Ovcharenko in connection with the harm caused by them to S-K. That was the aim and purpose of the agreement and the reference to third parties was intended to be a reference to the Defendants in this case, and any other persons who had participated in the wrongdoing to deprive S-K of the oil monies."

33. I am not at all sure that this is evidence which would be admissible under Article 431 since it is to be noted that the reference there is to the *"real common will of the parties"*

rather than the intention of just one party to a contract. In the present case there is no evidence from S-K as to what its intention was when entering into the 2015 Compensation Agreement. Professor Karabelnikov, Tatneft's Russian law expert, himself makes the point in his report at paragraph 114(c) that it is *"the common intentions of S-K and Tatneft"* which would need to be considered. Here, the evidence relied upon by Tatneft is only from Tatneft and, even then, not the signatory to the contract. However, leaving this point to one side, there is the further difficulty for Tatneft that Article 431 only permits resort to be had to evidence of the type described in the second paragraph of the provision if *"the rules contained in the first part of this Article do not allow the determination of the content of the contract"*. I do not consider that this is the position in the present case. In my view, the language used in Clauses 1.3 and 1.4 is clear. I do not see that there is the ambiguity which is suggested on Tatneft's behalf. On the contrary, in my view, it is quite clear that the 2015 Compensation Agreement does not embrace a claim brought against any third party which does not arise out of the documents listed in Clause 1.3. It follows that it is not permissible to resort to evidence such as that contained in Mr Syubaev's witness statement. Nor, it seems to me, should I be overly swayed by the suggestion that, the 2015 Compensation Agreement having been entered into only last year and so at a time when Tatneft's legal team was nearing the stage when proceedings under Article 1064 against the Defendants were to be brought, it must have been intended by Tatneft and S-K that the 2015 Compensation Agreement should cover such claims. Even if that was the case, Article 431 makes it clear that the focus should be on the words used and, only if this does not allow *"the determination of the content of the contract"*, should such considerations come into play.

34. I regard the meaning of the 2015 Compensation Agreement to be clear for a number of reasons. First, the second of the recitals needs to be borne in mind because it somewhat sets the tone for what follows, including in Clauses 1.3 and 1.4. Significantly, it defines *"Claims"* as the claims which the *"Debtor"* (S-K, then called Fenix) has against UTN. These are claims which can only be under the 2008 Assignment Agreement for the simple reason that a claim under that agreement is the only direct claim which, at that or any other stage, S-K has had against UTN. Secondly, following on from this recital and entirely consistently with it, Clause 1.3 then very specifically provides for the discharge of S-K's *"Obligations"* under the Suvar-Tatneft Commission Agreement (identified in the first recital as the *"Commission Agency Agreement"*) by S-K transferring to Tatneft *"compensation"* in the same amount as that described in the second recital (UAH 1,615,814,976) *"being the Debtor's Claim against TFIOC UTN … arising under the following documents"*, namely the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order. It follows that, under Clause 1.3, the transfer to Tatneft from S-K is S-K's claim, first, against UTN, rather than any other party, and secondly, under those three *"documents"*, rather than under any other *"documents"*, and still less, it seems to me, any other *"documents"* (or contracts) which are inconsistent with, or contradict, those three *"documents"*.

35. Thirdly, as to Clause 1.4, although this contains the *"also"* language highlighted by Mr Millett QC when addressing me orally, I consider that to treat such language as removing the link with the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order made so explicit in Clause 1.3, a link which also underlies the second recital and Clause 1.2, represents too much of a stretch. Mr Millett QC's submission understandably focused on the seemingly wide language which

follows the word *"also"*. However, what seems to me to be important is that still the focus of that wide language (*"rights … associated with and/or arising from the Claims and/or directly or indirectly related in any way"*) remains on the *"documents set forth in Clauses 1.3.1 to 1.3.3 hereof"*, specifically on *"the non-payment of sums owed to the Debtor under any or all"* of those documents. As Mr Weisselberg QC put it when developing his submissions orally, in such circumstances, there cannot be said to be an expansion of *"the subject matter of the grant"* so as to mean that the assignment is to be regarded as embracing rights arising wholly independently of the Clause 1.3 *"documents"* and even, if Tatneft is right, rights which arise on a basis which assumes the invalidity, or at least the inapplicability, of the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order. This, in circumstances also when it should be noted that nowhere in the 2015 Compensation Agreement is there any mention of the Ukrainian Judgment having declared that the 2008 Assignment Agreement was invalid; nor, indeed, any mention of Taiz, Tekhnoprogress or Avto at all.

36. Fourthly, although the point is related to the last, it is to be noted that the wording which follows the words *"including, but not limited to"* has as its focus still, certainly its primary focus, S-K's rights as against UTN and so on S-K's ability to claim against UTN under the 2008 Assignment Agreement. This is apparent from Clause 1.4(1) which refers to *"the Debtor's right to require TFIOC UTN … to make any payments"*, as well as from Clause 1.4(2) which refers to *"the Debtor's claims against TFIOC UTN … arising from damages caused and/or unjust enrichment"*. The same applies to Clause 1.4 (3) where it refers to *"the Debtor's right to sue TFIOC UTN"*. I acknowledge that in each of (1), (2) and (3) the reference to UTN is immediately followed by the words *"and/or third parties"* or in the case of (1) *"and/or any third parties"*. However, allied with the references to UTN, I consider that this does not justify a conclusion that the linkage with the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order, which is elsewhere made very clear, is to be regarded as no longer applicable. That, in my view, is to read too much into the *"third parties"* language. It is quite clear to me that any claim against third parties is a claim which, like the claim against UTN, takes as its context the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order, and that it is unrealistic for Tatneft to suggest that the 2015 Assignment Agreement covers rights which do not relate to those *"documents"*. It cannot be said, in short, that any such third party claim entails the assertion of S-K's *"rights … associated with and/or arising from the Claims and/or directly or indirectly related in any way"* to the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order.

37. I would add that I am not swayed from the conclusion which I have reached by a further submission made by Mr Millett QC concerning the translation of the words in Clause 1.4 *"the Debtor's claims against TFIOC UTN and/or third parties arising from damages caused and/or unjust enrichment"*, specifically the fact that Professor Karabelnikov considers that a more accurate translation from the Russian would entail the words *"damages caused"* being replaced by the words *"causation of harm"*. Mr Millett QC submitted, supported by Professor Karabelnikov, that such wording mirrors the words used in Article 1064 (as to which see below, although it is to be noted that the translation put forward in his first report where he set out a translation of Article 1064 did not use the words *"causation of harm"*) and, as such, represents a clear indication that the parties to the 2015 Compensation Agreement intended that Tatneft

should receive an assignment of S-K's Article 1064 claims against the Defendants (as third parties) on the facts of this case. The difficulty with this submission is that it does not answer the various points which I have made above. The most that it does is to support a contention that the assignment covered Article 1064 claims which proceeded on the basis that the 2008 Assignment Agreement was valid and applicable. That may well be the case. This is not, however, the type of Article 1064 claim which has been asserted in these proceedings, at least in the Particulars of Claim as currently framed. Furthermore, Mr Millett QC was driven to accept during the course of oral submissions that, as Professor Maggs has observed, the words *"causation of harm"* are a common form of words in Russian law and are, accordingly, not unique to Article 1064. It seems to me that, in the circumstances, the force of the point made by Mr Millett QC and Professor Karabelnikov is somewhat reduced.

38. It follows that, in my judgment, the rights sought to be asserted by Tatneft in these proceedings, by which I mean in the existing Particulars of Claim since I shall deal separately with the draft Amended Particulars of Claim, are not rights which were the subject of the 2015 Compensation Agreement and that Tatneft has no 'real prospect of success' in seeking to establish otherwise. Moreover, this is a conclusion which I am as able to reach at this early stage of the proceedings as a judge would be were the matter to proceed to trial since there is agreement between the Russian law experts instructed by the Defendants who addressed the assignment issue (Professor Maggs on behalf of Mr Bogolyubov, Professor Butler on behalf of Mr Kolomoisky and Dr Rachkov on behalf of Mr Yaroslavsky, but not Dr Pastukhov on behalf of Mr Ovcharenko who did not address the issue) and Professor Karabelnikov on behalf of Tatneft as to the proper approach to the construction exercise which Russian law, the governing law of the 2015 Compensation Agreement, requires. As Mr Millett QC and Mr McGrath QC were at pains to stress in their skeleton argument, it is not for the various Russian law experts to opine on what the words of the relevant contract mean in their opinion: see ***King v Brandywine Reinsurance Co.*** [2005] 1 Lloyd's Rep 655 at [67] and [68]. That is a matter for me, assisted by the effectively agreed Russian law evidence concerning the proper approach to be taken as regards the exercise of construction.

The claim under Article 1064

39. In view of the decision which I have reached in relation to the 2015 Compensation Agreement, it is not strictly necessary that I should go on and address the other points which arise on the Defendants' applications insofar as they relate to the case as currently set out in the Particulars of Claim. As, in my view, Tatneft did not have assigned to it S-K's rights to bring the claim which is put forward in these proceedings (in the unamended Particulars of Claim), a claim against the Defendants under Article 1064 which assumes the invalidity or inapplicability of the 2008 Assignment Agreement and Tatneft's argument to the contrary has no 'real prospect of success', there is no need to consider the viability of such a claim. It is nonetheless sensible that I do so in circumstances where I heard considerable argument on the issue and in case the matter were to go further. In any event, I shall later on have to consider this issue in the context of Tatneft's amendment application.

40. As will appear, there are three aspects to the Article 1064-related objections which are made by the Defendants: (i) an objection concerned with the manner in which Tatneft has formulated its Article 1064 case; (ii) an 'in principle' objection to the applicability

of Article 1064 in a case such as the present; and (iii) an objection which is specific to Mr Yaroslavsky and which, again, has as its focus the way in which the case has been presented by Tatneft. The first of these matters was covered by Mr Malek QC in oral submissions. The second is a point which was addressed in oral submissions by Mr Weisselberg QC. The third is a point which was the subject of submissions advanced before me by Mr Kenneth Maclean QC on Mr Yaroslavsky's behalf. I shall deal with each of these topics in turn.

(i) Tatneft's case under Article 1064

41. Article 1064 is in the following terms (again in translation):

> *"1. Harm caused to the person or property of a citizen and also harm caused to the property of a legal person shall be subject to compensation in full by the person who has caused the harm.*
>
> *A statute may place a duty for compensation for harm on a person who is not the person that caused the harm.*
>
> *A statute or contract may establish a duty for the person who has caused the harm to pay the victim compensation in addition to compensation for the harm.*
>
> *2. The person who has caused the harm is freed from compensation for the harm if he proves that the harm was caused not by his fault. A statute may provide for compensation for the harm even in the absence of fault of the person who caused the harm.*
>
> *3. Harm caused by lawful actions shall be subject to compensation in the cases provided by a statute.*
>
> *Compensation for harm may be refused if the harm was caused at the request, or with the consent, of the victim, and the actions of the person who caused the harm do not violate the moral principles of society."*

42. It is common ground between all the Russian law experts that there are four elements to a claim under Article 1064: *"harm"* suffered by the claimant; *"unlawful act"* on the part of the defendant; *"causation"*; and *"guilt"* on the part of the defendant in the sense of *"intention"* or *"negligence"*. That is, indeed, how the case has been pleaded in the Particulars of Claim at paragraph 85, which states as follows:

> *"The necessary elements of a claim under Article 1064 of the RCC are (i) infliction of harm to the claimant, (ii) an unlawful act on the part of the defendant, (iii) causation between the act of the defendant and the harm suffered by the claimant, and (iv) guilt of the defendant (either intention or negligence). The first three elements are to be proved by the claimant. Once the claimant has proved the relevant elements, the existence of the fourth element (i.e. guilt) is presumed. It is then for the defendant to prove that he did not act intentionally or negligently in causing the harm."*

Tatneft then goes on to set out its case in relation to each of these elements in paragraphs 86 to 90. It is important to appreciate what is there alleged given the nature of the Defendants' attack on the case which has been put forward, although I will need later

also to deal with a broader 'in principle' objection which was led by Mr Weisselberg QC. Paragraphs 86 and 87 deal with the first element (*"harm"*) and state as follows:

> *"86. Under Article 15 of the RCC, S-K is entitled to recover the full amount of the debt that Avto owed it but which it failed to pay due to the unlawful acts pleaded above, namely the USD 439.4 million in oil monies less the USD 105.3 million recovered by way of enforcement of the decision of the Arbitrazh Court of the Republic of Tatarstan dated 28 August 2008 (which S-K subsequently paid to Tatneft under the Suvar-Tatneft Commission Agreement), in total USD 334.1 million.*
>
> *87 Furthermore, S-K's claim lies in US Dollars on the basis that:*
>
> *(i) S-K's rights against Avto under the Suvar-Avto Framework Contract were denominated in US Dollars;*
>
> *(ii) the Assignment Agreement was a forced step for S-K, in mitigation of the harm that it was suffering by virtue of UTN's failure after October 2007, in breach of contract, to pay what it owed Taiz and Tekhnoprogress for Tatneft oil, and consequently did not and does not amount to an irrevocable election by S-K to abandon its US Dollar claims and rights against Avto and substitute them with UAH claims and rights against UTN, particularly in circumstances where UTN (it is to be inferred under the control or at the direction of the Defendants) successfully impugned the Assignment Agreement before the Ukrainian courts. In any event, the Defendants' unlawful actions in perpetrating the Oil Payment Siphoning Scheme were consistent and only consistent with the Assignment Agreement being of no effect, and followed not long after the Ukrainian judgments invalidating the Assignment Agreement.*
>
> *(iii) so far as concerns these Defendants, Tatneft has given credit to them for the recovery of USD 105.3 million from UTN pursuant to the Tatarstan judgment."*

43. Paragraph 88 addresses the next element, namely *"unlawful acts"*, in the following way:

> *"Tatneft relies on the following facts and matters as constituting relevant unlawful acts committed by the Defendants or some of them under the 'general tort' principle of Russian law for the purposes of Article 1064:*
>
> *(i) after taking over Taiz and Tekhnoprogress, they caused them to breach their contractual obligations to pay the oil money upstream via Avto to S-K by diverting the money offshore through the two rounds of sham share transactions connected with purchase of shares of various 'junk' companies; and/or*
>
> *(ii) by taking over and procuring the bankruptcy of Avto, Taiz and Tekhnoprogress, they deprived S-K of the full value of its claims against Avto under the Suvar-Avto Framework Contract (and in consequence any rights of recourse that Avto might otherwise have had downstream against Taiz and Tekhnoprogress, and that Taiz and Tekhnoprogress had against UTN, were rendered worthless)."*

Although this paragraph does not refer back to the earlier paragraphs which describe the Oil Payment Siphoning Scheme, namely paragraphs 55 to 82 of the Particulars of Claim, it is nonetheless implicit that reliance is here placed by Tatneft on those earlier paragraphs since otherwise the references in (i) and (ii) make little sense.

44. The topic which is then addressed in paragraph 89 is *"causation"*, as follows:

"But for the acts and omissions of the Defendants pleaded above comprising the unlawful acts, UTN would have paid Taiz and Tekhnoprogress what it owed them for the Tatneft oil sold and delivered in accordance with the agreements pleaded above, who in turn would have paid Avto and Avto would have paid S-K. As a matter of Russian law, it is an actionable wrong under Article 1064 of the RCC for a person to cause another person to breach his contractual obligations to, or not to pay his debt to, a third person, and the loss sustained by that third person is recoverable as damages by him pursuant to Article 15 of the RCC."

45. Paragraph 90 lastly addresses *"intention"* or *"negligence"*:

"It is to be inferred from the facts and matters pleaded at paragraphs 57 to 82 above, and in particular as to the timing of those events, that the unlawful acts were carried out intentionally. UTN's management would not likely have decided to (i) stop payments to Tatneft in 2007 and (ii) restart payments to Taiz and Tekhnoprogress in June 2009, a matter of days after the steps preparatory to the siphoning were completed, unless each of the Defendants was involved in the scheme and acted intentionally to bring it into effect."

46. Mr Malek QC, who advanced submissions on this aspect on behalf of all the Defendants, submitted that in the present case none of the three elements required for a claim under Article 1064 has been properly alleged by Tatneft. He emphasised that the case as contained both in the Claim Form and the Particulars of Claim has as its focus monies which were paid to Taiz and Tekhnoprogress and which, having been paid, did not go *"up the supply chain"*. The claim as currently pleaded, he submitted, does not, therefore, entail any contention that UTN should not have made the payments to Taiz and Tekhnoprogress but should instead have made the relevant payment directly to S-K as a result of the 2008 Assignment Agreement. The only case put forward in the current Particulars of Claim, Mr Malek QC explained, is that the Defendants procured the wrongful diversion of monies *out of* Taiz and Tekhnoprogress and then arranged for Taiz, Tekhnoprogress and Avto to be placed into bankruptcy, thus preventing Avto from satisfying its contractual obligations to S-K.

47. Specifically, Mr Malek QC pointed out that, in dealing with *"harm"*, Tatneft's pleaded case in paragraph 86 is that S-K has suffered by not recovering *"the full amount of the debt that Avto owed it but which it failed to pay due to the unlawful acts"* alleged to have been committed by the Defendants. Accordingly, the premise behind Tatneft's plea in relation to the first of the required Article 1064 elements is that Avto remained liable to S-K notwithstanding the 2008 Assignment Agreement, yet any such liability on Avto's part ceased to exist as a result of what was clearly agreed in the 2008 Assignment Agreement. Mr Malek QC placed particular reliance in this context on what Tatneft has itself pleaded in paragraph 48 of the Particulars of Claim in relation to the

2008 Assignment Agreement. There, Tatneft describes the 2008 Assignment Agreement as having *"contained a series of assignments whereby:*

(i) Tekhnoprogress assigned to Taiz its payment claims against UTN under the Tekhnoprogress-UTN Contracts dated 11, 21 and 24 September 2007, in a total principal debt amount of UAH 658,247,011. Tekhnoprogress' payment obligations to Taiz were thereby terminated.

(ii) Taiz assigned to Avto (i) the payment claims which it received from Tekhnoprogress and (ii) Taiz's own payment claims against UTN under the Taiz-UTN Contracts dated 30 May, 6 June, 11 June, 27 June, 3 July, 6 July, and 11 July 2007, in a total principal debt amount of UAH 1,470,571,955. Taiz's payment obligations to Avto were thereby terminated.

(iii) Avto assigned all of the foregoing claims in a total principal debt amount of UAH 2,128,818,966 to S-K. Avto's payment obligations (which included the principal debt) to S-K were thereby terminated. The amount was in UAH rather than USD, despite the fact Avto's payment obligation to S-K was in USD, because the amounts owed by UTN to Taiz and Tekhnoprogress were denominated in UAH, and UTN's obligation to pay in UAH could not have been amended by Taiz and Tekhnoprogress in a contract to which UTN was not a party. Avto's payment obligations to S-K in the amount of USD 421,548,310 were thereby terminated (this amount does not include approximately USD 17.9 million which were awarded in favour of S-K pursuant to ICAC proceedings, but were never recovered by S-K from Avto)."

Mr Malek QC submitted that this makes it abundantly clear that Tatneft's *"harm"* case, based as it is on the continued existence of a contractual chain which is no longer effective, is doomed to fail.

