EXHIBIT 33

Neutral Citation Number: [2008] EWHC 2613 (Comm)

Case No: 2007 FOLIO 1545

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2008

Before :

MR JUSTICE CHRISTOPHER CLARKE

- -

Between :

OJSC OIL COMPANY YUGRANEFT (in liquidation)	**Claimant**
- and -	
(1) ROMAN ARKADIEVICH ABRAMOVICH **(2) MILLHOUSE CAPITAL UK LIMITED** **(3) BORIS BEREZOVSKY**	**Defendants**

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- -

Michael Swainston QC, Rupert D'Cruz & Paul Wright (instructed by **Clyde & Co LLP**) for the **Claimant**

Mark Howard QC, Daniel Jowell & Stephen Midwinter (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK)**) for the **First and Second Defendants**
Barbara Dohmann QC (instructed by **Cadwallader)** for the **Third Defendant**

Hearing dates: 9th – 22nd July 2008

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Approved Judgment

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

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MR JUSTICE CHRISTOPHER CLARKE:

1. In the present action the Claimant - OJSC Oil Company Yugraneft ("Yugraneft") – claims damages against the first defendant - Roman Arkadievich Abramovich ("Mr Abramovich"), and the second defendant - Millhouse Capital UK Limited ("Millhouse"). I shall refer to these two hereafter as "the defendants". Yugraneft claims to have been the victim of a massive fraud directed by Mr Abramovich whereby its interest in a joint venture company named Sibneft-Yugra was effectively reduced from 50% to less than 1% as a result of which it has suffered a loss of billions of dollars.

2. Mr Abramovich is a Russian citizen who made his fortune there and is now one of the world's richest men. From 2000 to July 2008 he was Governor of the Russian province of Chukotka. Millhouse is an English corporation which has been validly served within the jurisdiction. Its exact role in the events which follow is a matter of dispute.

The applications in the Commercial Court

Jurisdiction

3. Mr Abramovich contests jurisdiction on the grounds that at the time of the issue of the Claim Form he was not resident within the jurisdiction for the purposes of Article 2 of the Judgments Regulation. He applies to have the service of the Claim Form set aside on that account. Yugraneft contends that it is well arguable that he was so resident but, if it is not, seeks permission to serve him out of the jurisdiction.

Merits

4. Both Mr Abramovich and Millhouse invite the Court to dismiss Yugraneft's claims against them under CPR 24 or 3.4 upon the basis that they have no realistic prospect of success. Mr Abramovich's application is made without prejudice to his application contesting jurisdiction.

The Companies Court application

5. Yugraneft is a Russian corporation which is now in liquidation in Russia. Its liquidator is Mr Mikhail Kotov, who was appointed as Liquidator on 28th May 2007. Further details of the history leading to the liquidation are set out in my judgment in respect of the Companies Court application.

6. On 12th November 2007 a petition was filed in the Companies Court by Sibir, Yugraneft's parent company, and OAO Moscow Oil and Gas Company ("MOGC"), seeking to wind Yugraneft up in England. The avowed purpose of the petition was to secure the appointment of an English liquidator who would carry forward the

Commercial Court action.

7. On 14th November 2007 Evans-Lombe, J., appointed Mr Stephen Cork as provisional liquidator of Yugraneft. In addition to their applications to have the claim against them dismissed, Mr Abramovich and Millhouse seek to have the appointment of Mr Cork as provisional liquidator set aside and invite the Court to declare that it declines to exercise its insolvency jurisdiction over Yugraneft. This application is made in the Chancery Division. The Claim Form was issued, and the other applications were made, in the Commercial Court. I have sat as a judge of both the Chancery Division and the Commercial Court.

8. The current proceedings are a sequel to (i) an unsuccessful attempt by Sibir, Yugraneft's parent company, to launch proceedings in the British Virgin Islands ("BVI") against six BVI companies, Sibneft, and Mr Abramovich and (ii) a series of ultimately unsuccessful proceedings brought by Yugraneft in Russia.