48. Similarly, Mr Malek QC submitted, the *"unlawful acts"* upon which Tatneft relies in paragraph 88 of the Particulars of Claim each entails Tatneft asserting the continued existence of contractual obligations which ceased to exist after the 2008 Assignment Agreement was concluded. Hence, in paragraph 88(i) the allegation is that *"after taking over Taiz and Tekhnoprogress"*, in other words in 2009 when, on Tatneft's own case, those companies were taken over by the Defendants, the Defendants *"caused them to breach their contractual obligations to pay the oil money upstream via Avto to S-K by diverting the money offshore"*, something which, again on Tatneft's own case, happened in 2009 and so after the 2008 Assignment Agreement had been entered into. In the same way, paragraph 88(ii) alleges that *"by taking over and procuring the bankruptcy of Avto, Taiz and Tekhnoprogress"*, again in 2009, the Defendants *"deprived S-K of the full value of its claims against Avto under the Suvar-Avto Framework Contract"*, despite the fact that the effect of the 2008 Assignment Agreement was to terminate Avto's obligations under that contract.

49. As for *"causation"*, Mr Malek QC submitted that, once again, what is alleged in paragraph 89 of the Particulars of Claim simply makes no sense, in that the alleged "*acts and omissions of the Defendants pleaded above comprising the unlawful acts"* cannot properly be alleged to have resulted in Avto not paying S-K under a contract

(the Suvar-Avto Framework Contract) which no longer, as a result of the 2008 Assignment Agreement, required Avto to make any such payment to S-K.

50. In short, the 2008 Assignment Agreement represents, Mr Malek QC submitted, an insuperable obstacle to the Article 1064 case which Tatneft seeks to put forward. In the circumstances, he argued, the case as currently advanced by Tatneft is unsustainable. He emphasised that this can be seen from the way in which the claim has been formulated by Tatneft itself both in its Claim Form and in the Particulars of Claim and does not, therefore, entail any need for a 'mini-trial'. As such, Mr Malek QC submitted, the case ought not to be permitted to continue.

51. Mr Millett QC disagreed. He suggested that Tatneft should not be regarded as precluding itself from advancing the case which is subsequently put forward in paragraphs 86 to 91 of the Particulars of Claim, premised as it is on the chain of contracts which pre-existed the 2008 Assignment Agreement continuing to have effect. Mr Millett QC sought, in particular, to argue that, notwithstanding what is pleaded in paragraph 48 of the Particulars of Claim, on its true construction, the 2008 Assignment Agreement continued to impose performance obligations on Avto, Taiz and Tekhnoprogress. As I shall explain, I cannot accept, however, that this was the case. Mr Millett QC specifically relied upon Clause 4.1, which provides as follows:

"A Party assigning the relevant claims shall be liable for the accurateness of the documents transferred under this Agreement and shall guarantee the availability and transfer of all of the assigned rights."

It is clear to me that this is not a provision which should be treated as meaning that the various intermediate contracts continue to have effect, and in particular that there remain in place liabilities in respect of the oil monies. To reach the conclusion advocated by Mr Millett QC would be wholly at odds with earlier provisions in the 2008 Assignment Agreement, including Clause 1.5 dealing with the position as between Avto (*"Assignor 1"*) and S-K (*"Assignee"*), as follows:

"the Assignor 1 shall assign and the Assignee shall accept all claims against the Debtor [UTN] arising out of the agreements between the Assignor 2 [Taiz] and the Debtor, as listed in Clause 1.2 of this Agreement, and out of the agreements between the Assignor 3 [Tekhnoprogress] and the Debtor, as listed in Clause 1.1 of this Agreement, subject to paragraph 2 of Clause 1.3, and any rights ensuring the performance of such obligations and any other related rights, including the right to any outstanding interest and any penalties."

It would also contradict Clause 2.2.3, again concerned with the position as between Avto and S-K, which states:

"Payment obligations of the Assignor 1 to Assignee in the amount of 421,548,310 US dollars … under the Contract No.3-0407 between them dated April 23, 2007 and Additional Agreements Nos. 14-20 thereto shall be terminated …".

Furthermore, Mr Millett QC's argument is difficult to reconcile with Clauses 3.4 and 3.5 as follows:

"3.4 Immediately upon the execution of the Act of delivery and acceptance mentioned in Clause 3.2 of this Agreement, the obligations of the party assigning the relevant claims towards the Party accepting the relevant claims under this Agreement shall be deemed performed ….

3.5 Immediately upon the execution of this Agreement the Assignee shall become a new creditor of the Debtor under the claims arising out of the agreements between the Assignor 3 and the Debtor, as listed in Clause 1.1 of this Agreement, and under the claims arising out of the agreements between the Assignor 2 and the Debtor, as listed in Clause 1.2 of this Agreement."

It is quite clear, in the light of these provisions, that the obligations of Avto, Taiz and Tekhnoprogress ceased on execution of the 2008 Assignment Agreement. The wording relied upon in Clause 4.1 cannot, in my view, sensibly have the effect for which Mr Millett QC contended. It simply makes no sense to treat such language as resurrecting a primary liability which the preceding provisions have brought to an end. Indeed, the use of the word *"guarantee"* itself counts against an argument that Taiz and Tekhnoprogress continued to be under payment obligations 'up the chain' of the type suggested by Mr Millett QC since a guarantee denotes a secondary, rather than a primary, liability.

52. I acknowledge that, in stating this view, I am dealing with a contract, the 2008 Assignment Agreement, which is subject to Russian law. However, this does not mean that I should not address the issue of construction. The Russian law expert evidence adduced before me did not address the argument put forward by Mr Millett QC. Had it done so, it would not have been of any particular assistance since, as Mr Millett QC stressed and as I have previously mentioned, it is not for a Russian law expert to state what he or she considers is the proper construction of a Russian law contract, as opposed to describing the Russian law approach to the task of construction in general. The Russian law expert evidence has equipped me to do what I need to do and, in such circumstances, I see no need for particular reticence if the 2008 Assignment Agreement is as clear as I consider it to be in relation to an argument which, I am bound to observe, was raised for the first time by Mr Millett QC only when he was making his oral submissions.

53. The inescapable conclusion, in the circumstances, is that the claim as put forward in the (unamended) Particulars of Claim is bound to fail and so has no 'real prospect of success'. Very simply, since Avto, Taiz and Tekhnoprogress had all been released from their contractual obligations pursuant to the 2008 Assignment Agreement, the Defendants cannot have caused Taiz and Tekhnoprogress *"to breach their contractual obligations to pay the oil money upstream"* (paragraph 88(i) of the Particulars of Claim) and the bankruptcies of Avto, Taiz and Tekhnoprogress cannot have deprived S-K of *"its claims against Avto"*. The Defendants cannot, therefore, have committed the *"unlawful acts"* which are alleged against them. In circumstances where the existing claim describes that *"harm"* as being S-K's contractual rights as against Avto, such rights having ceased to exist as a result of the 2008 Assignment Agreement, it is impossible to see how the claim as currently framed can succeed. The *"harm"* element is not made out. It is not open to Mr Millett QC simply to refer to the payments to Taiz and Tekhnoprogress in the abstract: if Taiz and Tekhnoprogress were under no contractual obligations 'up the chain', there can have been nothing unlawful about the

steps allegedly taken by the Defendants. Nor can Tatneft have suffered the *"harm"* which it is alleged to have suffered since S-K had already discharged Avto (and Avto had already discharged Taiz and Tekhnoprogress) from any obligation to make payment in respect of the oil deliveries.

54. I have previously addressed Mr Millett QC's argument concerning the 2008 Assignment Agreement and his suggestion that, notwithstanding the terms of that agreement, the obligations owed 'up the chain' continued. In truth, however, this was something of a fallback position for Mr Millett QC since his primary submission was that, as he put it, the Court should *"not get hung up on whether there are legal obligations"* since the *"question is one of causation, which is a question of fact"*. Mr Millett QC suggested that the real question, in the circumstances, was, again as he put it, whether Taiz and Tekhnoprogress *"would have ... hung on to the money"* and not paid the money 'up the chain' to S-K. The essential difficulty with this approach is, however, that, as Tatneft's own Russian law expert, Professor Karabelnikov, himself explains, for an Article 1064 claim to succeed there has to be *"harm"* to property, in this case S-K's property which, for the purposes of the present argument, Mr Malek QC was content to accept could include S-K's contractual rights (this is the 'in principle' issue which I shall come on to consider next). Specifically, it was rightly stressed by Mr Malek QC, in particular during his oral reply submissions although the point was raised in his skeleton argument, that Professor Karabelnikov, Tatneft's own Russian law expert, was clear in his evidence, relying upon a well-respected textbook on Russian civil law, edited by a Professor Evgeny Sukhanov, that *"[h]arm as the basis for liability in tort means property-related and non-property related consequences adverse to the party to civil relations arising from damage to or destruction of such party's property"*. This is a point which was made in Professor Karabelnikov's first report and which was repeated in his second report where he stated that the *"obligations arising from infliction of harm are based on the so-called general tort principle, whereby any person is prohibited from inflicting harm to the property or a person, and any infliction of harm to another person is unlawful, unless the person was authorised to inflict harm"*. He described this as a *"fundamental principle"*.

55. Nor, it follows, is the *"causation"* element made out: without *"harm"* and without an *"unlawful act"*, there cannot be the necessary *"causation"*. Indeed, as Mr Kenneth MacLean QC, Mr Yaroslavsky's counsel, pointed out, both in his skeleton argument and in the course of his oral submissions, and as Mr Weisselberg QC also submitted, even leaving to one side the logical difficulties with the case as it is set out in the Particulars of Claim, it is clear that there was no difference between S-K's actual position and the position that it would have been in but for the alleged fraud: irrespective of the Oil Payment Siphoning Scheme, S-K would not have been paid the oil monies and would have remained what Mr MacLean QC described as *"a frustrated judgment creditor of UTN"*. Mr Millett QC suggested otherwise, pointing out that it cannot have been a coincidence that UTN chose to pay Taiz and Tekhnoprogress monies equating to the amount owed in respect of the oil. I myself raised this point during the course of the hearing without receiving any explanation as to why this should have been the case. It does not follow, however, that there is not force in the submission which Mr MacLean QC made. This is because it is still necessary for Tatneft to make out its case. Unless this can be done, the Article 1064 claim cannot succeed.

56. It is not an answer for Mr Millett QC simply to point to the fact that the Russian law experts are agreed that causation is a question of fact and so, on that basis, submit that there needs to be a trial. The case as alleged must be coherently framed and, if it is not, there is no need for a trial to take place. The Russian law experts are agreed on the need for a claimant in Tatneft's position to show that the *"harm"* would not have been suffered but for the *"unlawful acts"*. This is what Professor Karabelnikov himself says, and it is no doubt why paragraph 89 of the Particulars of Claim is drafted as it is using 'but for' language. As Mr MacLean QC also pointed out, the experts appear largely to agree that the Russian courts generally require the claimant to show *"a direct and straightforward causal link"*, as Professor Karabelnikov describes it, between the *"harm"* and the relevant *"unlawful acts"* – something which Andrew Smith J also noted in ***Fiona Trust & Holding Corporation & others v Yuri Nikitin & Another*** [2010] EWHC 3199 (Comm) at [101], relying upon evidence given in that case by Professor Maggs. The decision whether in this case *"causation"* has been made out is not a matter for the Russian law experts, however, but a decision which is for the Court here to arrive at by reference to the facts. That is a decision which, I repeat, need not wait for a trial if the Court takes the view that there is no 'real prospect of success' in relation to it or that it does not raise a 'serious issue to be tried'. This is why it is not sufficient for Mr Millett QC simply to point to the *"causation"* issue entailing a factual question and, on that basis, insist that a trial must take place. I am satisfied that, in truth, there was never any prospect of S-K receiving the oil monies, and that S-K would have remained a *"frustrated creditor"* irrespective of the Oil Payment Siphoning Scheme. It is significant in this respect that Tatneft's own pleaded case (a case which remains unchanged in the draft Amended Particulars of Claim) is that UTN's failure to make payment from 2007 onwards was the result of a positive decision not to pay for the oil. This is what is stated in paragraph 26, as follows, when dealing with the position after 19 October 2007 when Mr Ovcharenko took over the Kremenchug refinery (as pleaded in paragraph 24):

"At this point, UTN (having paid for the oil supplied by Tatneft, or much of it, hitherto) ceased making any further payments for Tatneft's oil. As Ovcharenko was then Chairman of the Management Board of UTN, it is to be inferred that Ovcharenko made the decision to stop making any further payments for the oil, since Chairman of the Management Board was the most powerful executive position in UTN, and the Board by this stage had been packed with Ovcharenko's supporters … ."

The same point is made in paragraph 45, where this is stated:

"After Ovcharenko entered UTN's premises on 19 October 2007, UTN's payments ceased and UTN failed thereafter to pay either Taiz or Tekhnoprogress any further sums for oil deliveries made between August and October 2007… It is to be inferred from the timing of UTN's ceasing to make payments for Tatneft's oil (once the Defendants forcibly took over UTN) that the Defendants procured UTN not to make these payments."

As Mr MacLean QC submitted, it is, therefore, Tatneft's *own* case that from October 2007 UTN was not going to pay for the oil, and that obviously is why Tatneft remains to this day substantially out of pocket even though it has obtained the Tatarstan Judgment.

57. It is unrealistic, in the circumstances, for it to be suggested that UTN was ever going to pay S-K/Tatneft. Indeed, the Particulars of Claim as originally drafted do not, as such, advance such a case. The simple fact is that UTN was never going to do any such thing. There was never any prospect of UTN paying S-K or Tatneft the balance of the Tatarstan Judgment debt. This is confirmed, as Mr MacLean QC went on to submit, by what Tatneft alleges in paragraph 55 of the Particulars of Claim when summarising the elements of the Oil Payment Siphoning Scheme, as then developed in paragraphs 56 to 82 of the Particulars of Claim. In short, Tatneft's case concerning what happened in June 2009 is wholly at odds with any suggestion (not made in the unamended Particulars of Claim) that the Oil Payment Siphoning Scheme diverted any of UTN's money which S-K or Tatneft might otherwise have received, since at the core of Tatneft's case is the allegation that the payments which UTN made to Taiz and Tekhnoprogress were part of the Oil Payment Siphoning Scheme and not merely failed attempts to make payment ultimately to S-K/Tatneft. It follows that Tatneft cannot sensibly say that, but for the Oil Payment Siphoning Scheme, UTN would have made payment to S-K. Crucially, as Mr MacLean QC emphasised, Tatneft's case entails the allegation that the payments by UTN to Taiz and Tekhnoprogress followed the Defendants' acquisition of those two companies and their entry into the alleged sham share transactions. Tatneft's case must necessarily, therefore, entail the contention that such payments were intended ultimately to come to the Defendants, and not to find their way to S-K/Tatneft. It follows from this that S-K/Tatneft would have been in the same position as they have been ever since UTN stopped making payments 'up the chain' after Mr Ovcharenko took over UTN, regardless of whether the Oil Payment Siphoning Scheme took place or not. Causation is, accordingly, not made out on the basis of Tatneft's own pleaded case. As Mr Weisselberg QC pithily put it during the course of his oral submissions, *"the factual background demonstrates that this was harm that was already being suffered, was always being suffered and the payments made as part of the alleged siphoning scheme made no difference at all to the harm that had been suffered by S-K"*.

58. Besides the argument based on Clause 4.1 of the 2008 Assignment Agreement, Mr Millett QC made a number of other submissions in which he sought to meet the objections raised by Mr Malek QC and, albeit not directly, the submissions which were made also by Mr MacLean QC (and Mr Weisselberg QC) as just described. First, he sought to contend that the effect of the Ukrainian Judgment was that the debt owed by Avto to S-K under the Suvar-Avto Framework Agreement continued to exist. He suggested that, in the light of this judgment, Ukrainian companies such as Taiz and Tekhnoprogress would be bound to have regarded themselves as obliged to perform their contractual obligations 'up the chain' notwithstanding the 2008 Assignment Agreement. This is not a point which was pleaded in the Particulars of Claim; on the contrary, paragraph 48 of the Particulars of Claim appears to acknowledge the validity and applicability of the 2008 Assignment Agreement. Whilst it is true that the Particulars of Claim go on in paragraph 53 to refer to the Ukrainian Judgment, nonetheless there is no explanation given as to why it should be the case that, notwithstanding the 2008 Assignment Agreement, the previously existing contractual chain is to be regarded as extant. There is also the point that S-K itself has consistently adopted the position that the 2008 Assignment Agreement is valid. This was the stance adopted when obtaining the Tatarstan Judgment and when subsequently recovering, on the basis of that judgment, US$105.3 million as against UTN. It is also the stance which S-K adopted when it sought and obtained the ICAC Award delivered on 19 December

2008 and under which it was bindingly determined as between S-K and Avto that the only remaining liability of Avto to S-K in relation to the oil supplied was in the sum of US$17.9 million. Furthermore, by an assignment to a company called Zalesny City LLC dated 29 December 2012, S-K assigned the rights it had to bring claims against UTN, which again is wholly consistent with S-K having acquired such rights under the 2008 Assignment Agreement. The submission advanced by Mr Millett QC also ignores the fact that Avto was not itself a party which sought the Ukrainian Judgment. Avto had not, therefore, sought a declaration that the 2008 Assignment Agreement was invalid. Moreover, on a practical level, had Avto been sued by S-K in December 2008 after the Tatarstan and Ukrainian Judgments had been obtained, it seems very likely indeed that Avto would have responded by relying upon the Tatarstan Judgment and its confirmation of the validity of the 2008 Assignment Agreement because that would have entitled Avto to resist S-K's claim. Lastly, as Mr Malek QC pointed out, there is nothing in the Particulars of Claim, or indeed elsewhere in the evidence before me, whether in the witness evidence of Tatneft's solicitor, Mr Justin Williams of Akin Gump, or in the expert evidence given by Professor Karabelnikov, which addresses the point made by Mr Millett QC concerning the effect of the Ukrainian Judgment. I am clear, in the circumstances, that the submission made by Mr Millett QC is untenable.

59. Secondly, Mr Millett QC went on to submit that Avto's obligation to pay the oil money to S-K which had terminated as a result of the 2008 Assignment Agreement was revived as a result of UTN making payment to Taiz and Tekhnoprogress in June 2009. This is a submission which makes no sense. It is impossible to see how the mere fact that UTN made a payment to Taiz and Tekhnoprogress could revive contractual obligations 'up the chain', ultimately to S-K. Again, this is not a matter which has been pleaded and nor was it otherwise foreshadowed in advance of Mr Millett QC making the submission orally.

60. Thirdly, Mr Millett QC also argued that, having received payment from UTN, Avto owed an obligation, acting in good faith as a matter of Russian law, to make the payment to S-K. This is another submission which I cannot accept. First, it assumes that Taiz and Tekhnoprogress passed the monies in respect of the oil 'up the chain' to Avto in circumstances where I struggle to see that such an assumption ought to be made. Secondly, there is no support for the submission from any of the Russian law experts. Thirdly, in circumstances where Clause 3.4 of the 2008 Assignment Agreement provides that upon execution *"this Agreement shall be deemed performed"*, there cannot be any continuing obligation of the sort suggested by Mr Millett QC. This point is underlined by Clause 9.6, which states as follows:

"This Agreement shall become effective and should be deemed to be executed upon its execution by all parties and shall remain effective until full performance by the Parties of their obligations under this Agreement."

This makes it abundantly clear that any obligations ceased. Furthermore, although Mr Millett QC relied upon the expert evidence given by Dr Pastukhov, Mr Ovcharenko's expert on Russian law, it is important to bear in mind that that evidence was to the effect that the duty of good faith, as recognised by Russian law, applies to the *performance* of contractual obligations; in other words, it does not create new, or freestanding, obligations.