9. The application by Mr Abramovich and Millhouse to have the proceedings against them dismissed rests on the basis (i) that the proper law, or one of the proper laws, of any claim that Yugraneft may have against them is the law of Russia, and that by that law Yugraneft has no claim; and/or (ii) that as a result of what has happened in Russia and the BVI no claim is maintainable.

The parties and other relevant companies

10. Yugraneft is a Russian oil company. Its ultimate parent and controlling shareholder is Sibir Energy Plc ("Sibir"), which currently owns (indirectly) 99.368% of its shares. Sibir is incorporated in England but it carries on business entirely in Russia, where its assets are located. It is managed from Moscow. The principal shareholders of Sibir are Mr Chalva Tchigirinsky and the City of Moscow. The Chief Executive is Mr Henry Cameron. Sibir is the funder of the present proceedings. It procured the consent of Mr Kotov, Yugraneft's liquidator, to the initiation of those proceedings and then petitioned, with MOGC, for the appointment of an English provisional liquidator and the winding up of Yugraneft. Messrs Clyde & Co represented Sibir for the presentation of the petition and now represent Yugraneft.

11. Sibir did not always own most of Yugraneft. In 2002 and 2003, at the time of the wrongs that are complained of, Sibir was, either directly or indirectly, the 99% shareholder in Yugraneft. At the time of the proceedings in the BVI in 2005, Sibir had a total indirect interest in Yugraneft of about some 61%. Some of that interest was held through MOGC of which the City of Moscow held, through Central Fuel Company ("CFC"), 55% of the shares. In 2007 the CFC exchanged its shares in MOGC for shares in Sibir, the result of which was that Sibir became again virtually the sole owner of Yugraneft. The details are set out in Appendix 4.

12. OAO Siberian Oil Company ("Sibneft") is a giant Russian oil company. Until its sale to

Gazprom in 2005, Sibneft was beneficially owned, at least in large part, by Mr Abramovich. There is a dispute as to whether Mr Berezovsky also owned an interest in Sibneft to which I refer in paragraph 166 below. The President of Sibneft at the material time was Mr Eugene Shvidler and its General Manager was Mr Alexander Korsik. Mr Abramovich's interest in Sibneft was held by 5 Cypriot companies (i) White Pearl Investments Ltd; (ii) Heflinham Holdings Ltd (iii) N.P. Gemini Holdings Ltd; (iv) Marthacello Co Ltd; and (v) Kindselia Holdings Ltd. Yugraneft alleges that all of these entities were under the control of Millhouse.

The history

13. I set out below such of the history, which extends over 8 years and involves litigation in three jurisdictions, as I take to be necessary in order to address the issues. In doing so I acknowledge the assistance provided by the summaries of the parties, much of which I have adopted.

14. In 2000 Yugraneft held licences for the development of certain oil fields, including, in particular, the South Priobskoye & Palyanovskoye oil fields in the Khanty Mansiysk region of Russia. It had, however, lost its previous financial backer and did not have sufficient funds to exploit those fields as required by the licences and had urgent need of new financing.

15. In or about the late summer of 2000 negotiations took place in Russia between representatives of Sibir and Sibneft. Mr Alexander Tchigirinsky, the brother of Mr Chalva Tchigirinsky, represented Sibir and Mr Shvidler represented Sibneft. There is a dispute as to whether the negotiations then included Mr Abramovich and Mr Luzkhov, the Mayor of Moscow. Further negotiations took place in Russia principally between Mr Korsik, the general manager of Sibneft and Mr Cameron, the Chief Executive Officer of Sibir together with Mr Sergei Demine, one of Mr Cameron's deputies at Sibir's representative office in Moscow.

The Co-operation Agreement[1]

Sibneft agrees to lend to Sibneft-Yugra

16. On 23rd November 2000 Mr Cameron for Sibir and Mr Korsik for Sibneft executed in Russia a document in Russian headed (in translation) "*Principles of cooperation between [Sibir] and [Sibneft]*". Under this document Sibir was to set up a company,

1 This document, like all other documents recording the events on which the dispute turns, is in Russian.

eventually called Sibneft-Yugra, to which Yugraneft was to transfer the licences for the South Priobskoye, Palyanovskoye and Kamennoye oil fields. Sibneft was to purchase 50% of the company at nominal value and was to finance its activities "*to the full*". The financing was to take the form of a loan to the joint venture company at 17% per annum. Repayment of the loan was to start as soon as the company had positive cash flows. In the event that Sibneft-Yugra could obtain a cheaper loan, the credit granted by Sibneft was to be replaced with a cheaper loan. Once the loan was repaid the positive cash flow of the company was to be shared equally between Yugraneft and Sibneft.

17. The new company was to be managed by a board with equal representation from Sibir and Sibneft. The Chairman was to be nominated by Sibneft and the company was to be under Sibneft's operational management. The executive officer of the company was to be nominated by Sibneft. In the event that the new company was not set up, or the licences were not transferred to it, or Sibneft did not obtain 50% of its shares, Sibneft would obtain half of Sibir's shares in Yugraneft and Yugraneft would be obliged to repay the loan provided by Sibneft to the new company.

2001

18. On 10th January 2001 LLC Oil Company Sibneft-Yugra ("Sibneft-Yugra") was established. It was officially incorporated on 6th February 2001. Sibneft-Yugra is a company of the OOO type. Such companies do not have shares but what are called "*participation interests*". Under Russian law these take the form of nominal share capital in which the members of the company participate. Any changes in the number of the participation interests or in the names of the participants must be reflected in the foundation documents of the company and registered. The registration of the constitutional documents of such a limited liability company and all amendments, including the admission of new members, is administered by Russian governmental authorities in Russia upon application by the company itself.

19. The original nominal share capital of Sibneft-Yugra was 10,000 roubles and Sibneft and Yugraneft participated as to 5,000 roubles each.

20. On 10th January 2001 Mr Matevosov, a senior Vice-President of Sibneft, was appointed the General Director of Sibneft-Yugra. The board of directors was also elected and consisted of (in addition to Mr Matevosov) Mr Korsik, Mr Schegolev, Mr Novikov, Mr Cameron, Mr Jordan, Mr Demine and Mr Schupakov. The first four are Sibneft and the second four are Yugraneft people.

Sibneft lends to Yugraneft at 17% against the security of Yugraneft shares

21. For some reason there was a delay in the transfer of the oil licences from Yugraneft to

Sibneft-Yugra. As a result Yugraneft undertook the initial development of the oil fields with finance made available to it by Sibneft. On 12th January 2001 two Loan Agreements (Nos 1 and 2), in Russian, were executed under which Sibneft agreed to lend Yugraneft a total of up to $ 100 million at a rate of 17% per annum. The agreements were subject to Russian law. The repayment date was on or before 14th January 2002. The loans were to be secured by pledges of the shareholdings of Sibir subsidiaries in Yugraneft which were agreed to have a total assessed value of $ 34,000,000.

22. On 18th January 2001 share pledge agreements were drawn up between three subsidiaries of Sibir (Farrell Resources, SF International and Dalehurst Ltd) and Sibneft. Under these agreements, which were governed by Russian law and provided for Russian jurisdiction, the Sibir subsidiaries pledged their shares in Yugraneft to Sibneft as security for the loans under the Loan Agreements. The shares pledged came to just over 49% of the total share capital of Yugraneft. The shares were valued under the pledge agreements at $ 35.115m.

23. On 18th January 2001 Mr Cameron (of Sibir) wrote to Mr Korsik (of Sibneft) referring to Loans 1 and 2 and the pledges. He noted that it was anticipated that the joint venture company (i.e. Sibneft-Yugra) would be incorporated and the licences transferred to Sibneft-Yugra before the maturity of the loans. He noted that if they were not, Sibneft had agreed to prolong the life of the loans until the transfer of the licences (or until some arrangement acceptable to both parties had been entered into) and that interest on the loans would accrue every six months and would be added to the loans, and would not be repayable until the two loans were repaid. When the licences were transferred to Sibneft-Yugra, Sibneft would provide it with a further loan to allow it to purchase from Yugraneft all of its assets (at the amount of the two prior loans plus capitalized interest). Upon receipt of such consideration, the letter recorded, Yugraneft would repay the two loans (plus capitalized interest) and Sibneft would discharge the pledges.