61. Fourthly, Mr Millett QC raised a further argument in support of his contention that Avto would have had to pay the oil monies to S-K. This was that S-K would have had a potential claim against Avto in unjust enrichment. Ultimately, however, he accepted that no such claim would have arisen in circumstances where the oil monies had not been received by Avto from Tatneft since for an unjust enrichment claim to succeed under Russian law the defendant must have received the relevant money from the claimant. Mr Millett QC was driven to make this concession in the light of the decisions of Andrew Smith J in the ***Fiona Trust*** case at [119] and Mr Andrew Sutcliffe QC (sitting as a Deputy High Court Judge) in ***OJSC TNK-BP Holding v Beppler & Jacobson Ltd & Others*** [2012] EWHC 3286 (Ch) at [149] and [150].

62. More generally, Mr Millett QC submitted that the Court should *"maintain a sense of perspective"* and not permit what he described as *"technical"* points to be made in order to defeat the claim advanced by Tatneft. However, I agree with Mr Malek QC when he submitted that no additional *"perspective"* can allow Tatneft to ignore the basic elements of a claim under Article 1064 as a matter of Russian law. These are matters which may be *"technical"* in the sense that the Defendants' submissions entail a close scrutiny of Tatneft's current statement of case. This does not mean, however, that the criticisms made by the Defendants lack merit, any more than would criticisms raised by defendants in relation to a claim alleging, for example, that a common law duty of care is owed under English law when, on analysis, it can be seen from the relevant pleading that that cannot be the case. Mr Malek QC's submissions highlight a fundamental flaw in Tatneft's case. In such circumstances, it is no answer for Mr Millett QC to complain that the Defendants' objection is merely *"technical"*. I am clear that the claim as currently framed by Tatneft against the Defendants has no 'real prospect of success' or, put differently, that there is no 'serious issue to be tried' in relation to it.

63. I would add, in conclusion on this topic, that, in my view, I should not be dissuaded from reaching this conclusion by the scale of the case. I acknowledge that there is a need for caution in dealing with applications such as those made by the Defendants in a case of this complexity and value. I acknowledge also that Tatneft considers that it has been the victim of dishonesty. However, I bear in mind not only what Lewison J had to say in the ***Easyair*** case at [15(vii)] but also the following guidance given by Lord Hobhouse in the ***Three Rivers*** case at [156]:

> *"There is always an exercise of judgment to be undertaken by the judge whether the perceived short-cut will turn out to have been beneficial and, inevitably in a proportion of cases expectations will be confounded. Caution is required. But it is simplistic to suppose that in complex litigation the exercise should never be attempted. The volume of documentation and the complexity of the issues raised on the pleadings should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which that will involve. Indeed it can be submitted with force that those are just the sorts of case which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties."*

As I see it, this is an appropriate case in which it is not only appropriate, but absolutely necessary, to subject Tatneft's claim to *"critical scrutiny"*. The more so, given what

Lord Hobhouse went on to say at [157] about what is to be expected when a case is pleaded:

"… Any skilful pleader should be able to draft a pleading which sufficiently makes the minimum allegations to support the legal definition of the tort and I have detected no lack of skill in the lawyers acting for either side in this litigation. The question then becomes whether the particulars given provide realistic support for the primary allegations. …".

The Particulars of Claim in the present case, despite their length and detail, suffer from fundamental inconsistencies which simply cannot be, and certainly should not be, overlooked. The conclusion which I have reached has not entailed any sort of 'mini-trial'; it is merely the result of examining how Tatneft puts its own case.

(ii) The 'in principle' objection

64. Like the issue concerning the 2015 Compensation Agreement, this last conclusion is also sufficient to mean that the Defendants' various applications must succeed. It is right, however, that I go on to address (albeit, in the circumstances, only briefly) the two further points concerning Article 1064 which were raised by the Defendants, starting with the submissions which were made by Mr Weisselberg QC concerning the applicability (or, as Mr Weisselberg QC suggested, the inapplicability) of Article 1064 as a matter of principle in a case such as the present before then coming on to deal with Mr MacLean QC's submissions concerning Mr Yaroslavsky and how Tatneft has put the case against him specifically. Specifically, it was Mr Weisselberg QC's submission that Russian law does not recognise parallel contractual and delictual claims and does not allow the conversion of a contractual claim into a delictual one, no matter how inconvenient or impractical a contractual claim might be said to be. In support of his submission, Mr Weisselberg QC highlighted how the Defendants' Russian law experts agree that no claim under Article 1064 arises in this case because Article 1064 is not, they maintain, a general provision allowing for compensation for any harm caused but a specific rule which has no application in the contractual context. He was obliged to acknowledge, however, that Tatneft's expert, Professor Karabelnikov, disagrees and states that a claimant in Tatneft's position *"is not obliged to pursue any contractual claims against other entities which may exist"*. It was Mr Weisselberg QC's contention that, this notwithstanding, the Court should conclude that, as he put it in his oral submissions, *"when one stands back and takes perspective it is clear … that the [Article] 1064 claim does not get off the ground"*.

65. Attractively presented, though, as Mr Weisselberg QC's submissions on this point were, I do not consider myself able to adopt the approach which he urged upon me. This is because, however the matter is put, such an approach would involve me in rejecting expert evidence given by a distinguished Russian law expert, Professor Karabelnikov, who has expressed the opinion that an Article 1064 claim *can* be brought in the contractual context. I appreciate, of course, that the Russian law experts instructed by the Defendants disagree. However, Mr Millett QC's submissions on this issue did not entail any invitation to conclude, once and for all, that the Defendants' Russian law experts' views should be rejected. His position was that the dispute as between the experts was a matter which would need to be addressed at trial. I agree with Mr Millett QC about this, and this is sufficient to mean that the issue cannot properly be determined

at this juncture. It may very well be, were the matter to come to trial notwithstanding the conclusions which I have reached as set out above, that Professor Karabelnikov's opinion would be rejected. Indeed, I am bound to observe that there appeared considerable force in the points which Mr Weisselberg QC made concerning Professor Karabelnikov's reliance on the Russian authorities which he identified in his evidence: the so-called *Stove Case, the Logistics Case, the Garage Case, the Railway Case, the Road Police Case, the Fine Case and the Embezzlement Cases*. None of these cases is directly on point, and I agree with Mr Weisselberg QC that it is somewhat surprising that there is apparently no case which does deal with a case like the present or, indeed, any case involving what English law would characterise as a procuring breach of contract claim. Mr Millett QC suggested that the reason why no such cases have been identified is that Russian law is codified and there is no system of precedent. That, however, does not answer Mr Weisselberg QC's point which is not to suggest that there need to be previously decided cases which operate as precedents, but that the absence of any previous example casts considerable doubt on the opinion which Professor Karabelnikov has expressed.

66. Nonetheless, despite my being doubtful about what Professor Karabelnikov has to say, I do not consider it appropriate for the reason I have explained, to conclude at this stage that there is not a 'real prospect of success' or a 'serious issue to be tried' on this aspect. I bear in mind, further, in this context, that, as Mr Millett QC pointed out, there is nothing in Article 1064 itself which seeks to limit its applicability to cases where no contract is involved. This is a point which Professor Karabelnikov himself makes, and it may be a complete answer to the 'in principle' submissions made by Mr Weisselberg QC. This is, however, a matter which would need to be addressed in a trial.

(iii) The case against Mr Yaroslavsky

67. This brings me, lastly before I deal with the parties' submissions in relation to limitation, to certain submissions which Mr MacLean QC made concerning the position of Mr Yaroslavsky specifically. It was Mr MacLean QC's submission that the case as advanced against Mr Yaroslavsky in the Particulars of Claim is deficient, not only for the reasons which I have previously addressed but also because there is a failure to make out a proper Article 1064 case against Mr Yaroslavsky. As such, Mr MacLean QC submitted, given the nature of the allegations made which entail assertions of dishonest conduct, there is non-compliance with the Commercial Court Guide, which provides at C1.2(c) that full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality, and that, where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out. There is also non-compliance, Mr MacLean QC suggested, with the CPR Part 16PD, paragraph 8.2 requirement that a claimant *"must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim: (1) any allegation of fraud, (2) the fact of any illegality, … (5) notice or knowledge of a fact"*. Furthermore, as Lord Millett explained in the ***Three Rivers*** case at [184] *"fraud or dishonesty … must be distinctly alleged and as distinctly proved; [and] that it must be sufficiently particularised"*.

68. In my view, Mr MacLean QC's submissions are well-founded. Paragraph 55 of the Particulars of Claim begins by stating that in 2009 Mr Bogolyubov and Mr Kolomoisky, *"with the assistance of the other Defendants"*, took part in the Oil Payment Siphoning

Scheme. The *"other Defendants"* obviously include Mr Yaroslavsky and, in those circumstances, Mr MacLean QC's submission was that Mr Yaroslavsky is entitled to be provided with proper particulars which set out how Tatneft alleges that Mr Yaroslavsky gave his *"assistance"*, including what it is that he is alleged to have done by way of (i) gaining or assisting in gaining control of Avto, Taiz, or Tekhnoprogress, (ii) causing or assisting in causing UTN to inject money into Taiz and Tekhnoprogress, (iii) causing or assisting in causing Taiz or Tekhnoprogress to enter into so-called sham share transactions and/or (iv) arranging or assisting in arranging for the bankruptcies of Taiz, Tekhnoprogress or Avto. Tatneft itself acknowledges that there is this entitlement to particulars because the next paragraph, paragraph 56, states that such particulars are to be provided in the paragraphs which follow. It is apparent, however, from paragraphs 57 to 80 of the Particulars of Claim that Tatneft does not allege that Mr Yaroslavsky himself took any of the steps which Tatneft alleges comprised the Oil Payment Siphoning Scheme. Accordingly, it is not alleged that he himself carried out any of the steps in the alleged fraud; nor that he owned, controlled or managed any of the companies involved in the allegedly fraudulent payments to and from Taiz and Tekhnoprogress; nor that he played any part in the assumption of control over Taiz, Tekhnoprogress or Avto; nor that he participated in the alleged sham shares sale and purchases; nor that he procured the transfer of funds from UTN to Taiz or Tekhnoprogress; and nor that he procured the bankruptcies of Taiz, Tekhnoprogress or Avto. The case is, rather, a case which consists of inference. This is, indeed, what is expressly stated at the beginning of paragraph 81, as follows:

"The best particulars that Tatneft can presently give as to the involvement of the Defendants in the Oil Payment Siphoning Scheme are based on inferences to be drawn from the facts and matters as to that involvement pleaded above and more particularly the following."

There then follow thirteen sub-paragraphs setting out details of a number of companies and links alleged between those companies and Mr Bogolyubov and Mr Kolomoisky, but not Mr Yaroslavsky or, for that matter, Mr Ovcharenko (albeit that, as Chairman of UTN's Management Board, Mr Weisselberg QC accepted that he was *"front and centre"* in relation to the case as it is advanced by Tatneft, a submission which he made in making the point, as regards the limitation issue, that S-K ought to have known about that involvement for some time).

69. The only other paragraph of relevance is the next paragraph, paragraph 82. This starts with the following introductory wording:

"Tatneft also relies on the following facts and matters linking the Defendants and each of them to the Oil Payment Siphoning Scheme:"

Eight sub-paragraphs then follow. They do not, however, provide details of the *"assistance"* which Tatneft pleads in paragraph 55 of the Particulars of Claim was given by Mr Yaroslavsky. Sub-paragraph (i) is concerned with Mr Ovcharenko and repeats that, after taking over the Kremenchug refinery, in his position as Chairman of the Management Board, he decided to suspend payments to Taiz and Tekhnoprogress. Sub-paragraph (ii) similarly provides no particulars concerning Mr Yaroslavsky. It states as follows:

"After the Ukrainian courts invalidated the shareholdings of Tatneft, AmRuz and Seagroup in UTN as pleaded above, Korsan began to buy up these UTN shares. On 27 June 2009, in an auction organised by UTN (under Ovcharenko's management), Korsan, acting as sole auction participant, purchased the 18.296% stake which had previously belonged to AmRuz and Seagroup. Further, Korsan also acquired shares in UTN previously owned by the Republic of Tatarstan, effectively Korsan ended up with 47.07% of UTN's shares".

Sub-paragraph (iii) likewise gives no particulars concerning Mr Yaroslavsky, whilst sub-paragraph (iv) is concerned with Mr Bogolyubov, stating:

"Bogolyubov is one of the ultimate beneficial owners of Korsan and Viloris. Bogolyubov also was the beneficial owner of B.O.G. (through Modena), the company that had provided an armed gang to Ovcharenko for his forced takeover of UTN on 19 October 2007."

Sub-paragraph (v) then states:

*"As Kolomoisky told the BIT Arbitration tribunal on 25 March 2013, Korsan was a joint venture between Privat (i.e. Bogolyubov and Kolomoisky) and Yaroslavsky for the ultimate acquisition of the Tatneft shares in UTN. In the same evidence, referring to the take-over of UTN, he referred to '**our** reinstatement of Ovcharenko' (emphasis added)."*

Although Mr Yaroslavsky is mentioned here, nonetheless no particulars are given in relation to his alleged *"assistance"*. The same applies to sub-paragraph (vi) which states:

"In an interview with Forbes in November 2012, Yaroslavsky said that he owned 28.4% of UTN, which shareholding is equal to almost exactly half of the stake acquired by Korsan and Viloris from UTN after the expropriation of the Tatar shareholding."

Although, again, Mr Yaroslavsky is here mentioned in terms of his shareholding, it is not stated in what way, specifically, he gave *"assistance"* as alleged in paragraph 55. Nor do sub-paragraphs (vii) and (viii), the latter referring to Mr Yaroslavsky being elected to UTN's Supervisory Board in February 2010 and so after the Oil Payment Siphoning Scheme had been completed.

70. It seems to me that, at best, the inference which the sub-paragraphs relating to Mr Yaroslavsky support is one of involvement, but whether that involvement entailed *"assistance"* is not a matter which the pleading really addresses. As Mr MacLean QC pointed out, it is common ground that, if putting forward a claim under Article 1064, then, as Professor Karabelnikov puts it, *"the claimant must prove the tortfeasor has committed an unlawful act"*. As Dr Rachkov has explained in evidence which, Mr MacLean QC explained, correctly, has not been contradicted by Professor Karabelnikov, the focus in this regard is on each defendant separately if there are several defendants against whom the claim is asserted. Dr Rachkov put it as follows:

"... Article 1064 CCRF does not operate like the English law of conspiracy and instead works on the basis of a strict defendant-by-defendant analysis of the facts. PJSC Tatneft

would have to show that Mr Yaroslavsky in fact committed the acts (or some of them) that caused harm to S-K. …".

He went further in his report, stating in the next paragraph as follows:

"… I consider that the statement that Mr Yaroslavsky was involved in the Oil Payment Siphoning Scheme is not a sufficiently precise allegation as to actual wrongdoing to be relied upon to establish liability under Article 1064 CCRF. It would not be possible to conclude from involvement what, if any, harm was caused by Mr Yaroslavsky….".

Here Dr Rachkov was directing his attention to the allegation of *"involvement"* made in paragraph 81 of the Particulars of Claim. Dr Rachkov went on, however, in the same paragraph to contrast the allegation made in the Particulars of Claim with what had been stated by Mr Williams in the witness statement prepared in support of the application for the Worldwide Freezing Order. In that witness statement, Mr Williams had referred to Mr Yaroslavsky as having *"directed the dubious share transactions"*. Mr Williams set out his reasons for making this statement. These include the fact that Mr Ovcharenko has apparently been described in the past as Mr Yaroslavsky's protégé, as well as the suggestion that Mr Yaroslavsky lobbied for Mr Ovcharenko to be named Chairman of UTN's Management Board. Reliance was placed also on Mr Yaroslavsky's allegedly close relationship not only with Mr Ovcharenko but also with Mr Bogolyubov and Mr Kolomoisky *"for example, through Korsan ... which was a 50/50 joint venture between him and Privat"*. Mr Williams went on in the four following sub-paragraphs to say this:

"(iii) It follows that it is also reasonable to assume that Mr Yaroslavsky would have been aware of the reason why Mr Ovcharenko was asked by Privat to cause UTN to pay the oil monies to Taiz and Tekhnoprogress in June 2009, i.e. because the takeovers of Taiz and Tekhnoprogress had just been completed, and the stage set for the dubious share transactions and siphoning.

(iv) Given Mr Yaroslavsky's likely awareness of the planned siphoning, it is reasonable to assume that Mr Ovcharenko would not have caused UTN to pay the oil monies to Taiz and Tekhnoprogress in June 2009 without Mr Yaroslavsky's agreement. This is because Mr Yaroslavsky was Mr Ovcharenko's mentor and because Mr Yaroslavsky had a relationship with Privat through Korsan. Moreover, it would have been difficult to hide anything from Mr Yaroslavsky, as he was elected to UTN's Supervisory Board in February 2010.

(v) It is reasonable to assume that Mr Yaroslavsky would not have agreed with Mr Ovcharenko's decision to cause UTN to pay the oil monies to Taiz and Tekhnoprogress unless he was involved with the dubious share transactions and/or stood to benefit personally from the siphoning. I believe it is unrealistic to think that Mr Yaroslavsky would have consented to UTN, a company which he held a stake through Korsan, in essence to give hundreds of millions of dollars to Messrs Bogolyubov and Kolomoisky unless he, Mr Yaroslavsky, had a personal commercial interest in this occurring.

(vi) Finally, it was personally confirmed by Mr Kolomoisky in the BIT Arbitration that Mr Yaroslavsky became one of the beneficiaries of UTN through Korsan and Viloris (joint ventures between Privat (and hence Mr Bogolyubov and Mr

Kolomoisky) and Mr Yaroslavsky and his affiliates) upon completion of the takeover of UTN in early 2010. Thus, it may be inferred that Mr Yaroslavsky was as much interested in the (successful) takeover of UTN and the Oil Payment Siphoning Scheme as Messrs Bogolyubov and Kolomoisky."

As Mr MacLean QC pointed out, the Particulars of Claim did not include the allegation that Mr Yaroslavsky himself directed anything. Although I shall come on to deal with the proposed amendments later, it is to be noted that the draft Amended Particulars of Claim similarly contain no such allegation, although they do contain details of Mr Yaroslavsky's involvement with Korsan. Why this should be so is not clear.

71. It is also to be observed that, during the course of his submissions, Mr Millett QC handed up a document which he described as *"a graphic depiction"* of how Mr Bogolyubov and Mr Kolomoisky were *"involved in pushing the buttons in the oil siphoning scheme"*. This was not a document which had as its focus Mr Yaroslavsky; it was expressly only concerned with Mr Bogolyubov and Mr Kolomoisky. As such, it did not advance Tatneft's case against Mr Yaroslavsky at all. Mr Millett QC had no real answer to Mr MacLean QC's submissions in this regard. He complained that Mr Yaroslavsky had not chosen to respond to what Mr Williams stated in one of his witness statements. However, as Mr MacLean QC submitted, it is for Tatneft to make out its case in the Particulars of Claim. Had this been done, there would have been more force in what Mr Millett QC had to say. Be that as it may, Dr Rachkov went on in his report to consider what Mr Williams had to say in this context. In his opinion, which it seems to me it is legitimate for him to express as a foreign law expert, but, in any event, it is an opinion which confirms my own thinking having considered what the Russian law experts have to say concerning the elements which make up Article 1064, nothing contained in sub-paragraphs (i) to (vi) justify the claim which is sought to be made by Tatneft against Mr Yaroslavsky. Specifically, awareness of the Oil Payment Siphoning Scheme is insufficient, without more, to found a cause of action under Article 1064, and so is mere involvement as alleged in sub-paragraph (v). Otherwise, the fact that Mr Yaroslavsky stood to benefit from the Oil Payment Siphoning Scheme, as alleged in sub-paragraph (vi), is also insufficient since that does not necessarily mean that Mr Yaroslavsky (as opposed to the other Defendants) committed any *"unlawful act"*. The position is not rescued by the plea in paragraph 88 of the Particulars of Claim that *"relevant unlawful acts"* were *"committed by the Defendants or some of them"* since this is a reference back to earlier parts of the statement of case setting out the various acts said to comprise the Oil Payment Siphoning Scheme, and none of those acts are alleged to have been performed by Mr Yaroslavsky himself.

72. In the circumstances, I consider that the case as it has been put against Mr Yaroslavsky is a case which, even if I had reached a different conclusion on the submissions made by Mr Malek QC on behalf of the other Defendants (as well as Mr Yaroslavsky), should not be permitted to stand. It is not a case which has been pleaded in a manner which is appropriate. Nor is it a case which, in my view, can be described as either having a 'real prospect of success' or as entailing a 'serious issue to be tried'.

Limitation

73. Limitation is another issue which, strictly speaking, in the light of my earlier conclusions, does not arise. It is, however, a matter in relation to which a substantial amount of evidence has been assembled and in relation to which submissions were made at considerable length, primarily on the Defendants' behalf by Mr Adkin QC. The Defendants' position is that the claim which Tatneft seeks to bring as S-K's assignee is time-barred in that the relevant three-year limitation period, as prescribed in Article 196 of the Russian Civil Code, has expired. It is common ground that this is the applicable limitation period for a claim under Article 1064 and that time runs "*from the day when a person knew or should have known of the violation of his right"*; in other words, either from when the person had actual knowledge or from when the person had constructive knowledge of the violation. There is a debate between the various Russian law experts as to whether prior to September 2013, when the relevant provision, Article 200, was amended so as to add the words *"knew or should have known the identity of the proper defendant"*, and so to make it necessary for a person not only to have actual or constructive knowledge of the violation of his rights but also the identity of the proper defendant, there was this dual requirement or whether the person needed only to have actual constructive knowledge of the violation of his rights. Professor Karabelnikov considers that the amendment was intended merely to clarify what, in practice, had already been regarded as the position, rather than to bring about any substantive change in the requirement for knowledge. Clearly this is not a dispute which is suitable for determination at this stage. Indeed, Dr Rachkov, Mr Yaroslavsky's Russian law expert, appears to recognise that the position is not clear-cut. Mr Adkin QC acknowledged that, for present purposes, therefore, the Court should proceed on the basis that there would need to be actual or constructive knowledge of both matters. His submission was that the Court could be confident that S-K had, at the very least, constructive knowledge of both the violation and the identity of the wrongdoers (the Defendants), so as to cause time to run, more than three years prior to the issue of the Claim Form in March this year, and so at a point before March 2013.

74. Mr Adkin QC realistically accepted that the Court is in no position at this juncture to be confident what S-K actually knew at any particular time. In circumstances where there was witness evidence before me from Mr Evgeniy Korolkov, S-K's General Director, and his Deputy, Mr Rinat Gubaidullin, disputing that they had the necessary knowledge before March 2013, this must obviously be right. This is why Mr Adkin QC's focus was on the issue of constructive knowledge. Mr Adkin QC submitted that in relation to this, as opposed to actual knowledge, the Court could be confident that S-K should have known of the relevant facts more than three years before March 2016 when these proceedings were commenced. He submitted, specifically, that a conclusion that S-K had constructive knowledge is a conclusion which does not require S-K's or any other witnesses to attend to give evidence and be cross-examined. It is a conclusion, it was suggested, which could be reached having regard to evidence which is already before the Court. Mr Millett QC did not agree, submitting that it would be just as inappropriate for the Court to make any determination concerning constructive knowledge as it would be for it to do so in relation to actual knowledge.

75. In support of his submissions, Mr Adkin QC placed heavy reliance on evidence which Professor Karabelnikov gave in ***Slutsker v Haron Investments Ltd & Another*** [2012] EWHC 2539 (Ch), in which Underhill J (as he then was) referred at [162] to him having given evidence that if a claimant (in that case known as VS) *"did not have complete information, but knew the general outline and did not make any further enquiries, that*

is enough under Russian Law to debar him from making a claim later on". This is a view which is shared by Professor Maggs and Dr Rachkov, as well as, in essence, by Professor Pastukhov. As such, Mr Adkin QC was at pains to point out, there is no issue between the experts as to the level of knowledge which is required, albeit that it is also common ground that whether a party (here S-K) had constructive knowledge is a question of fact, which is a matter which was stressed by Professor Karabelnikov in his responsive report. In the same report Professor Karabelnikov also made the point that *"it is important to that in order to start the running of the statute of limitations, the Russian courts consider only regular, routine, operations of the claimant"*, and that there is *"no obligation to go beyond the regular/routine operations for the purposes of consideration of start of running of statute of limitations"*. Although on this last matter Dr Rachkov and Dr Pastukhov expressed views which differ from those of Professor Karabelnikov, for the purposes of his submissions on the constructive knowledge issue, Mr Adkin QC proceeded on the footing that Professor Karabelnikov was right, recognising that the Court is not in a position to resolve an expert issue such as this. It was Mr Adkin QC's submission that S-K should, in any event, be regarded as having constructive knowledge and that there was no real prospect of it being shown at trial that the contrary was the case.

76. Mr Adkin QC's central proposition was that, since it is not in dispute that Tatneft had the relevant knowledge for Article 200 purposes by at the latest March 2013, by which Mr Adkin QC meant actual knowledge, and given the close relationship between S-K and Tatneft, so S-K should be regarded as having constructive knowledge for Article 200 purposes. As to Tatneft's knowledge, Mr Adkin QC highlighted how in one of his witness statements Mr Williams acknowledged that Tatneft was aware of the fact that UTN had made the payments to Taiz and Tekhnoprogress very shortly after they were made in June 2009. Indeed, as early as 23 September 2009, Tatneft made a Criminal Complaint alleging, with details of the relevant bank accounts, that UTN had *"transferred from its bank account … to the bank account of [Taiz] and the bank account of [Tekhnoprogress] the money designated to pay for the oil supplied"* and, furthermore, that those companies had in August 2009 been made bankrupt. Likewise, Mr Adkin QC submitted, Tatneft had sufficient knowledge to allege in the BIT Arbitration as long ago as December 2009 that both Mr Kolomoisky and Mr Ovcharenko had participated in a scheme to siphon away the oil monies ultimately due to Tatneft. Specifically, in Tatneft's Rejoinder on Jurisdiction dated 14 December 2009, this was stated in paragraph 275:

"First, Taiz and Tekhnoprogress are Ukrainian owned and controlled entities that in 2009, through a series of opaque and suspect transactions, along with another Ukrainian entity, Avto, came under the control of Igor Kolomoisky and Privat Group - the principal partners and co-conspirators of Mr Ovcharenko and his group of raiders - who now control the management of [UTN] and who are responsible for the orchestrated purchase at auction of shares seized from AmRuz and Seagroup. Thus, for Respondent now to argue that payment of hundreds of millions of dollars of debt for oil supplied by Tatneft has been made in full to two companies controlled by those who seized control of[UTN] and are attempting to own it outright is preposterous. Not a penny of the amounts allegedly paid by [UTN] under Mr Ovcharenko's control has gone to Tatneft. Instead, all of these amounts apparently would have gone to Privat, a further flagrantly illegal misappropriation of [UTN's] funds which has caused harm to Claimant."

Mr Adkin QC submitted that this paragraph makes it abundantly clear that, at the very least, Tatneft suspected Mr Kolomoisky of having diverted the payments which it now alleges in the current proceedings he diverted. He stressed that this was only a matter of months after the payments were made by UTN to Taiz and Tekhnoprogress.

77. Reliance was placed also on a witness statement which was taken from Mr Nayil Maganov, Tatneft's First Deputy Chief Executive Officer, the following month, on 22 January 2010. In this witness statement the following is stated:

"Since the end of October 2007 to the present, the Privat Group controls both petrol supplies to [UTN] and sales of finished production. The de facto management of [UTN] is performed by I.V. Kolomoisky.

Until June 2009 P.V. Ovcharenko denied existence of debts of [UTN] to [Tatneft], [S-K] and Ukrainian enterprises: [Avto], [Taiz] and [Tekhnoprogress] who participated in petrol supplies from [Tatneft] to the refinery of [UTN] in 2007. However, according to the information provided by legal consultants of Ukraine to international arbitration which was examining the lawsuit of [Tatneft] versus Ukraine according to UNCITRAL arbitration rules, it became known that in mid-June 2009 [UTN] fully paid all the amount of existed debt in the amount of circa 2.1 billion hryvnas to the accounts of [Taiz] and [Tekhnoprogress] ... At the same time, despite existing contractual obligation, the named monetary funds were not received by [Tatneft] or S-K. I suppose that several months before transferring funds to [Avto], [Taiz] and Tekhnoprogress] these companies were acquired by the Privat Group.

I believe that the entire scheme of seizure of the plant and imaginary 'repayment' of debt for oil supplied by [Tatneft] was planned by I.V. Kolomoisky and P.V. Ovcharenko. It is also confirmed by the fact that funds were transferred to the accounts of [Taiz] and [Tekhnoprogress] opened in Commercial Bank Privatbank CJSC by both the plant and the above-mentioned intermediary enterprises. It became known to me from banking documents represented on behalf of [UTN] to the international court.

In October 2009 [Avto], [Taiz] and [Tekhnoprogress] were declared bankrupt on the basis of the lawsuit of one of enterprises taking part of the Privat Group, namely [Optima Trade] ... At the present, on the basis of the decisions of the Economic Court of Poltava Region of Ukraine, the procedure of liquidation of the above-mentioned enterprises is underway.

The payment to[Korsan] for 18 percent of shares of [UTN] of the amount which is similar by scale to the amount of the plant's debt to [Tatneft] is also an element of the illegal scheme conceived by I.V. Kolomoisky and implemented by his associate on the Privat Group, Korban G.O., who acted on the auction acquiring the shares on behalf of [Korsan].

It became known to me from mass media that in the end of October 2009 the Economic Court of Poltava Region instituted the [UTN] bankruptcy proceedings. I possess neither information in more details on this case nor materials on this case. I suppose that this bankruptcy is controlled on the part of the Privat Group because the creditor referred to in mass media (Private Enterprise Industrial Enterprise AgroTechBusiness (city of Cherkasyy) has claims to [UTN] totalling in the amount of 250 thousand hryvynas only. I suppose that bankruptcy was initiated by the Privat Group in order, through

termination of existence of[UTN], to hide its criminal acts and to avoid paying debts for petrol supplied by [Tatneft]."

This, too, supports the proposition, Mr Adkin QC submitted, that Tatneft had actual knowledge at a relatively early stage.

78. This is apparent also, Mr Adkin QC submitted, from the terms of a letter written by the Ministry of Land and Property Relations of the Republic of Tatarstan to the Prosecutor General of Ukraine dated 21 April 2010. That letter begins as follows:

"The Republic of Tatarstan highly appreciates intentions of the new political-leadership of Ukraine to fully analyze situation with CJSC 'Ukrtatnafta' and to take steps to restore rule of law and legitimate rights of its Russian shareholders, which were greatly infringed by the actions taken in respect of CJSC 'Ukratnafta' since 2007."

It continues:

"The Republic of Tatarstan and, in particular, the Ministry of Land and Property Relations of the Republic of Tatarstan, as the shareholder and the person representing interests of the Republic regarding ownership of 29% of CJSC 'Ukrtatnafta' shares, has always been interested in development and modernization of the company and is currently ready to fully cooperate with Ukrainian public authorities in the process of investigation of the raider seizure of CJSC 'Ukrtatnafta' and subsequent activities of raider character, which were organised by Ukrainian business group 'Privat', headed by businessman I. Kolomoisky (in cooperation with businessmen A. Yaroslavsky and P. Ovcharenko)."

The letter then goes on to say this:

"In 2007 from OJSC 'Tatneft' resources oil for amount of about 540 million USD was supplied to Kremenchug oil refinery, payment for oil was not made (i.e. actually its misappropriation took place).

In April 2008 intermediary companies, which had the right to claim to CJSC 'Ukrtatnafta' as to payment for oil, concluded assignment agreement and transferred specified rights to LLC 'Company 'Suvar-Kazan' (the Consignee of OJSC 'Tatneft' as for oil supplies). LLC 'Company 'Suvar-Kazan' appealed to the Russian court against CJSC 'Ukrtatnafta' and won the case. As a result, less than quarter of the debt was charged back from CJSC 'Ukrtatnafta' for account of its property on the territory of the Russian Federation."

Of particular importance, so Mr Adkin QC suggested, is the paragraph which then follows:

"However, according to information from OJSC 'Tatneft', in June 2009 CJSC 'Ukrtatnafta' organized financial transaction (having signs of fraud) for elimination of CJSC 'Ukrtatnafta' accounts payable for the oil supplied. Formally payments were made to accounts of Ukrainian companies opened in 'Privatbank', and after that funds disappeared. According to information available, earlier 'Privat' group established

control over these intermediary companies, and is currently implementing their bankruptcy and liquidation."

Mr Adkin QC highlighted the reference in this paragraph to the fact that information had been received from Tatneft. Some months later, on 1 October 2010, the Russian Ministry of internal affairs wrote to the Ukrainian authorities with a *"Request for Legal Assistance in connection with the investigation of a criminal case"*. The letter was again focused on what Tatneft now describes as the Oil Payment Siphoning Scheme.

79. Mr Adkin QC went on to point out that in the BIT Arbitration Tatneft repeated the allegations, specifically in its Memorial on the Merits dated 15 June 2011 at paragraph 139, as follows:

"Beyond this, in 2009 Taiz, Tekhnoprogress Research and Production and Avto, through a series of opaque transactions, themselves came under the control of Igor Kolomoisky and Privat Group - the principal partners and co-conspirators of Mr Ovcharenko. As a result of these actions, even payments thereafter allegedly made by Ukrtatnafta to these entities for Tatneft oil never reached Tatneft. Instead, all of these amounts apparently went to Privat, a further flagrantly illegal misappropriation of Ukrtatnfafta's funds which has caused harm to Claimant."

This was followed by a Criminal Complaint made on 22 December 2011 to the Chief Investigation Directorate, Ministry of the Interior, Republic of Tatarstan by both Tatneft and S-K. This starts by referring to the Suvar-Avto Framework Contract and the fact that the oil supplied by S-K to Avto came from Tatneft, before going on to refer to the involvement of Taiz and Tekhnoprogress in a chain in which UTN was *"the end purchaser"*. It then explains that *"The oil supplied by [S-K] was only partially paid for, with the result that [S-K] could not meet its obligations to [Tatneft]"* and the 2008 Assignment Agreement came to be entered into. There follows reference to the Russian Judgment and to UTN's continued non-payment. The complaint then states as follows:

"In spite of the decision of the court and the enforcement proceedings, instead of paying the debt, recognised by the court and due to be paid to [S-K], in about the summer of 2009 [UTN] began making payments to the companies [Taiz] and [Tekhnoprogress]. No payments whatever have been made to [S-K] (with the exception of the amount obtained as a result of the enforcement proceedings) until now.

Thereby, as we became aware, bankruptcy proceedings had begun in relation to the companies [Avto], [Taiz] and [Tekhnoprogress] and they were subsequently liquidated. Thus, there are grounds for supposing that the managers of [Avto], [Taiz] and [Tekhnoprogress] diverted funds which should have been transferred in compliance with the order of the Russian court, thereby causing a loss to the Russian companies, and since over 30% of the shares in [Tatneft] are held by OJSC 'Svyazinvestneftekhim' (an enterprise owned 100% by the Republic of Tatarstan through the MZIO RT) and thus to the interests of the Russian Federation."

Mr Adkin QC submitted that the fact that S-K was involved in the filing of this complaint demonstrates that S-K, as well as Tatneft, had at least constructive knowledge of relevant matters for limitation purposes. He suggested that it is, as he put it, *"preposterous"* to suppose that Tatneft did not share with S-K what it knew concerning the Oil Payment Siphoning Scheme at that stage.

80. Mr Adkin QC lastly made reference to Tatneft's Second Memorial on the Merits filed in the BIT arbitration on 10 August 2012, specifically to paragraphs 68 to 82. By way of example, paragraph 78 of this document states as follows:

"It was only after Privat Group took ownership and control of the oil intermediaries, and put these convoluted funnelling mechanisms in place, that UTN (under the control of Mr Ovcharenko) finally proceeded to 'pay' Taiz UAH 1.47 billion between June 12 and 16, 2009, and Tekhnoprogress nearly UAH 772 million between June 15 and 17, 2009. Those payments matched exactly the debts for valueless shares that had been engineered for Taiz (UAH 1.47 billion) and Tekhnoprogress (UAH 772 million) by its Privat-controlled management. Thus, through an elaborate series of transactions, Privat Group essentially managed to make the more than US$430 million UTN paid to the oil intermediaries and owed to Tatneft vanish into thin air."

In similar vein, paragraph 90 states as follows:

"In the end, the raiders had engineered a massive theft of more than US$400 million by taking control of the oil intermediaries that existed in the chain between Tatneft and UTN and then causing UTN to pay hundreds of millions of dollars to those intermediaries that were immediately siphoned off through prearranged mechanisms into Privat Group companies, with the intermediaries ceasing to exist as the result of sham bankruptcy proceedings in the Ukrainian courts commenced by Privat. This theft was accomplished to the detriment of UTN and its shareholders, and of Tatneft, which has never seen a penny of the stolen money."

It was Mr Adkin QC's submission that, in the circumstances, the fact that Tatneft had knowledge, by which he meant actual knowledge, of the Oil Payment Siphoning Scheme by this stage is obvious. He submitted, in particular, that Tatneft was able to make the same sort of allegations as are made in the current proceedings, whether in the BIT Arbitration or by way of Criminal Complaint. He went further, however, because he submitted that it is plain that S-K must, at the very least, have had constructive knowledge of what Tatneft knew at the time that Tatneft knew it. It was submitted that S-K was Tatneft's commission agent and, as such, ought to be regarded as having similar knowledge to that held by Tatneft, its principal. Mr Adkin QC added that, since Tatneft was able to make the allegations which it did in the BIT Arbitration, there is no sensible reason why S-K ought not also to have been able to acquire such knowledge. Mr Adkin QC suggested, in addition, that Mr Kolomoisky's involvement in the Oil Payment Siphoning Scheme was the subject of contemporary press comment, which should have alerted S-K also. Particular reference was made to a report on 31 May 2010, with a specific allegation that Mr Kolomoisky as follows:

"Igor Kolomoisky kills the chances of Rustam Minnikhanov to become the biggest creditor of [UTN]… . The once key oil suppliers to the Kremenchug Refinery – OOO Taiz and OOO [Tekhnoprogress] are about to be liquidated. Thus, Privat Group will kill the last chance of Tatar businessmen … to recover from ZAO [UTN] $300 mln of debt for the black gold supplies."

S-K, Mr Adkin QC stressed, was not merely a disinterested third party but, on the contrary, an entity which had its own primary liability (to Tatneft). This was a point which was made by Mr MacLean QC also. As he explained, S-K was at all relevant

times under an obligation to pay Tatneft for the oil supplied to UTN. Tatneft wished to maintain the possibility of suing S-K for the debt and so gave S-K no comfort that it would not ultimately pursue that course of action. It follows that S-K had every commercial incentive to pursue with real diligence any line of enquiry that might have enabled it to recover in respect of the oil supplied to UTN and so discharge its (huge) payment obligation to Tatneft. Moreover, S-K, Mr Adkin QC suggested, had every opportunity to obtain from Tatneft the necessary knowledge. Indeed, Mr Adkin QC highlighted that Clause 2.2.8 of the Suvar-Tatneft Commission Contract expressly contemplated that Tatneft would provide S-K with information in response to enquiries, since it describes one of Tatneft's obligations as being to:

"Make timely replies to the Commission Agent's enquiries and take actions associated with the performance of this Contract."