24. On 23rd March a meeting of the Board of Directors of Yugraneft, chaired by Mr Tchigirinsky, took place. The directors elected Mr Matevosov as general director of Yugraneft with effect from 26th March 2001. It is accepted in the Particulars of Claim (PoC) that this was done at Sibneft's proposal, because Sibneft would be undertaking the development of the fields and providing the finance, and was accepted by Sibir and Yugraneft.

25. On about 26th June 2001 Yugraneft resolved to sell all its assets to Sibneft- Yugra. On 25th July 2001 Sibneft agreed to lend Sibneft-Yugra up to $ 150 million at 17% interest for investment in oil fields and purchase of property from Yugraneft. The agreement was in Russian and was subject to the jurisdiction of the Arbitrazh court for the Omsk Region.

26. On 26th December 2001 the relevant licences were transferred to Sibneft-Yugra.

Millhouse

27. Millhouse was incorporated in England on 24th September 2001. Shortly afterwards Mr Eugene Tenenbaum, a Canadian accountant, who had previously been head of corporate finance at Sibneft, and Ms Maria Elia were appointed directors. She has no day-to-day role in the management of the company. Mr Tenenbaum was the managing director. Millhouse initially had a modest office in Weybridge and then, by 2005, one in London at Chelsea Football Club's offices at Stamford Bridge. On 20th November 2001 Mr Tenenbaum and Ms Elia signed a very wide general power of attorney in favour of Mr David Davidovich, which included power to establish a representative office in the Russian Federation. The function of a representative office is not to run a general business but to represent, and look after the Russian-related affairs of, a foreign company. Mr Davidovich, who had previously worked as a senior business adviser to Mr Shvidler, the President of Sibneft, established the Representative Office of Millhouse in Moscow in February 2002. The office was on one side of the river and Sibneft's premises, where Mr Davidovich also had an office, was on the other. He continued to have an office at Sibneft and to act as a senior business adviser to Mr Shvidler. In April 2006 the Representative Office was separately incorporated as a Russian company, Millhouse LLC. Mr Shvidler is its current Chairman. It had originally been intended that Mr Shvidler should be Millhouse's Chairman. But in the event he was neither its Chairman, Director nor manager. On his evidence, which is in dispute, he provided some general assistance to Millhouse from 2004 onwards (for which he was paid) but did not exercise any executive function for it until April 2006.

28. The events that I have described in the previous paragraphs are either undisputed or appear from documents that there is no reason to question. The events that I describe in paragraphs 29 – 64 also appear from the documents. I shall revert hereafter to the highly disputed events which are said to have occurred in between.

The first EGM

Dilution of Yugraneft's interest in Sibneft-Yugra from 50% to 5 %

29. By a notice dated 9th September 2002 Mr Korsik, on behalf of Sibneft, requisitioned an Extraordinary General Meeting of Sibneft-Yugra. The notice recorded the fact that the development of the oil fields required "*considerable financing*" but that:

> *"the vulnerable situation on the oil market and a possibility of attraction of investment on conditions of not less than 15% annual interest make questionable the economic efficiency of the whole project".*

It noted that, following a search for financing on more favourable terms, Sibneft had obtained preliminary consent to financing (of up to $30m) at a low rate of interest (Libor +3%) from Carroll Trading S.A ("Carroll"), Shaw Invest & Finance Corp ("Shaw") and Tranquillo Trading S.A. ("Tranquillo") on condition that each should

acquire a 15% participation interest in Sibneft-Yugra. Carroll and Shaw are BVI companies. Tranquillo is Panamanian.

30. The notice sought (a) the admission of Carroll, Shaw and Tranquillo as members; (b) the increase in Sibneft-Yugra's capital to 100,000 roubles; (c) the adoption of a new revised Memorandum of Incorporation and amendments to the Charter; and (d) the appointment of a new board of Sibneft-Yugra consisting of Mr Matevosov, Mr Korsik, Mr Novikov, Ms Nikulina, Ms Lobanova, Mr Freyman, Mr Aristarkhov and Mr Shmyrev. The notice was received and signed by Mr Matevosov on the same day as General Director of Sibneft-Yugra.