There would, accordingly, it was suggested. have been no bar to Tatneft providing the information which S-K needed to know for S-K's own purposes in view of S-K's own liability to Tatneft.

81. As Mr Weisselberg QC emphasised, Tatneft having set out its suspicions in relation to Privat Group, Mr Kolomoisky and Mr Ovcharenko in the BIT Arbitration as early as December 2009 and having informed the Tatar authorities of those suspicions in October 2010, it is not altogether easy to see why, if S-K had asked Tatneft for more information about the theft of the oil monies, knowing that Tatneft was itself seeking to recover those monies and that S-K remained 'on the hook' as regards Tatneft, Tatneft would not have told S-K what it knew. Mr Syubaev suggests in his witness statement that *"there was no point in doing so because S-K had already done all it could and was obliged to do pursuant to the 2007 commission agency agreement to recover the oil debts, and also because the BIT arbitration was anyway ongoing and we were hoping to recover those sums as part of an award against Ukraine"*. However, as Mr Weisselberg QC submitted, S-K could have done something, if only by bringing in its own right the present Article 1064 claim which Tatneft now brings as S-K's assignee against the Defendants. This is a claim which Tatneft itself acknowledges it had the necessary knowledge to bring by the summer of 2012 since by that stage Tatneft had obtained information from the criminal investigations which, as Mr Syubaev explains, showed *"the fate of the oil payments owed to us – they had been siphoned from Taiz and Tekhnoprogress though a sophisticated fraudulent scheme orchestrated by [Mr Ovcharenko] and Privat Group represented by [Mr Kolomoisky]"*.

82. In these circumstances, there is obvious substance in the argument that S-K ought to have asked Tatneft what it knew and that, had such a request been made, Tatneft would have passed on sufficient information to enable the present Article 1064 claim to be brought by S-K against at least some of the Defendants. It is clear, and accepted by Mr Gubaidullin in his witness statement, that *"Tatneft and S-K started exchanging information on the events that took place at the refinery once it became clear that UTN would no longer pay for the delivered oil"* and that:

"In the end of 2007, or the beginning of 2008…there were regular discussions between [S-K's lawyers]… and Tatneft's lawyers. There were regular calls to brainstorm ideas and discuss options as to how best to recover the money owed to S-K … That

cooperation, in trying to find the best options for S-K to recover the contractual indebtedness for the supplied oil, continued until the beginning of 2010."

This clearly provides significant support for the Defendants' constructive knowledge case. The difficulty remains, however, that Mr Korolkov and his Deputy, Mr Gubaidullin, have each given witness statements disputing that they had the necessary knowledge before March 2013. Specifically, their evidence is to the effect that S-K was not aware that UTN had made payments in respect of the oil to Taiz and Tekhnoprogress in June 2009 and did not become aware of those payments until the end of December 2011. Similarly, they maintain, S-K was not aware of the bankruptcy proceedings in relation to Taiz and Tekhnoprogress until December 2011. Nor, they say, did S-K have access to the documents and submissions filed by Tatneft in its confidential BIT Arbitration against the Ukraine; instead, S-K simply provided documents to Tatneft as and when Tatneft asked. It was only towards the end of April 2013 that, he explains in his witness statement, Mr Gubaidullin learnt from Tatneft that Mr Kolomoisky had given oral testimony in the BIT Arbitration proceedings and that such testimony had pointed to the possibility that Mr Kolomoisky and his associates had been directly involved in the siphoning of the funds. Although this is evidence which is as to their actual knowledge and although Mr Adkin QC is able to submit, with considerable force, that given that S-K and Tatneft were in regular communication in relation to the recovery of the oil monies, S-K ought to have known what Tatneft knew, nonetheless it does not seem to me that it would be appropriate to decide, once and for all, that S-K had constructive knowledge, or more accurately that the case that S-K did not have such knowledge has no 'real prospect of success', and that, accordingly, the claim cannot succeed. Such a conclusion would involve the Court in the type of 'mini-trial' which the authorities are clear should not be allowed to take place.

83. This is not to say that I consider the case that S-K had constructive knowledge to be bad; on the contrary, it seems to me that there is considerable force in the submissions which were made by Mr Adkin QC. I am unpersuaded, in particular, by Mr Millett QC's submission that Tatneft would not have been in a position to share with S-K information obtained from the Criminal Complaint after it had been determined by the prosecution authorities that Tatneft should be regarded as the 'injured party', rather than S-K. Indeed, as Mr Adkin QC pointed out, when belatedly requested to do so by S-K, Tatneft's own evidence is that it shared with S-K the product of the Criminal Complaint. Furthermore, there was apparently no difficulty from a confidentiality perspective with S-K being told by Tatneft about highly relevant evidence given by Mr Kolomoisky in the BIT Arbitration during the course of a casual encounter in the street. Nor, despite Mr Millett QC's strenuous efforts to persuade me otherwise, do I consider his submission that Clause 2.2.8 of the Suvar-Tatneft Commission Contract was somehow inapplicable. Despite all this, however, I am not satisfied that there is a 'killer point' which would justify the approach urged upon me by Mr Adkin QC. It seems to me, in short, that to reach a final conclusion on what S-K ought to have known, even if it did not have actual knowledge, is asking too much at this stage. I do not consider it right or sensible to reach a conclusion in relation to constructive knowledge wholly divorced from a consideration of what S-K actually knew and so without affording S-K's witnesses the opportunity to be cross-examined on the constructive knowledge issue. I appreciate that there is a certain logic to Mr Adkin QC's submission that constructive knowledge does not require S-K's witnesses to have the constructive knowledge case

put to them. However, in my view, they should be afforded the opportunity to which I have referred, if only as a matter of fairness.

84. There is, in addition, the point that, in arriving at any conclusion on what S-K ought to have known, it will be necessary to consider closely the extent of any such knowledge on S-K's part. The precise extent to which S-K needs to be shown to have had constructive knowledge is not, it seems, a matter which is the subject of complete agreement between the Russian law experts. Mr Millett QC submitted, for instance, that as regards the Criminal Complaint the fact that this referred to possible wrongdoing by the managers of Taiz and Tekhnoprogress, and did not name the Defendants, indicates that, as at December 2011, S-K should not be regarded as having either actual or constructive knowledge of the Defendants' roles in the Oil Payment Siphoning Scheme, merely that there had been wrongdoing, which is not enough for limitation purposes. As Mr Millett QC submitted, S-K's witnesses' evidence was that, had S-K (and Tatneft) had enough information to name the Defendants, they would have been named in the Criminal Complaint. Moreover, it seems to me likely that the question of knowledge (whether actual or constructive) would need to be considered by reference to the individual Defendants, and that Mr Yaroslavsky's role was not as discoverable as that played by the other Defendants, so as to mean that the limitation clock started later in relation to the claim as against him. This type of consideration underlines the need to adopt a cautious approach at this stage. As Longmore LJ put it in ***Kazakhstan Kagazy plc v Arip*** [2014] EWCA Civ 381, [2014] 1 CLC 451 at [23], albeit when dealing with an application to discharge a freezing order on the basis that there was no 'good arguable case' (the issue to which I shall come):

"It is very important that applications to discharge freezing applications do not turn into mini-trials; parties are often tempted to anticipate the real trial on these applications but that temptation must be firmly resisted. The application took 3 days before the judge and, in my view, was a far heavier application than it need or should have been. As is evident from Barnstaple Boat Co Ltd v Jones [2008] 1 AER 1124 the English court has quite enough difficulty in establishing when the relevant English time limit begins for a fraud action. It was there held to be unsuitable for summary decision. It cannot be any easier for a court dealing with a Kazakh time-limit. Unless the position is very clear, it cannot be determined on an interlocutory application."

I consider that the position as regards limitation is insufficiently clear, and so that it cannot be resolved at this stage.

The proposed amendments

85. I need now to consider Tatneft's application to amend the Particulars of Claim. In the light of the conclusion which I have reached in relation to the existing claim, in asking myself whether permission to amend ought to be granted to Tatneft, I am necessarily having to decide whether the proposed amendments come, in effect, to Tatneft's rescue in enabling Tatneft to maintain proceedings which, but for the proposed amendments, I have decided are not maintainable. For reasons which I shall explain in what follows, my conclusion is that the application to amend ought not to be granted and that, accordingly, the proceedings should, indeed, not be permitted to continue.

86. The critical question in the present context is whether the proposed amendments involve the assertion of a new claim, as the Defendants contend, or whether they merely involve particularisation of the existing claim, as Tatneft suggests. If the position is the former, then, since there is no issue that any new claim is now time-barred given that even Tatneft accepts that, by the time that the application to amend came to be issued, and certainly by now (the amendments having, of course, not yet been made), S-K should be taken as having the requisite constructive knowledge for Russian law limitation purposes more than three years before, it is plain that permission to amend ought not to be granted. This must be the case in view of the conclusions which I have reached in relation to the case as it currently is. It cannot be appropriate that a case which I have decided is not maintainable can be used as the vehicle by which a new and time-barred cause of action is asserted against the Defendants. Mr Millett QC did not, indeed, seek to argue to the contrary.

87. The Defendants also make the point, again uncontroversially as I understand it as far as Mr Millett QC was concerned, that permission ought not to be granted if the proposed amendment has no 'real prospect of success', again applying the CPR 24 test: see the notes in the White Book at 17.3.6. That this must be the position is regardless of whether it would be open to Tatneft to rely upon CPR 17.4(2) and say that the new claim arises out of the same or similar facts to the existing cause of action. Indeed, in their skeleton argument, Mr Millett QC and Mr McGrath QC themselves appeared to acknowledge this because their focus was on the argument that the proposed amendments represent particularisation of the existing claim and a submission that *"if the original claim was in time, then the amendment is in time"*, rather than that the amendments should be permitted even if they involved the assertion of a new claim.

88. As it happens, however, CPR 17.4(2) has no application in the present case (indeed, Tatneft's amendment application was not made under this provision but under CPR 17.1(2)(b)) and, whilst Mr Millett QC did not expressly concede the point, he nonetheless felt unable to advance any submissions in support of the contrary proposition. This is because, as the Defendants (primarily Mr Adkin QC) submitted, CPR 17.4(2) does not apply to allow an amendment after the expiry of a foreign limitation period applicable pursuant to Article 15(h) of the Rome II Regulation (EC) No 864/2007 ('Rome II'). CPR 17.4(2) only applies to applications to amend where the effect of the amendments will be to add or substitute a new claim where a limitation period has expired under the Limitation Act 1980, the Foreign Limitation Periods Act 1984 or any other enactment which allows such an amendment, or under which such an amendment is allowed. The 1984 Act, however, has no application to claims which are governed by Rome II: see s.8(1), and Dicey & Morris, *Conflict of Laws* (15th Ed., 2012), at paragraph 43-064.

89. As a result, the Court has no power to allow an amendment the effect of which is to add a new and time-barred claim which falls within the scope of Rome II. Even if that were not the case, however, and it were open to the Court to permit the addition or substitution of a new claim whose limitation period has expired where the new claim *"arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings"*, it is only appropriate to permit an amendment adding a new claim into an existing action if the claimant can discharge the burden of showing that there is no reasonably arguable limitation defence at the time of the amendment application. . This

was the approach explained by Tomlinson LJ in ***Ballinger v Mercer Ltd*** [2014] 1 WLR 3597, [2014] EWCA Civ 996 at [27]:

"… Working from first principles … it is plain that, provided the defendant can show a prima facie defence of limitation, the burden must be on the claimant to show that the defence is not in fact reasonably arguable. The claimant is after all in effect inviting the court to make a summary determination that the defence of limitation is unavailable. If the availability of the defence of limitation depends upon the resolution of factual issues which are seriously in dispute, it cannot be determined summarily but must go to trial. Hence it can only be appropriate at the interlocutory stage to deprive a defendant of a prima facie defence of limitation if the claimant can demonstrate that the defence is not reasonably arguable."

Then, in stating his conclusion, Tomlinson LJ said this at [32]:

"…The Respondents did not show, and in my view did not come close to showing, that the Appellants have no reasonably arguable limitation defence to the new claims, and permission to amend should not therefore have been granted pursuant to CPR 17.1(2)(b). The judge answered question one of the threefold enquiry correctly and in the affirmative. It is important to appreciate that his determination was not a final determination that the relevant claims are time-barred. His finding was that the Appellants have a reasonably arguable case that they are time-barred. That does not preclude the Respondents from issuing separate proceedings in which they will seek to prove that the claims are not in fact time-barred, as they have indeed done. Thus the judge was in my view right to identify as decisive of the application before him the question whether the proposed amendments or any of them arise out of the same facts or substantially the same facts as those already in issue in the claims as then currently pleaded."

In the present case, the fact that the new claim sought to be introduced by the proposed amendments, if it is a new claim (which Tatneft disputes), is time-barred is not merely reasonably arguable but is accepted by Tatneft.

90. Returning, therefore, to the critical question of whether the proposed amendments amount merely to particularisation of the existing case or a new case, Mr Millett QC submitted, in the first instance, that the question of whether the proposed amendments introduce a new cause of action is a matter of Russian law rather than English law. He went on to highlight that there is no Russian law evidence before the Court on that question. His suggestion, which was implicit if not express, was that, in consequence, the amendment application should succeed. I cannot accept that Mr Millett QC is right about this for three reasons. First, I do not agree with him that the question is a matter of Russian law: it is a procedural matter and, as such, Rome II does not apply (Article 3.1), so as to mean that the question is governed by English law. Secondly, even if Mr Millett QC were right and Russian law applies to the question, it does not assist Tatneft in circumstances where the burden is clearly on Tatneft to satisfy the Court, on *its* amendment application, that the proposed amendments do not bring in a new cause of action. Accordingly, any absence of Russian law evidence on the issue counts against Tatneft, not the Defendants. Thirdly, although this point is related to the last, if Russian law is applicable on the amendment question, then, in the absence of Russian law evidence directed to it, the Court is entitled to presume that Russian law is the same as

English law, based on what was stated by Arden LJ in ***Brownlie v Four Seasons*** [2015] EWCA Civ 665, [2016] 1 WLR 1814 at [88] and [89], as follows:

"The remaining question is whether this court can, under Rome II, in the absence of proof as to Egyptian law, apply the presumption that Egyptian law is the same as English law. I would reject Mr Palmer's argument on this. In OPO v (1) MLA (2) SLT [2014] EWCA Civ 1277, this court decided that Article 4(1) of Rome II did not exclude the presumption. Giving the judgment of the court, I held:

'111. There is no discussion in the judgment of Simon J, or the Law Commissions' report, of the important restriction on the presumption which would result if that were the effect of (in the case of the former) the Regulation or (in the case of the latter) what is now the 1995 Act. Nor is there any indication in the 1995 Act or the Regulation themselves as to what the court must do if there is no evidence as to foreign law. In my judgment, it is clearly a matter which has been left to be resolved in accordance with the rules of the forum. I note that the leading work on the subject, Dicey, Morris and Collins, The Conflict of Laws, (15th ed. 2012) previously took the contrary view, but no longer does so (see paragraph 35-122 of the main work and see paragraph 35-122 of the First Supplement published in January 2014 which merely notes the views of Simon J in Belhaj without expressing a view on this question). Accordingly I do not consider that the observations of Simon J should be taken as supporting the proposition for which Mr Dean has cited them.'

This case went to the Supreme Court, who reversed the decision of the Court of Appeal on the question whether there was a properly constituted tort under English law (James Rhodes v OPO [2015] UKSC 32). Accordingly the Supreme Court did not have to deal with the question whether the mandatory nature of Article 4(1) of Rome II excluded the presumption that foreign law is the same as English law in the absence of proof to the contrary. However, at [121], Lord Neuberger (with whom Lord Wilson agreed) specifically accepted the presumption could be applicable, although he did not give his reasons for that conclusion. I accept Mr Palmer's submission that the ruling on the presumption in OPO is no longer binding under the doctrine of precedent, though it would constitute strong persuasive authority: see R v Secretary of State for the Home Department ex-parte Al-Mehdawi [1990] 1AC 876 at 883 per Taylor LJ with whom Nicholls and O'Connor LJJ agreed. However, Mr Palmer did not seek to address the point made in paragraph 111 of my judgment in OPO that there is no indication in Rome II as to what the court must do if there is no evidence as to foreign law. In a common law system, such as that in England and Wales, the court does not have any inquisitorial function and cannot therefore conduct an inquiry itself as to foreign law. Even if it did so it might not come to the right conclusion. If Mr Palmer's argument is right, it would moreover follow that the court could not act on any agreement of the parties as to what the foreign law was or any agreement by the parties not to plead foreign law. These seem to me to be startling conclusions. Accordingly, for these reasons, in addition to those which I gave in OPO, I reject Mr Palmer's submissions that the presumption as to foreign law being the same as English law does not apply and his overarching submission that Lady Brownlie has failed to show a completed cause of action in tort because she has not adduced evidence as to Egyptian law."

Adopting this approach, and so assuming that Russian law is the same as English law, results in the application of English law.

91. For these various reasons, it is, therefore, English law which falls to be considered. As to that, Mr Millett QC relied upon the well-known observation made by Millett LJ (as he then was) in ***Paragon Finance v DB Thakerar & Co*** [1999] 1 All ER 400 at page 405 that *"... the addition of further instances or better particulars does not amount to a distinct cause of action"*. He cited also ***Co-operative Group Ltd v Birse Developments Ltd*** [2013] EWCA Civ 474, in which after reviewing the relevant authorities at [19] to [22] Tomlinson LJ added what he described as his *"own gloss"* by observing that there is not likely to be a new cause of action unless the *"new breach does not arise out of the same or substantially the same facts as those already in issue"*. The reference here was not, however, to the CPR 17.4(2) test and was clearly not intended to be in circumstances where CPR 17.4(2) only comes into play at all once it has been determined that there is a new claim which is the subject of the amendment application. It is important, therefore, not to overfocus on Tomlinson LJ's *"gloss"* and instead to have proper regard to the helpful review which precedes it. I set that out below before drawing together the key elements:

> *"19. A cause of action is, as Diplock LJ famously observed in Letang v Cooper [1965] 1 QB 232 at 242/3, 'a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'. Longmore LJ in Berezovsky v Abramovich [2011] 1 WLR 2290 at 2309 expressed the concept in essentially the same way: 'A cause of action is that combination of facts which gives rise to a legal right'.*
>
> *20. In the quest for what constitutes a 'new' cause of action, i.e. a cause of action different from that already asserted, it is the essential factual allegations upon which the original and the proposed new or different claims are reliant which must be compared. Thus 'the pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action' – see Paragon Finance v Thakerar [1999] 1 All ER 400 at 405 per Millett LJ. 'So in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading' - see per Robert Walker LJ in Smith v Henniker-Major [2003] Ch 182 at 210.*
>
> *21. The court is therefore concerned with the comparison of 'the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed' – see per David Richards J in HMRC v Begum [2010] EWHC 1799 (Ch) at paragraph 32. 'A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action' – ibid, paragraph 30.*
>
> *22. Where an amendment pleads a duty which differs from that pleaded in the original action, it will usually assert a new cause of action – see per Sir Iain Glidewell in Darlington Building Society v O'Rourke [1999] PNLR 365 at 370. However as Sir Iain went on to observe, where different facts are alleged to constitute a breach of an already pleaded duty, the courts have had more difficulty in deciding whether a new cause of action is pleaded. Particularly has this been so in construction cases. Thus in Steamship Mutual Underwriting Association v Trollope and Colls [1986] 33 BLR 77 a claim in respect of a defect in brickwork caused by a breach of the self-same duty as had earlier been relied upon to found*

a claim in respect of air-conditioning pipes in the cavity walls was regarded by the Court of Appeal as a new claim, whereas on apparently indistinguishable facts the Court of Appeal had in Idyll Limited v Dinerman [1971] 1 CLJ 294 regarded claims in respect of the roof as asserting the same cause of action as the original claim founding on the same duty in relation to defects in the brickwork and functions of the building. In the former case May LJ offered the guidance that one must look not only to the duty, but also to the nature and extent of the breach relied upon, as well as to the nature and extent of the damage complained of in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon. The question to be resolved is therefore one of fact and degree. For my part I am not convinced that one needs to look further than for a change in the essential features of the factual basis relied upon, bearing in mind that the factual basis will include the facts out of which the duty is to be spelled as well as those which allegedly give rise to breach and damage. I respectfully agree with Lloyd LJ, as he then was, later Lord Lloyd of Berwick, who observed in the Trollope and Colls case, at page 101, that 'in most cases it will be easy to say on which side of the line the case falls'. But as Lloyd LJ observed, there will sometimes be a grey area, where different views are possible. I would not therefore dissent from the following distillation of the principles by Jackson J, as he then was, in Secretary of State for Transport v Pell Frischmann [2006] EWHC 2909 (TCC) at paragraph 38:-

'(i) If the claimant asserts a duty which was not previously pleaded and alleges a breach of such duty, this usually amounts to a new claim;

(ii) If the claimant alleges a different breach of some previously pleaded duty, it will be a question of fact and degree whether that constitutes a new claim.

(iii) In the case of a construction project, if the claimant alleges breach of a previously pleaded duty causing damage to a different element of the building, that will generally amount to a new claim.'"

92. Accordingly, in order to determine whether a proposed amended claim is a new claim involves comparing *"the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed"*. The amendment will introduce a new cause of action if there is a *"change in the essential features of the factual basis"* relied upon. This will include consideration of whether the amendment introduces a duty which was not previously pleaded, or relies on a new distinct act said to have caused a loss at a different time from the loss originally pleaded. In this connection, reliance was placed on the decision of the Court of Appeal in ***Del Grosso v Payne & Payne (a Firm)*** [2007] EWCA Civ 340, where Maurice Kay LJ stated as follows at [29] and [30]:

"The submission made by Mr Myerson on behalf of the respondent would require us to see the 'facts already in issue' at a very high level of abstraction. It was put on the basis that the essential facts all occurred in the course of a meeting between the respondent and his solicitor on 28 August and that what passed at that meeting has always constituted 'the facts in issue'. In my judgment the 'facts already in issue' require more rigorous analysis than that and fall to be determined primarily on the content of the existing pleadings in comparison with the proposed amended pleading.

The claimant cannot move from one account of what was said at a meeting to another very different account and thereafter simply assert this is still a dispute about what was said at the meeting. In one rather loose sense it may be, but it is a different dispute from the earlier one and for the reasons given by Pill LJ it cannot be said that the new cause of action 'arises out of the same facts or substantially the same facts as are already in issue'."

This was in relation to an appeal against a decision of the judge at first instance to allow the amendments to be made under CPR 17.4(2) ('same or similar facts), the judge having decided that the amendments entail a new cause of action (indeed, that the *"whole case has now changed in colour and context"*: see [13] per Pill LJ). It was not, therefore, a case in which it was decided that there was no new cause of action sought to be introduced by the amendments.

93. It is with these principles in mind that I must consider the parties' rival submissions as to whether the proposed amendments entail the assertion of a new cause of action. I should, first, however, set out the proposed amendments or at least the main aspects. I start with paragraph 54A of the draft Amended Particulars of Claim, which states as follows:

"UTN should have paid S-K pursuant to the Assignment Agreement (i) upon receipt of the notification of entry into the Assignment Agreement and payment request from S-K in May 2008 or (ii) upon confirmation by the Tatarstan judgments of UTN's indebtedness pursuant to the Assignment Agreement. However, as described below, rather than causing UTN to make such payment to S-K, the Defendants embarked on a dishonest scheme whereby UTN would, inconsistently with the Assignment Agreement and the Tatarstan judgments, make payment of the oil monies to Taiz and Tekhnoprogress (over which they had acquired control) with the sole aim of fraudulently siphoning off those funds from Taiz and Tekhnoprogress for the Defendants' own benefit."

Paragraph 54B then states:

"In any event, irrespective of the validity of the Assignment Agreement, and as the Defendants were well aware, S-K had a lawful right to be paid for the oil that had been supplied to UTN through the contractual chain, either directly, pursuant to the Assignment Agreement, or indirectly, through the intermediate companies in that contractual chain. By carrying out the Oil Payment Siphoning Scheme described below, the Defendants misappropriated UTN's payment for the oil for their own benefit and thus ensure that S-K would not be paid (thereby causing loss to S-K)."

Paragraph 56 in its draft amended form (with underlining) states as follows:

"In more detail, the fraudulent scheme preceded by the following steps. It is to be inferred from the facts pleaded below that each of the following steps was undertaken at the ultimate direction of the Defendants, alternatively Bogolyubov and Kolomoisky with the assistance or participation of Yaroslavsky and Ovcharenko as pleaded specifically at paragraphs 80A-E, 81 and 82 below. To the extent that any Defendant did not carry out these steps, they connived in and/or facilitated them and thus participated in the unlawful acts for the purposes of article 1064 and 1080 of the

Russian Civil Code. *The following are the best particulars that Tatneft can presently give as to the modus operandi of the Oil Payment Siphoning Scheme."*

Paragraph 80A of the draft Amended Particulars of Claim then states:

"As set out at paragraph 30 above, on 30 June 2009, Korsan completed the purchase of a 18.296% shareholding in UTN (being the shareholding in UTN formerly controlled by Tatneft)."

This is followed by paragraph 80B, which alleges:

"Such purchase coincided with the Oil Payment Siphoning Scheme and followed only a few weeks after UTN had paid UAH 2.24 billion to Taiz and Tekhnoprogress as set out at paragraph 74 above."

A number of sub-paragraphs follow which set out the ownership structure of Korsan, including the interests held by Privat, Yaroslavsky and Ovcharenko. Specifically, it is alleged that on 15 June 2009 companies representing the interests of Privat, Yaroslavsky and Ovcharenko acquired interests and approved the increase in the charter capital of Korsan by UAH 2.24 billion, corresponding exactly, or almost exactly, with the payments made by UTN to Taiz and Tekhnoprogress. It is alleged that, in view of the contributions made by the respective companies, Privat had a 50% interest in Korsan and Yaroslavsky and Ovcharenko each a 25% interest. The following is then alleged:

"(5) On 17 June 2009 (the same day as the final payments by UTN to Tekhnoprogress), Korsan deposited UAH 303,526,720 with the account of UTN in PrivatBank as a guarantee for participation in the auction for the sale of the UTN shares and which constituted 20% of the initial auction price.

(6) On 27 June 2009 Korsan won the auction being the sole bidder.

(7) On 30 June 2009 Korsan signed a shares sale and purchase agreement ('SPA') with UTN in relation to the 18.296% shareholding in UTN.

(8) According to the SPA the purchase price for the shares amounted to UAH 2,100,000,000 and Korsan was to transfer the balance of UAH 1,796,473,280 within a month after the SPA execution date.

(9) It is to be inferred that the UAH 2.1 billion acquisition cost of the UTN shares was funded from the UAH 2.24 billion paid by UTN to Taiz and Tekhnoprogress (which had been extracted from Taiz and Tekhnoprogress pursuant to the sham share sale and purchase transactions pleaded above). In particular, it is to be inferred that the UAH 2.24 billion paid to Taiz and Tekhnoprogress was routed by the Defendants to the new participants in Korsan to allow them to fund their contributions to Korsan's increased charter capital, which funds were then, in substantial part, used to pay for Korsan's 18.296% shareholding in UTN.

(10) Further, the General Director of Korsan, Mr F.A. Lysenko, confirmed in a letter to the Ukrainian Ministry of Interior of the Dnepropetrovsk Region (in response to a

request from the Ministry dated 25 August 2010) that the funds used by Korsan to purchase the shareholding in UTN were provided by the founders of the company."

Paragraphs 80C-E go on to state:

"80C. Accordingly, the Oil Payment Siphoning Scheme allowed the Defendants, via Korsan, to acquire the valuable shareholding in UTN formerly owned by Tatneft for the benefit of the Defendants with funds that should have been paid to S-K (and ultimately to Tatneft itself) in return for the oil that it had supplied, through the contractual chain, to UTN. Thus Tatneft was deprived not only of its shareholding in UTN, but (together with S-K) of payment for hundreds of millions of dollars' worth of oil which had been supplied to UTN.

80D. Privat (and therefore Bogolyubov and Kolomoisky), Yaroslavsky and Ovcharenko all had beneficial interests in Korsan as pleaded above and were therefore each direct financial beneficiaries of the Oil Payment Siphoning Scheme.

80E. As a consequence of the matters pleaded above, it is to be inferred that each of the Defendants was aware of the source of the funds used by Korsan to purchase its 18.296% shareholding in UTN and was aware of, and participated in, or at least connived in and/or facilitated, the Oil Payment Siphoning Scheme in order to obtain substantial financial benefits for themselves and causing harm to S-K."

94. The draft Amended Particulars of Claim also contain proposed amendments in the section headed *"Liability under Article 1064 of the RCC"*, in which the constituent elements of the Article 1064 claim are set out. Thus, under a heading of *"Harm"*, paragraph 86 is in the following terms:

"As set out above, rather than abiding by the Tatarstan judgments, the Defendants caused UTN to make payment of the oil monies to Taiz and Tekhnoprogress, a course of conduct consistent only with the invalidity of the Assignment Agreement. However, as pleaded above, the oil monies were then misappropriated by the Defendants before they could be passed up the contractual chain to S-K. Under Article 15 of the RCC, S-K is entitled to recover compensation representing the full amount of the debt that Avto ~~owed it but which it~~ failed to pay due to the unlawful acts pleaded below ~~above~~, namely the USD 439.4 million in oil monies less the USD 105.3 million recovered by way of enforcement of the Decision of the Arbitrazh Court of republic of Tatarstan dated 28 August 2008 (which S-K subsequently paid to Tatneft under the Suvar-Tatneft Commission Agreement), in total USD 334.1 million."

Dealing with *"unlawful acts"*, paragraph 88 of the draft Amended Particulars of Claim then states:

"Tatneft relies on the following facts and matters as constituting relevant unlawful acts committed by the Defendants or some of them under the 'general tort' principle of Russian law for the purposes of Article 1064:

(i) after taking over Taiz and Tekhnoprogress, they caused them to breach their contractual obligations to pay the oil money upstream ~~via~~ to Avto ~~to S-K~~ by diverting the money offshore through the two rounds of sham share transactions connected with purchase of shares of various 'junk' companies; and/or

(ii) ~~by~~ taking over and procuring the bankruptcy of Avto, Taiz and Tekhnoprogress as pleaded at paragraphs 76 to 80 above; ~~they deprived S-K of the full value of its claims against Avto under the Suvar-Avto Framework Contract (and in consequence the rights of recourse that Avto might otherwise have had downstream against Taiz and Tekhnoprogress, and that Taiz and Tekhnoprogress had against UTN, were rendered worthless);~~ and/or

(iii) further and in any event, in carrying out the Oil Payment Siphoning Scheme, the Defendants were not engaged in legitimate and lawful business activity but rather in a dishonest scheme to deprive S-K of substantial payments for oil that had been supplied by it through the contractual chain. Such scheme involved the misappropriation of funds for the Defendants' own financial benefit through fraudulent sham transactions as described above and the procurement of the bankruptcy of Avto, Taiz and Tekhnoprogress for the purpose of defrauding S-K and ensuring that it would not be paid the monies that were lawfully due to it. As a matter of Russian law, the infliction of harm through such a dishonest scheme is unlawful for the purposes of Article 1064.

(iv) The role of the Defendants in the said unlawful conduct is to be inferred from the facts and matters set out at paragraphs 80A-80E, 81 and 82 above."

Then, dealing with *"causation"*, paragraph 89 states as follows:

"But for the acts and omissions of the Defendants pleaded above comprising the unlawful acts, UTN would have either paid S-K directly under the Assignment Agreement or else paid Taiz and Tekhnoprogress what it owed them for the Tatneft oil sold and delivered in accordance with the agreements pleaded above, who in turn (but for the unlawful Oil Payment Siphoning Scheme) would (consistently with having received the money from UTN and consistently with the position under Ukrainian law) have paid Avto and Avto would have paid S-K. As a matter of Russian law, it is an actionable wrong under Article 1064 of the RCC for a person to cause another person to breach his contractual obligations to, or not to pay his debt to, a third person, and the loss sustained by that third person is recoverable as damages by him pursuant to Article 15 of the RCC."

There then follows a new paragraph, paragraph 89A, which states:

"Accordingly, S-K was lawfully entitled to payment for the oil supplied to UTN through the contractual chain, whether directly, pursuant to the assignment agreement and the Tatarstan judgments or indirectly via Taiz and Tekhnoprogress and Avto. By means of the Oil Payment Siphoning Scheme described above, the Defendants intended and ensured that S-K would not receive such payments and that they would instead be diverted and misappropriated for the Defendants' own benefit as aforesaid. In the premises, the Defendants caused S-K not to receive substantial payments to which, on any view, it was lawfully entitled and thereby caused loss to S-K in the amount of the payment not received. To the extent that they did not cause these events they connived in and/or facilitated them and thus participated in the unlawful acts for the purposes of Articles 1064 and 1080 of the Russian Civil Code."

95. Mr Millett QC adopted a straightforward position: that the proposed amendments were merely of a *"tweaking"* kind which did not seek to introduce a new cause of action but,

instead, simply amplified an existing (and valid) cause of action. He submitted, in particular, that, as he put it, the *"elements"* of the Oil Payment Siphoning Scheme *"are all there in detail"*, by which he meant in the original Particulars of Claim, and that in paragraph 80A of the draft Amended Particulars of Claim more details relating to Korsan have been provided. Mr Millett QC rejected the suggestion that the Oil Payment Siphoning Scheme is merely background or context. It was his submission that it was at the heart of both the original and the proposed amended claims and that, as such, the cause of action remained the same. Similarly, Mr Millett QC submitted, the case on causation remains the same: that, but for the Oil Payment Siphoning Scheme, as he put it in his reply submissions, *"Avto would have been paid, and it would then have been in funds and been able to discharge its extant obligations to S-K"*. In sum, he submitted, there is *"nothing new"* in the amendments sought to be made by Tatneft and, accordingly, permission to amend ought to be granted.

96. These are not submissions which I can accept for a number of reasons. I am clear that the proposed amendments do, as Mr Adkin QC submitted, introduce a new cause of action. However adamant Mr Millett QC may have been in submitting to the contrary, it is not sufficient merely for him to point to the fact that both the original Particulars of Claim and the draft Amended Particulars of Claim are founded on the Oil Payment Siphoning Scheme since this does not mean, without more, that the cause of action remains the same. What matters is what the cause of action currently asserted under Article 1064 is and whether the claim in the draft Amended Particulars of Claim is different from the claim in the original Particulars of Claim. The context, namely the Oil Payment Siphoning Scheme, may be the same, but that does not of itself justify a conclusion that the cause of action is the same. As a matter of analysis, in my view, there is little room for doubt that the proposed amendments entail a new claim.

97. I have previously referred to the fact that the Claim Form alleges, in the fourth paragraph, that there was a *"wrongful diversion of US$439.4 million (or its UAH equivalent) of cash out of Taiz and Tekhnoprogress"* and that this had *"the consequence that those up the supply chain (namely S-K and ultimately the Claimant) did not get paid.…"*. The Particulars of Claim expand on this and, as such, focus on the allegation that there was a *"wrongful diversion"* of monies out of Taiz and Tekhnoprogress. Accordingly, as previously pointed out, in addressing the key elements of the Article 1064 claim which is asserted by Tatneft against the Defendants: (a) the *"harm"* is alleged to consist of *"the full amount of the debt that Avto owed"* S-K under the Suvar-Avto Framework Contract that was unpaid (paragraph 86 of the Particulars of Claim); (b) the *"unlawful acts"* alleged to have been committed by the Defendants are said to be acts taken in 2009, namely causing Taiz and Tekhnoprogress, after they had been taken over by the Defendants, to *"breach their contractual obligations to pay the oil money upstream via Avto to S-K by diverting the money offshore through the two rounds of sham share transactions"*, and *"by taking over and procuring the bankruptcy of Avto, Taiz and Tekhnoprogress"* depriving *"S-K of the full value of its claims against Avto under the Suvar-Avto Framework Contract"* (paragraph 88(i) and (ii)); (c) the Defendants' *"unlawful acts"* are alleged to have caused Tatneft's *"harm"* because, but for the *"unlawful acts"*, Taiz and Tekhnoprogress would have paid the oil monies to Avto and Avto would, in turn, have paid them to S-K (paragraph 89); and (d) the Defendants' alleged *"unlawful acts"* are said to have been *"intentional"* (paragraph 90). In contrast, despite the fact that Tatneft does not seek to amend the Claim Form, the proposed amendments assert a different claim: (a) as for *"harm"*, this is alleged to

be that UTN did not make payment of the oil monies directly to S-K under the 2008 Assignment Agreement, an agreement which, as previously noted, brought the previously existing contractual chain to an end (paragraphs 51A, 54A and 86 of the draft Amended Particulars of Claim); (b) besides some revision to paragraph 88(ii), the *"unlawful acts"* alleged remain the same, although there is the addition of a further allegation (in the version of the draft Amended Particulars of Claim ultimately relied upon by Tatneft at, or more accurately, during the course of the hearing) that the Defendants misappropriated funds for their own financial benefit through fraudulent sham transactions and the procurement of the bankruptcies of Avto, Taiz and Tekhnoprogress *"for the purpose of defrauding S-K and ensuring that it would not be paid the monies that were lawfully due to it"* (paragraph 88(iii) of the draft Amended Particulars of Claim); (c) the Defendants' *"unlawful acts"* are alleged to have caused UTN not to pay S-K directly under the 2008 Assignment Agreement, as opposed to S-K receiving payment from Avto 'up the chain' in the pre-2008 Assignment Agreement regime (paragraphs 89 and 89A); and (d) the Defendants' alleged *"unlawful acts"* are said to have been *"intentional"* (paragraph 90 which is unamended).

98. Accordingly, whereas the claim advanced in the Particulars of Claim has as its focus the *"wrongful diversion"* of the oil monies from Taiz and Tekhnoprogress and assumes that those monies would, but for the Oil Payment Siphoning Scheme, have found their way 'up the chain' to S-K, the proposed amendments add a claim based on the applicability of the 2008 Assignment Agreement, and so payment directly from UTN to S-K. It follows that the amendments focus not on any diversion of monies from Taiz and Tekhnoprogress but on the Defendants procuring UTN not to pay S-K. This is a different and necessarily new claim.