31. On 10th and 11th September 2002 Carroll, Shaw and Tranquillo (collectively "*the first set of offshore*[2] *companies*") each applied to acquire 15% of the charter capital of Sibneft-Yugra. Each notice indicated a preparedness to arrange the financing of Sibneft-Yugra for up to $ 10 million. Mr Matevosov signed for them on behalf of Sibneft-Yugra.

32. Carroll and Shaw were vehicles for investments by Mr Abramovich in Aeroflot. Yugraneft believes that Tranquillo was another such vehicle.

33. On 17th September 2002, Mr Korsik gave notice on behalf of Sibneft, to Mr Matevosov, in his capacity as General Director of Yugraneft, of the forthcoming EGM of Sibneft-Yugra on 28th September at the offices of Sibneft in Moscow and the agenda therefor. The notice stated that information in connection with the EGM could be found at Sibneft's offices and included an agenda detailing, inter alia, the proposed resolutions to admit Carroll, Shaw and Tranquillo as members and the proposed change in board composition. Yugraneft contends that no one at Sibir or Yugraneft (apart from Mr Matevosov) was informed of, or knew of, the proposed issue of new capital.

The first power of attorney

34. On 25th September 2002, Mr Matevosov, as General Director of Yugraneft, provided a Power of Attorney under Russian law to Mr Davidovich, the head of Millhouse's Moscow Representative office enabling him to represent Yugraneft at the EGM of 28th September 2002, to attend it, vote on all items of the agenda, obtain all documents provided, and sign all documents necessary for the execution of his powers and the revised versions of the constituent documents of the company.

The first dilution – to 5%

2 I continue to use this description even in respect of proceedings in the BVI where the two BVI companies were, in BVI terms, onshore.

35. On 28 September the EGM of Sibneft-Yugra took place at Sibneft's offices in Moscow. Present were Mr Korsik, representing Sibneft and acting as Chairman, and Mr Davidovich, representing Yugraneft (pursuant to the power of attorney referred to in the previous paragraph) and acting as Secretary. According to the minutes of the meeting it was agreed :

i) to accept the 3 offshore companies (Carroll, Shaw and Tranquillo) as additional members of Sibneft-Yugra on the basis of a payment of 15,000 roubles each;

ii) to increase the charter capital of Sibneft-Yugra to 100,000 roubles based on the receipt of an additional 45,000 roubles from the 3 companies and an additional 45,000 roubles from Sibneft;

iii) to adopt new Articles of Association and to modify the company's Charter;

iv) to appoint a new board. The new board members were: Mr Matevosov, Mr Korsik, Mr Novikov, Mr Nikulina, Ms Lobanova, Mr Freyman, Mr Aristarkhov and Mr Shmyrev. These individuals were, according to Yugraneft, employed by or connected with Millhouse and represented Mr Abramovich's interests.

36. The Charter and Articles of Association of Sibneft-Yugra were amended so as, inter alia, to reflect the increase in charter capital and the new members. The amendments to the Charter were signed by Mr Korsik, Mr Davidovich, Mr Truskoliavskaya, Ms Andreeva and Mr Efremov. One of them amended Clause 3.1 so as to read:

> *"Charter capital of the Company consists of nominal value of its participants shares and is equal to the amount of 100,000 roubles"*

Another amended Clause 3.2 so as to provide that the shareholders had, in the case of Sibneft, "*50% of the shares of the Company's charter capital. Nominal value is 50,000 roubles*" and to make similar provision, mutatis mutandis, in the case of the other shareholders.

37. The amendments to the company's incorporation documents were registered with the tax office of the Khanty-Mansisyk Autonomous District of Russia on 10 October 2002.[3]

3 See the judgment dated 4 April 2007 of the Arbitrazh Court of Khanty-Mansisyk Autonomous District in Case No. A75-9221/2006.

38. The result of the EGMs and the amendments to the Sibneft-Yugra charter was that the percentages of the participation interests became:

Sibneft	50%
Carroll, Shaw and Tranquillo	15% each
Yugraneft	5%.