99. That the proposed amendments introduce a new case is confirmed by comparing the case as contained in the draft Amended Particulars of Claim not only with the original Particulars of Claim but also with the way in which the claim is described in the Claim Form. Put simply, whereas the Claim Form refers to the *"wrongful diversion"* of the oil monies from Taiz and Tekhnoprogress *"with the consequence that those up the supply chain (namely S-K and ultimately the Claimant) did not get paid"*, the proposed amendments are concerned with monies which ought to have been paid directly to S-K under the 2008 Assignment Agreement. This is not the same claim. In common law terms, a case akin to alleging that the Defendants procured a breach of contract (the Taiz-Avto Commission Agreement and the Taiz-Tekhnoprogress Contracts) by Taiz and Tekhnoprogress has been replaced, or more accurately supplemented, by a case alleging that the Defendants procured a breach of contract (the 2008 Assignment Agreement) by UTN. I consider that, in these circumstances, it cannot legitimately be said that the essential factual elements of the originally pleaded case and the case proposed to be introduced by the amendments are the same. They are, at heart and on analysis, not the same claims, even though the factual context, the Oil Payment Siphoning Scheme, is common to both the existing and the proposed claims. As Mr Adkin QC pointed out, that this is the position is hardly surprising given that the whole purpose of the amendments is to introduce a new cause of action involving a new alleged causation of harm to seek to avoid the fatal causation flaw which the Defendants have identified in the case as originally advanced.

100. In any event, in view of my earlier acceptance of the submissions made by Mr MacLean QC concerning the fact that, on Tatneft's own case, from October 2007 UTN

was not going to pay for the oil, even if it were to be concluded that the proposed amendments did not entail a new cause of action, still the case would be bound to fail as a matter of causation and so the third element of any article 1064 claim. Put simply, UTN's alleged failure to make payment to S-K under the 2008 Assignment Agreement pre-dates the Defendants' alleged *"unlawful acts"* in 2009. Accordingly, even on Tatneft's own case, the alleged *"harm"* predates those allegedly *"unlawful acts"*. The proposed Amended Particulars of Claim, therefore, like the original Particulars of Claim, entail a claim which is misconceived as a matter of causation. It follows that, the proposed amendments entailing a claim which cannot succeed, permission to amend ought not to be granted. I would add in this regard that, as Mr Adkin QC pointed out, if and insofar as the violation of rights in the draft Amended Particulars of Claim are said to comprise the Defendants causing UTN to pay the oil monies to Taiz and Tekhnoprogress rather than to S-K, and that, but for such procurement, UTN would have paid S-K, this is a case which must fail in circumstances where, again on Tatneft's own case, UTN remained indebted to S-K under the 2008 Assignment Agreement despite the payments which it made to Taiz and Tekhnoprogress, and it is no part of Tatneft's case that the payments prevented UTN from being able to pay S-K directly.

101. The application for permission to amend must, therefore, be refused: the draft Amended Particulars of Claim entail the assertion of a new cause of action which is time-barred and, even if that were not the case, the proposed amendments suffer the same fatal causation-related difficulties as the case contained in the existing Particulars of Claim. It follows that Tatneft is in no position to show that there is no reasonably arguable limitation defence to the case which it seeks to advance by way of the proposed amendments to the Particulars of Claim and that, furthermore, those proposed amendments have no 'real prospect of success'. Accordingly, permission to amend ought not to be granted.

102. I should, for completeness, record that I do not refuse the application based on the conclusion which I have reached as regards the 2015 Compensation Agreement. I am satisfied, in short, that, under the 2015 Compensation Agreement, Tatneft had assigned to it the right to bring the claim which it now seeks to bring by way of the proposed amendments since it is a claim which, in contrast to the claim asserted in the Particulars of Claim, can legitimately be described as involving a claim against third parties which entails the assertion of S-K's *"rights … associated with and/or arising from the Claims and/or directly or indirectly related in any way"* to the 2008 Assignment Agreement, the Tatarstan Judgment and the Russian Enforcement Order.

103. This leaves, lastly on this topic, the position of Mr Yaroslavsky. I consider that, despite the amplification contained in paragraph 80A of the draft Amended Particulars of Claim concerning Mr Yaroslavsky's interests in Korsan, still the case as sought to be levelled against him by Tatneft is deficient given that it continues to entail no allegation that Mr Yaroslavsky directed anything or that he himself took any of the *"unlawful acts"* alleged against the other Defendants. In circumstances where mere involvement or the obtaining of a financial benefit are not sufficient to found a claim under Article 1064, it must follow that the case against Mr Yaroslavsky, even as advanced in the draft Amended Particulars of Claim, is inadequate. Accordingly, even if I had otherwise been minded to grant permission to amend as regards the other Defendants, I would not have done so in relation to Mr Yaroslavsky in any event.

Abuse of process

104. Before I come on to deal with the issues which relate to the application to discharge the Worldwide Freezing Order, I should, first, address a further argument which was advanced by Mr Weisselberg QC concerning abuse of process. It was Mr Weisselberg QC's submission that since it is clear, and is indeed admitted by Mr Korolkov, that Tatneft and S-K have collaborated together closely from the outset as to what litigation and arbitration steps to take in relation to the unpaid oil monies, it is an abuse of process for the present claim to be put forward by Tatneft as S-K's assignee when the similar Article 1064 claim which Tatneft would have had, at least on its own case, has become time-barred. The litigation strategy devised by Tatneft in conjunction with S-K has entailed, Mr Weisselberg QC submitted, a number of different sets of proceedings, specifically the ICAC Arbitration brought by S-K against Avto and the Tatarstan Judgment obtained by S-K against UTN after S-K had entered into the 2008 Assignment Agreement, as well as the BIT Arbitration brought by Tatneft against the Ukraine together with the Criminal Complaint brought by Tatneft and S-K jointly in December 2011 (and, indeed, another Criminal Complaint made by Tatneft against Mr Ovcharenko in March 2008). All the while, Mr Weisselberg QC submitted, at least on Tatneft's case, the present Article 1064 claim could have been brought by Tatneft and S-K, yet it was not brought until Tatneft's own such claim had become time-barred. His submission was that Tatneft has manufactured a misconceived (or at best novel) claim under Article 1064 in circumstances where, on Tatneft's own version of events, it had kept from S-K, its commission agent, material information which could have allowed S-K to commence such a claim (and which, but for such concealment, would have rendered S-K's claim time-barred), only then to take an assignment from that agent of a cause of action which Tatneft also had but allowed to become time-barred. Tatneft, Mr Weisselberg QC submitted, has *"played fast and loose with multiple international jurisdictions and with its own agent"*, and so the proceedings should now be stopped.

105. Mr Weisselberg QC submitted that the Court has an inherent power to prevent a misuse of its processes and procedures in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people, as it was put by Lord Diplock in ***Hunter v Chief Constable of the West Midlands*** [1982] AC 529 at page 536. This approach was approved by Lord Bingham in ***Johnson v Gore Wood & Co*** [2002] 2 AC 1 at page 22E-F. Lord Bingham went on at page 31F to state that the question is *"whether, in all the circumstances, a party is misusing or abusing the process of the court"*. In particular, Mr Weisselberg QC emphasised, a litigant's conduct in embarking on a strategy which, unilaterally and by his own action, seeks to achieve an extension of the time allowed by statute for the commencement of an action (and thereby to deprive the defendant of a potential limitation defence) may amount to an abuse of process. In this regard, reliance was placed on ***Nomura International Plc v Granada Group Ltd*** [2007] EWHC 642 (Comm), a case in which Cooke J said this at [37]:

> *"In my judgment, when regard is had to these authorities the key question must always be whether or not, at the time of issuing a Writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshal what it knew, to formulate Particulars of Claim. If the claimant was not in a position to do so, then the claimant could have no present*

intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way, a claimant has no business to issue a Claim Form at all 'in the hope that something may turn up'. The effect of issuing a Writ or Claim Form in such circumstances is, so the plaintiff/claimant hopes, to stop the limitation period running and thus deprive the defendant of a potential limitation defence. The plaintiff/claimant thus, unilaterally, by its own action, seeks to achieve for itself an extension of the time allowed by statute for the commencement of an action, even though it is in no position properly to formulate a claim against the relevant defendant. That must, in my judgment, be an abuse of process and one for which there can be no remedy save that of striking out the proceedings so as to deprive the claimant of its putative advantage. The illegitimate benefit hopefully achieved can only be nullified by this means. Whatever powers may be available to the court for other abuses, if this is an abuse, there is only one suitable sanction."

As is apparent from this passage, the abuse in that case was in the issuance of a claim form in order to protect time *"in the hope that something may turn up"*. Cooke J stated his conclusion on this at [41]:

"In my judgment therefore if Nomura, at the time of issuing its Claim Form, was not in a position to do the minimum necessary to set out the nature of the claim it was making, it would be seeking an illegitimate benefit, namely the prevention of further time running under the Limitation Acts for a claim which it could not properly identify or plead. That would be an abuse of the process of the court. Insofar as it sought to make any claim in contract, it would be necessary for it to be able to identify the particular contract and the alleged breach. In the case of any breach of tortious duty, it would be necessary for it to be in a position to identify the essential acts or omissions which constituted the breach of duty, negligence or negligent misstatement. For the purposes of negligent misstatement, Nomura would have to be able to identify what advice or information was inaccurate and what was given negligently, at least in essence. If Nomura was not in a position to do this, it was not in a position properly to issue a claim, since it could not have proceeded properly to plead Particulars of Claim without the off chance occurring that something would turn up. In such circumstances it could have no present intention to pursue a claim since it had no sufficient idea of the claim it wished to pursue."

106. In his skeleton argument, Mr Weisselberg QC made his submissions by reference not only to English law on abuse of process but also by reference to Russian law on that topic. In the event, however, Mr Millett QC accepted in his skeleton argument that only English law is relevant. Therefore, I need say nothing about Russian law and focus, instead, exclusively on the English law position. Adopting this approach, I am nonetheless not persuaded that it is appropriate to regard Tatneft's conduct, as described by Mr Weisselberg QC, as entailing an abuse of process. I appreciate that Mr Weisselberg QC can point to the close relationship between Tatneft and S-K and the fact that the current proceedings follow several other proceedings and are part of a combined strategy. However, I do not consider that, without more, this warrants the conclusion which has been urged upon me. The expiry of the limitation period for

Tatneft's Article 1064 claim is not, in my view, a factor which demands such a conclusion either. I do not feel able, in short, to agree with Mr Weisselberg QC's submission that Tatneft has been 'playing fast and loose' or *"misusing or abusing the process of the court"*. It follows that I reject this objection to the proceedings.

The applications to discharge the Worldwide Freezing Order

107. A number of matters arise in relation to the Defendants' applications to discharge the Worldwide Freezing Order. However, in view of the conclusions which I have reached thus far, plainly the Worldwide Freezing Order can no longer stand, whether as against the Defendants or as against the Non-Cause of Action Respondents represented by Mr Morgan QC. In the circumstances, I shall endeavour to deal with this aspect as economically as possible, even though it is fair to say that a substantial part of the hearing was taken up with the discharge applications, in particular the contention that Tatneft did not comply with its duty of full and frank disclosure when seeking, and obtaining, the Worldwide Freezing Order from Teare J.

'Good arguable case'

108. The first matter concerns whether Tatneft's claim meets the requirement that there be a 'good arguable case'. This test was described by Mustill J (as he then was) in ***Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH & Co KG*** [1984] 1 All ER 398, at page 404D, as entailing consideration whether the case advanced by the claimant seeking freezing order relief *"is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than a 50% chance of success ..."*. The Court of Appeal agreed with this, adding at page 415D that:

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

109. As recently explained in ***Holyoake v Candy*** [2016] EWHC 970 (Ch), [2016] 3 WLR 357, the 'good arguable case' test will be applied somewhat differently depending on the nature of the issue concerned. Nugee J in that case said this at [13]:

"When the question is one of construction or one of law, and there is argument on the point, the court may well be able to take a view as to who appears, albeit at the interlocutory stage, to have the better, or indeed much the better, of the argument."

At [15], however, he explained that:

"In the case of purely factual questions, I consider that it is sufficient for the claimant to meet the traditional test laid down by Mustill J ... that the claimant needs to show a good arguable case in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success."

110. Mr McGrath QC highlighted also ***Finurba Corporate Finance Ltd v Sipp SA*** [2011] EWCA Civ 465, in which Lord Neuberger MR said this at [31]:

"In the light of the increasing sophistication of fraudsters, and their extensive use of companies and other entities to mask their activities and assets, the court should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that the fraud has occurred."

Mr McGrath QC did so at the same time as also making the point that the appropriate approach is not to ask, as is asked in the context of applications for service out of the jurisdiction, whether the claimant *"has a much better argument on the material available"* (***Bols Distilleries BV v Superior Yacht Services Ltd*** [2007] 1 WLR 12 at [26]). That, the so-called 'Canada Trust Gloss', the Court of Appeal held in the ***Kazakhstan Kagazy*** case (at [25] per Longmore LJ and [63] to [68] per Elias LJ) does not apply to the 'good arguable case' test as it applies in the context of freezing orders. It is, indeed, Mr McGrath QC suggested, perfectly possible and logical to conclude that *both sides* have a good arguable case on the material presently available and that their dispute can only be resolved at trial. Mr McGrath QC also submitted, relying upon the ***Kazakhstan Kagazy*** case at [23] (as well as ***Derby & Co Ltd v Weldon*** [1990] Ch 48 at 57-58), that the Court should, at this early stage in the litigation, discourage any attempt to embroil it in a detailed assessment of the facts or legal argument. I accept that Mr McGrath QC is right about this. In the present case, however, my having decided that there is no 'serious issue to be tried', it is impossible to conclude that the 'good arguable case' test has been met.

Risk of dissipation

111. Even if it had been established that there were a 'good arguable case', that would not of itself be sufficient to justify the making of the Worldwide Freezing Order since Tatneft would also need to show that there is a sufficient risk of dissipation. As to this, and again taking the matter shortly in the circumstances, as made clear by Kerr LJ in ***The Ninemia*** at page 419H, the Court must conclude, *"on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied"*.

112. As to the nature of the evidence required, Sir Peter Pain stated as follows in ***O'Regan v Iambic Productions Ltd*** [1989] 139 NLJ 1378 (cited with approval by Nugee J in the ***Holyoake*** case at [19]):

"There are numerous paragraphs in the authorities relating to Mareva injunctions which make it plain that unsupported statements and expressions of fear carry very little, if any weight. The Court needs to act on objective facts from which the Court can infer that the Defendant is likely to move assets abroad or dissipate them within the jurisdiction".

In ***Thane Investments v Tomlinson*** [2003] EWCA Civ 1272 at [21] Peter Gibson LJ emphasised that it *"is important that there should be solid evidence adduced to the court of the likelihood of dissipation"*. More recently, Mann J commented in ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2014] EWHC 4336 (Ch) at [221]:

"What one has to do is to acknowledge the seriousness of the consequences of a freezing order, and the invasion of liberty that it involves (especially bearing in mind it is usually

sought in a without notice application) and to reflect that in requiring proof to an appropriately high standard. Orders are not to be lightly sought and will not be granted on flimsy evidence. The requirement to demonstrate a risk of dissipation is a lot more than formal."

113. More recently still, in ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) Males J summarised the position at [69] and [70], as follows:

"As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label "risk of dissipation" ...

... the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.

b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.

c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.

d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.

e. The nature, location and liquidity of the defendant's assets are important considerations.

f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

g. So too is the defendant's behaviour in response to the claim or anticipated claim."

114. As to the principle to which Males J makes reference at (c), Tatneft accepts that, following the ***Thane Investments*** case, not every general allegation of dishonesty will be sufficient to justify an inference that there is a real risk of dissipation. It was submitted, however, correctly in my view, that it is appropriate to take into account the underlying allegations made against a defendant. Thus, in ***VTB v Nutritek*** [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep 313 Lloyd LJ said this at [177]:

"We agree with Peter Gibson LJ that the court should be careful in its treatment of evidence of dishonesty. However, where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets. That is supported

by two earlier Court of Appeal decisions, not cited in Thane Investments. These are Norwich Union v Eden (25 January 1996 unreported) and Grupo Torras SA v Al Sabah (21 March 1997 unreported). Both of them were cited by Flaux J in his judgment in Madoff Securities International Ltd and others v Raven and others … . Those decisions are not inconsistent with what Peter Gibson LJ said in Thane Investments v Tomlinson, but they put it into context, and their context is a good deal closer to that of the present case."

Lloyd LJ then went on to quote from the ***Madoff Securities*** case ([2011] EWHC 3102 (Comm)) where Flaux J said this at [163]:

"163. In this context, and entirely properly, Mr Weekes referred me to the decision of the Court of Appeal in Thane Investments v Tomlinson [2003] EWCA Civ 1272 where Peter Gibson LJ at [28] deprecates the tendency to infer a risk of dissipation from the fact that allegations of dishonesty are made against the defendant. However, Mr Weekes submitted that Thane Investments was a case which must be approached with caution, as it was an ex tempore judgment given where the defendant was unrepresented, so that the case was not perhaps as fully argued as it might have been. In particular, two earlier relevant decisions of the Court of Appeal do not appear to have been cited to the Court of Appeal."

Flaux J went on at [164] to address ***Norwich Union v Eden*** (25 January 1996, unreported), in which Phillips LJ (as he then was) said this:

"It seems to me that when the court considers whether there is a good arguable case it is at that stage that it considers whether the likelihood of a judgment in favour of the plaintiff is sufficient to justify the grant of Mareva relief. If it is so satisfied, the question then arises:- if such a judgment is given, what is the risk that there will be no assets there to satisfy it? If the judgment in question being considered is a judgment in which allegations of fraud are made, then it seems to me that it is open to the court to conclude from that fact alone that there is sufficient risk of dissipation of assets to justify the grant of relief. For myself it does not seem to me that there would be any prospect of persuading this court that the learned Judge had erred in principle in so concluding."

At [165] Flaux J then referred to ***Gruppo Torras SA v Al Sabah*** 1997 WL 1105536 (21 March 1997) where Saville LJ (as he then was) stated as follows:

"Mr Etherton also criticised the judge for failing, as he put it, properly to address himself to the question whether there was a real risk of dissipation of assets, and simply concluded that such a risk existed because this was a fraud case. In this context Mr Etherton pointed out that Mr Dawson had lived and worked as an investment adviser in Switzerland for a long time and that his assets included a very valuable house in Geneva, so that it was hardly likely that he would set about making them judgment proof. Mr Etherton also drew attention to the fact that the litigation had begun years ago and long before Mr Dawson was joined to it, yet there was no suggestion that he has yet made any attempt to dissipate assets.

These are certainly points that can be made on behalf of Mr Dawson, but again I am not persuaded that the judge simply failed to take them into account. What is clear from the judgment is that the judge took the view that there was a good arguable case that Mr Dawson was knowingly implicated in the fraud; and that the nature of the

allegations was such that there was a strong fear of dissipation. Since it is part of Mr Dawson's own case that he was expert in the sort of intricate, sophisticated and international financial transactions which feature in this case, and since the plaintiffs had established a good arguable case that Mr Dawson had used his expertise for dishonest purposes, I am not in the least surprised that the judge reached the conclusion he did. In short I remain wholly unpersuaded that the judge so erred in his assessment of the risk of dissipation that it would be right for this court to interfere."