The Security Agreement

39. On 28th September 2002, i.e. the same day as the EGM, an agreement ("the Security Agreement") was purportedly concluded in Russian between Sibneft, Caroll, Shaw and Tranquillo and Yugraneft. Mr Davidovich signed it on behalf of Yugraneft. Mr Korsik signed it for Sibneft. The Security Agreement provided that Caroll, Shaw and Tranquillo would provide loans to Sibneft-Yugra. Yugraneft was to be at liberty to repay the loans on behalf of Sibneft-Yugra. If it did so, Yugraneft was to be allowed to repurchase the interests in Sibneft-Yugra owned by Caroll, Shaw and Tranquillo at no more than their nominal value (i.e. 15,000 roubles x 3). The agreement was to be effective for one year.

40. According to Mr Davidovich the reason for dealing with matters in this way was because of doubts as to whether Yugraneft's shares were already pledged, and for reasons relating to taxation (see paragraph 20 of his third witness statement). He says that he faxed a copy of the Security Agreement to Mr Tchigirinsky. Mr Tchigirinsky denies ever receiving such a fax.

The first set of offshore companies lends to Sibneft-Yugra

41. By Agreements dated 20th February 2003 the first set of offshore companies agreed to lend to Sibneft-Yugra amounts totalling $ 32.9 million with interest at 6% repayable in 3 years. Mr Matevosov signed on behalf of Sibneft-Yugra. The defendants have produced payment orders which purport to vouch payment of about that amount. These agreements were governed by English law. These loans appear to have been new money, the 2001 loans not having been repaid.

The second EGM

Dilution of Yugraneft's interest in Sibneft-Yugra from 5% to 0.98 %

42. On 22nd January 2003, Carroll, Shaw and Tranquillo each made applications, signed on their behalf by their directors (respectively Mr Truskolyavskaya, Ms Andreyeva and Mr

Efremov), to make an additional contribution of 70,000 roubles each to the charter capital of Sibneft-Yugra. On the same day, Sibneft, by notice signed by Mr Korsik, informed Sibneft-Yugra of its proposal to make a further contribution of 210,000 roubles (i.e. 70,000 x 3) to the charter capital of Sibneft-Yugra, and asked to leave the amount of its share participation in the capital of the company unchanged. The applications were signed and acknowledged on behalf of Sibneft-Yugra by Mr Tsitsinov (the Executive Director of Sibneft-Yugra). Again, according to Yugraneft, no one at Sibir or Yugraneft was informed or knew of the proposed issue of new capital.

The second power of attorney

43. A second EGM of Sibneft-Yugra was called. On 3rd February 2003, Mr Matevosov gave Mr Davidovich a further power of attorney, in the same form as before, authorising him to participate, vote, and sign documents on behalf of Yugraneft at the second EGM.

The second EGM

44. The second EGM was held on 4th February 2003 in Khanty-Mansiysk. According to the minutes, the participants of the meeting included, as before, Mr Korsik on behalf of Sibneft, and Mr Davidovich on behalf of Yugraneft. Also present at this meeting were the three Russian directors of Carroll, Shaw and Tranquillo: Anna Andreyeva, Oleg Efremov and Maria Truskoliavskaya. At this meeting, the charter capital of Sibneft-Yugra was increased to 520,000 roubles in accordance with the applications of Sibneft, Carroll, Shaw and Tranquillo for additional capital contributions totalling 420,000 roubles. Decisions were made to adopt a further new version of the company's incorporation agreement and to make further appropriate amendments to the company's Charter.

45. The result of the issue of the additional charter capital was that the capital of, and participation interests in, Sibneft-Yugra became as follows:

Shareholder	*Interest in roubles*	*Percentage*
Sibneft	260,000[4]	50%

4 i.e. 5,000 + 45,000 + 210,000

Carroll	85,000[5]	16.34%
Shaw	85,000	16.34%
Tranquillo	85,000	16.34%
Yugraneft	5,000	0.98%.