In the next two paragraphs, Flaux J said this:

"166. Mr Weekes relied upon that case in support of a submission that, like the defendant in that case, Mrs Kohn is experienced in sophisticated international financial transactions. He submitted that in the light of those earlier authorities, the way in which Thane Investments should be read is correctly set out by Patten J in Jarvis Field Press v Chelton [2003] EWHC 2674 (Ch), where having cited the relevant passage from the judgment of Peter Gibson LJ, the learned judge says at [10]:

'The relevance of that passage, of course, is to the submission made by Mr Lord, on behalf of the claimants on this application, that I should infer from the apparent dishonesty of Mrs Chelton, together with the recent change of circumstances, a real likelihood and risk of dissipation. I have no difficulty in accepting the general principle, emphasised by Peter Gibson LJ, that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a freezing order. It is necessary to have regard to the particular respondents to the application and to ask oneself whether, in the light of the dishonest conduct which is asserted against them, there is a real risk of dissipation. As Peter Gibson LJ made clear in the passage I have already quoted, the court has to scrutinise with care whether what is alleged to have been dishonesty justifies the inference. That is not, therefore, a judgment to the effect that a finding of dishonesty (or, in this case, an allegation of dishonesty) is insufficient to found the necessary inference. It is merely a welcome reminder that in order to draw that inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care.'

167. I agree with that analysis of the approach which the court should adopt when considering whether to grant a freezing injunction, in a case where there are allegations of fraud or deliberate misconduct against a defendant."

Returning to the ***VTB*** case, after referring to the ***Madoff Securities*** case, Lloyd LJ said this at [178]:

"We agree with those observations by Flaux J. On that basis it seems to us that it would have been right for the judge to take into account a finding of a good arguable case that Mr Malofeev had been engaged in a major fraud, and that he operated a complex web of companies in a number of jurisdictions, which enabled him to commit the fraud and would make it difficult for any judgment to be enforced. We would regard such factors as capable of providing powerful support for the case of a risk of dissipation."

115. It was submitted on Tatneft's behalf that, given the nature of the case which it advances against the Defendants in these proceedings, in particular the complexity and scale of the Oil Payment Siphoning Scheme which is alleged, there is in the present case "*powerful support for the case of a risk of dissipation*". I tend to agree. I agree also that

the mere fact of delay in bringing the application for the Worldwide Freezing Order does not, without more, mean that there is no risk of dissipation. I am doubtful that the delay in this case should be treated as demonstrating that Tatneft itself does not consider that there is a risk of dissipation, but, even if it did, it would still only be a factor to be weighed in the balance in considering whether or not to grant the injunction sought. This was the approach explained by Flaux J in the ***Madoff Securities*** case at [156]:

"It seems to me that the following principles relevant to the present application can be discerned from those two cases:

(1) The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard inter partes, does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it;

(2) The rationale for a freezing injunction is the risk that a judgment will remain unsatisfied or be difficult to enforce by virtue of dissipation or disposal of assets (see further the citation from Congentra AG v Sixteen Thirteen Marine SA ('The Nicholas M') [2008] 2 Lloyd's Rep 602; [2008] EWHC 1615 (Comm) below). In that context, the order for disclosure of assets normally made as an adjunct to a freezing injunction is an important aspect of the relief sought, in determining whether assets have been dissipated, and, if so, what has become of them, aiding subsequent enforcement of any judgment;

(3) Even if delay in bringing the application demonstrates that the claimant does not consider there is a risk of dissipation, that is only one factor to be weighed in the balance in considering whether or not to grant the injunction sought."

These principles were approved by Eder J in ***Enercon GmbH v Enercon (India) Ltd*** [2012] EWHC 689 (Comm), [2012] 1 Lloyd's Rep 519 at [77] and [78].

116. In the present case, had I reached a different decision on the merits-related issues, in view of the nature and scale of the Oil Payment Siphoning Scheme combined with the way in which Tatneft's efforts to recover under the Tatarstan Judgment have been substantially thwarted by UTN, with the Defendants standing behind UTN, I would have concluded that Tatneft had established a sufficient risk of dissipation notwithstanding any delay on its part, which I consider are explained by Tatneft having to take different steps at different times in order to try to seek redress.

117. I say this notwithstanding an additional submission made on behalf of at least some of the Defendants to the effect that they are so very wealthy that it is most unlikely that they would try, or be able, to dissipate their assets if the Worldwide Freezing Order were not in place. This may or may not be right. I do not see, however, why Tatneft should have to take the risk that it is right.

118. I should add that, in the circumstances, nor would I have refused to maintain the Worldwide Freezing Order on any discretionary grounds. In truth, aside from the delay point and perhaps the abuse of process issue which I have previously addressed, there were no other discretion-related matters relied upon by the Defendants.

Duty of full and frank disclosure

119. I turn, then, to the duty of full and frank disclosure. Although this is a matter which was the subject of a considerable amount of submission, both in writing and orally, I do not propose to lengthen this already long judgment still further by dealing with every point which was made. I have already decided that these proceedings should not be allowed to continue. I have also decided that there is no 'good arguable case' as is required for worldwide freezing order relief to be granted. In these circumstances, it will be appreciated that I am now dealing with a topic which is not of central importance. I shall, accordingly, resist the temptation to address every argument which was advanced and to consider every authority which was deployed, but shall instead focus on the key points. In the final analysis, two such points were made by Mr Adkin QC who took the lead on this issue at the hearing on behalf of the Defendants: first, that there was a culpable failure on the part of Tatneft to explain to Teare J when obtaining the Worldwide Freezing Order that its case on causation was, as Mr Adkin QC put it, *"fatally flawed"*; and secondly, that there was a culpable failure to deal properly before Teare J with the issue of S-K's constructive knowledge.

120. Before I address these matters, I should indicate that it was not in dispute between Mr Adkin QC and Mr McGrath QC, who dealt with this topic at the hearing on behalf of Tatneft, that an applicant for without notice relief must disclose to the court all matters which are material to the application. As to this, the requirement to give 'full and frank disclosure' has been described as a *"heavy duty of candour and care"*: ***Brink's Mat v Elcombe*** [1988] 1 WLR 1350 at page 1359C, per Slade LJ. The importance of the duty of full and frank disclosure on an ex parte application is well established, and rightly so. It is the *quid pro quo* for an applicant inviting the Court to proceed in the absence of another party.

121. As Bingham J (as he then was) put it in ***Siporex Trade SA v Comdel Commodities Ltd*** [1986] 2 Lloyd's Rep. 428 at page 437:

> *"... an applicant must show the utmost good faith and disclose his case fully and fairly ... He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state."*
>
> In the ***Brink's Mat*** case, at page 1356F, Ralph Gibson LJ commented as follows:
>
> *"(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts' ...*
>
> *(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers ...*
>
> *(3) The applicant must make proper inquiries before making the application ... The duty of disclosure therefore applies not only to material facts known to the*

applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant ... and (c) the degree of legitimate urgency and the time available for the making of inquiries ...".

In the recent ***Pugachev*** case, Mann J explained as follows:

"171. The obligation to anticipate defences in pursuit of the obligation to make full and frank disclosure is very important ... An applicant for without notice relief has actively to consider what points of defence might be taken by the defendant and put them before the court. That is a fundamental requirement, and safeguard.

172. In making an assessment as to whether a point of defence is sufficiently obvious, one must guard against assuming that any point that has occurred to the defence lawyers ought to have occurred to the claimants' lawyers. The obligation to disclose does not require that every potential point be flushed out. Nevertheless there is an obligation to look at things from a defendant's point of view and anticipate defences which are obvious and those which require some thought but are nonetheless plain enough (as arguable defences) when thought about ...."

122. Mr McGrath QC also emphasised that materiality is defined in a very broad sense and that, within that broad concept of materiality, there are significant degrees of relevance. This is the point which was made by Toulson J (as he then was) in ***Crown Resources AG v Vinogradsky*** (15 June 2001, unreported) when he stated as follows at pages 6, 7 and 22 (in passages quoted by Longmore LJ in the ***Kazakhstan Kagazy*** case at [36]):

"... where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion.

...

I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees.

...

In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion."

As Males J put it in the ***National Bank Trust*** case at [21], it is only "*those trees which are of particular importance*" which merit close scrutiny in a discharge application.

123. Before I address the two matters relied upon by the Defendants, I should mention that Mr McGrath QC raised two threshold objections to the case on failure to comply with the duty of full and frank disclosure which is advanced. First, Mr McGrath QC submitted that the Defendants' allegations of breach of duty are inappropriate because they are in the nature of a *tabula in naufragio* (a plank in a shipwreck) in the sense that, as Slade LJ explained in the ***Brink's Mat*** case at page 1359E, they are put forward on *"rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience"*. I reject the suggestion that this is the position in relation to the alleged breaches of duty in the present case. For reasons which I have explained, I do not consider that the Worldwide Freezing Order is maintainable because no 'good arguable case' has been established. This is not, therefore, a situation where it can rightly be said that the breach of duty allegations are the plank which, alone, saves the Defendants from drowning; on the contrary, they are a plank for which the Defendants have no need because land has already been safely reached.

124. Secondly, Mr McGrath QC submitted that the Defendants' breach of duty allegations lack focus and were not identified with sufficient clarity coming into the hearing. He highlighted in support of this submission the observation made by Hoffmann J (as he then was) in ***EMI Records Ltd v The CD Specialists Ltd*** [1992] FSR 70 at page 74 that *"a party moving to discharge an interlocutory order should give the other side as much notice as the circumstances will allow of the precise grounds upon which the application is made"*. Mr McGrath QC suggested that, far from doing this, the Defendants in this case went out of their way to avoid giving precise details of the allegations. He pointed out that, when the issue was first raised, the whole thrust of the allegations was that Tatneft had misled Teare J about its own knowledge (as distinct from S-K's knowledge) and that this was directly relevant to the existence or otherwise of a limitation defence, despite the fact that it is S-K's knowledge which matters for limitation purposes. It was only later, Mr McGrath QC suggested, that more detail was given in relation to other matters and, even then, it was not made clear that the allegations, or some of them, involved allegations that there had been deliberate or reckless breaches of duty. In my view, however, there is no substance in this point either. It was made clear in the witness evidence served on the Defendants' behalf that the allegations of breach were said to be culpable. I do not consider, in the circumstances, that it matters that it was only at the hearing that Mr Adkin QC made it clear that the only matter in relation to which it was being suggested that there had been any deliberate breach of duty concerns the fact that Tatneft failed to make it clear to Teare J that it had become aware of Mr Kolomoisky's involvement in the Oil Payment Siphoning Scheme since as long ago as 2009 when the Rejoinder on Jurisdiction was prepared. That the Defendants were alleging culpability from the outset is clear.

125. Despite my rejection of these two preliminary objections, I nonetheless do not accept the submission that the Worldwide Freezing Order ought, in any event, to be discharged on the grounds of a failure to comply with the duty of full and frank disclosure. As to the first point, I feel unable to conclude that there was any culpable failure on the part of Tatneft to explain to Teare J, when obtaining the Worldwide Freezing Order, that its case on causation was weak or, as Mr Adkin QC put it, *"fatally flawed"*, for the reasons which I have addressed at considerable length earlier in this judgment. I am quite clear that, consistent with the position adopted by Tatneft at the hearing before me, Tatneft

and its lawyers did not consider that this was the position when they made their application. There is, therefore, no question of them being culpable. As to the second matter concerning Tatneft's state of knowledge, it is regrettable that this was not more precisely and accurately dealt with in the application before Teare J. Nonetheless, I do not agree with Mr Adkin QC that this means that there was of necessity a culpable non-disclosure or, worse still, any deliberate intention on the part of Tatneft (not the lawyers since it is not suggested that they knew that what Tatneft was telling them about its state of knowledge was incorrect) to mislead Teare J. I am clear that the focus was on what S-K knew since, as the Defendants accept, it is S-K's knowledge (actual or constructive) which directly matters for limitation purposes (albeit that, as I have explained, what Tatneft knew impacts on S-K's constructive knowledge), and that this is the reason why Tatneft's knowledge was not dealt with as well as it should have been. In these circumstances, I cannot be confident that there was a deliberate decision on the part of Tatneft to mislead. Therefore, I am not satisfied that, in the case of either of the two key allegations which I have previously identified, discharge would be appropriate.

126. In any event, even had I concluded that there was a culpable breach of duty, I am far from satisfied that in a case such as this the right course would have been to discharge the Worldwide Freezing Order. As to this, in the ***National Bank Trust*** case, at [18] Males J identified the following principles applicable to the decision whether to discharge or not:

> *"a. A fact is material if it is one which the judge would need (or wish) to take into account when deciding whether to make the freezing order.*
>
> *b. Failure to disclose a material fact will sometimes require immediate discharge of the order. This is likely to be the court's starting point, at least when the failure is substantial or deliberate.*
>
> *c. Nevertheless the court has a discretion to continue the injunction (or to impose a fresh injunction) despite a failure of disclosure; although it has been said that this discretion should be exercised sparingly, the overriding consideration will always be the interests of justice.*
>
> *d. In considering where the interests of justice lie, it is necessary to take account of all the circumstances of the case including (without attempting an exhaustive list) (i) the importance of the fact not disclosed to the issues which the judge making the freezing order had to decide; (ii) the need to encourage proper compliance with the need for full and frank disclosure and to deter non-compliance; (iii) whether or to what extent the failure to disclose was culpable; and (iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts.*
>
> *e. The interests of justice may sometimes require that a freezing order be continued, but that a failure of disclosure be marked in some other way, for example by a suitable order as to costs."*

A similar approach had previously been described by Christopher Clarke J (as he then was) in ***Millhouse Capital UK Ltd v Sibir Energy plc*** [2008] EWHC 2614 (Ch), [2010]

BCC 475 at [102] and [103]. In the next paragraph, [104], Christopher Clarke J said this:

"The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders."

127. Applying this approach, I am not satisfied that it would have been appropriate to discharge the Worldwide Freezing Order. I consider, therefore, that neither of the two matters relied upon by the Defendants can really, on analysis, be classified as being of sufficient importance as to warrant discharge. Whilst what Tatneft knew was relevant and possibly highly relevant, depending on the view taken concerning the parties' respective submissions on limitation, I cannot agree with Mr Adkin QC that the point is so important as to mean that Tatneft's position in relation to limitation is impossible. Nor do I consider that, insofar as it concerns the question of delay, the question of Tatneft's knowledge is as important as Mr Adkin QC was inclined to suggest. It follows that, had it been necessary to reach a concluded view on the issue relating to the duty of full and frank disclosure, I would not have acceded to the Defendants' submission that the Worldwide Freezing order should be discharged on the basis that that duty had been broken and discharge is the appropriate response.

Quantum

128. The last matter concerns the question of quantum, specifically whether, if the Worldwide Freezing Order were to be maintained, it should remain in the sum in which it was granted. This is plainly an issue which would only arise had I decided that worldwide freezing order relief is appropriate in this case. As that is not what I have decided, it is wholly academic whether the Worldwide Freezing Order actually obtained by Tatneft prohibiting each of the Defendants from disposing of or dealing with their assets up to a limit of US$380 million is in too large an amount. However, I shall deal with the matter out of completeness since Mr Adkin QC submitted on behalf of the Defendants that Tatneft's claim in these proceedings is exaggerated and, as a result, the Worldwide Freezing Order is excessive in amount.

129. It will be recalled in this context that the US$380 million is made up of US$334.1 million by way of damages, US$34.3 million by way of interest and US$11.5 million by way of costs. Mr Adkin QC referred me to what is set out in paragraph 86 of the Particulars of Claim, namely (although I have previously quoted from this paragraph):

"Under Article 15 of the RCC, S-K is entitled to recover the full amount of the debt that Avto owed it but which it failed to pay due to the unlawful acts pleaded above, namely the USD 439.4 million in oil monies less the USD 105.3 million recovered by way of enforcement of the decision of the Arbitrazh Court of the Republic of Tatarstan dated

28 August 2008 (which S-K subsequently paid to Tatneft under the Suvar-Tatneft Commission Agreement), in total USD 334.1 million."

Mr Adkin QC pointed out that the UAH amounts which Tatneft itself states in the Particulars of Claim were paid by UTN to Taiz and Tekhnoprogress, when converted to US Dollars, equate to US$193.1 million in the case of Taiz (the equivalent of UAH 1.47 billion, as pleaded in paragraph 64) and US$101.1 million in the case of Tekhnoprogress (as pleaded in paragraph 69). Added together, the sums come to US$294.2 million. This is the figure which, on Tatneft's own case, as Mr Adkin QC points out, Avto did not receive from Taiz and Tekhnoprogress and, accordingly, did not pass on to S-K. Once the amount recovered in execution of the Tatarstan Judgment, US$105.3 million, is taken into account, the US$294.2 million figure reduces to US$188.9 million. That, Mr Adkin QC submits, ought to be the amount which is claimed in these proceedings, rather than the US$334.1 million to which reference is made in paragraph 86 of the Particulars of Claim and which formed the basis of the application for an order at the level of the Worldwide Freezing Order which Tatneft obtained at the hearing before Teare J.

130. Mr Millett QC complained during the course of his submissions in relation to the quantum issue that there had been insufficient notice coming into the hearing of the point which Mr Adkin QC made. That clearly was not the case, however, given that Mr Andrew Lafferty, a partner in Fieldfisher LLP, Mr Kolomoisky's solicitors, raised the very issue in paragraph 73.1 of the witness statement which he made in support of his client's application.

131. Otherwise, Mr Millett QC sought to justify the higher figure claimed by reference to certain contractual penalties for late payment which, he suggested, would have been payable by UTN to Taiz and Tekhnoprogress under UTN's contracts with those parties and/or which would have been payable by Avto to S-K under the Suvar-Avto Framework Contract. I need not set out the detail here since I am quite satisfied that there is nothing in Mr Millett QC's point, in circumstances where what is claimed in these proceedings are damages to compensate Tatneft in relation to monies which were diverted *"out of Taiz and Tekhnoprogress"* (as it is put in the Claim Form) and those monies amount to US$294.2 million rather than the US$439.4 million suggested by Tatneft both in the Claim Form and in paragraph 86 of the Particulars of Claim.

132. Furthermore, insofar as Mr Millett QC's submission has as its focus the Suvar-Avto Framework Contract, the difficulty is that all of S-K's and Avto's rights under that contract were terminated when the 2008 Assignment Agreement was entered into. Accordingly, S-K was no longer entitled to look to Avto to pay any contractual penalty. Indeed, the effect of the ICAC Arbitration was to cap Avto's liability to S-K at US$17.9 million based on the 2008 Assignment Agreement. Moreover, when S-K sued UTN under the 2008 Assignment Agreement in Tatarstan, in other words when S-K sought to be paid what UTN would have owed 'up the chain' but for the assignment to S-K, the amount awarded in the Tatarstan Judgment by way of penalty was limited to UAH 50 million which in June 2009 equated to about US$6.5 million. Clearly, therefore, if relevant at all, the significance of any penalty payment is limited to say the least.

133. There can, in the circumstances, be no justification for the suggestion that a claim as large as US$334.1 million would be justified. It follows that, if I had decided that it was

appropriate that the Worldwide Freezing Order should be maintained, its quantum would have had to be significantly reduced.

Conclusion

134. In conclusion, therefore, I decide as follows:

(1) Mr Kolomoisky's and Mr Ovcharenko's applications for orders setting aside the order permitting service out on them succeed on the basis that there is no 'serious issue to be tried' on the merits of the claim against them.

(2) Mr Bogolyubov's and Mr Yaroslavsky's applications for summary judgment succeed on the basis that Tatneft's claims against them have no 'real prospect of success'.

(3) Tatneft's application to amend the Particulars of Claim is refused.

(4) Each of the Defendants' applications seeking the discharge of the Worldwide Freezing Order succeeds.

135. I end by expressing my gratitude to all counsel for their considerable assistance in ensuring that the large number of issues needing to be addressed at the hearing were dealt with as efficiently as possible.