46. On 13th February 2003, the amendments to the company's incorporation documents were registered with the tax office and the corresponding changes were introduced into the Charter of Sibneft-Yugra. Clause 3.1 was amended so as to provide that the amount of the charter capital of the company was 530,000 roubles. Clause 3.2 was amended to provide, in the case of Sibneft, that the nominal value of the share was 260,000 roubles and that the share was 50% of the Charter capital of the company, and, similarly in relation to the other participants.

47. According to Mr Davidovich, the reason for this second meeting was that Sibneft had miscalculated the value of the participation interests that would need to be issued to the first set of offshore companies in order to give effect to the Security Agreement. The error was corrected by a further issue at the second meeting. Yugraneft disputes this account.

48. Mr Davidovich's evidence in the BVI was that in October 2003 he was alerted to the fact that Yugraneft had not made any repayment of the 6% loans. He telephoned Mr Tchigirinsky to remind him and to ask whether Yugraneft had got the financing yet. He was told that it was not in place but was expected soon. Either then or later he agreed by telephone a further year for repayment. Then, when discussing the position internally with his accounting and legal teams he thought that it was important for Sibneft to have increased control over the foreign nominee companies holding its interest. As a result he asked Sibneft's lawyers in Moscow to arrange a transfer of all rights to claim the repayment of loans and to transfer the 49% interest in Sibneft-Yugra to "*three nominee companies which were closer to Sibneft and which would be consolidated with the international financial statements of the Sibneft Group*". He did this after consultation with Mr Shvidler.

49. The reason why the new nominee companies – Richard, Gregory and Ferenco (see paragraph 57 below) – would be closer to Sibneft than their predecessors appears to be that there were (or came to be) in existence call option agreements dated 1st January 2000 between Sibneft and the owners of the three new offshore companies, although the document in respect of Ferenco is missing. Under the call options, which were for an indefinite period, Sibneft could purchase the shares of each of the new companies for the nominal value of each company's charter capital (up to $ 100,000) from a named individual - Ms Evdokimova in the case of Richard and Mr Osipov in the case of

5 i.e. 15,000 + 70,000

Gregory, both of whom were Millhouse personnel. In addition the three new companies entered into management agreements to provide management services. These documents are curious in that none of the three companies were in fact incorporated by 1st January 2000; but only later in the year. The actual date of execution of the documents is unknown.

50. Mr Davidovich has also produced management agreements and call options in respect of Richard and Gregory, both dated 1st January 2004. The call options have the same individuals as sellers, but give the right to buy to Sibneft Oil Trading Co ("SOTC"). There are signed and unsigned versions of these documents. In respect of Ferenco there is an unsigned 1st January 2004 call option in respect of which Joanna Elia, a Meritservus person, is expressed to be the seller. According to Mr Davidovich in 2004 the management and call option agreements were reassigned to SOTC. The call options were not exercised prior to the sale of Sibneft to Gazprom (see paragraph 64 below).

51. There has also been produced a signed call option agreement dated 6th August 2003 between SOTC and Farleigh International Ltd in which the latter company is said to have been (contrary to anything that appears in the Cypriot share register) the owner of Ferenco. All these agreements are subject to English law.

52. Whatever was the date of execution of these documents, their effect appears to have been to place the second set of offshore companies firmly within the Sibneft Group with effect from a date that precedes the sale of most of Sibneft to Gazprom in September 2005, to which I refer below. According to the defendants that is what was intended, the first set of offshore companies not being controlled by Sibneft or Millhouse (but by whom they were controlled is, on that hypothesis, unclear).

53. Mr Michael Swainston, Q.C. for Yugraneft, submits that this documentation means that the exact mode of Mr Abramovich's enrichment is not clear; and that it is possible (in the light of the fact that a transfer of the shareholding in Ferenco to SOTC is only recorded in the Cypriot register as happening in 2007 by virtue of a transfer dated 29th January 2007) that there was some separate transaction whereby the second set of offshore companies was transferred to Gazprom outside the sale of the Sibneft interest. In the light of the sale and purchase agreement, to which I refer in paragraph 129 below, this seems to me implausible. Further Yugraneft's claim to participate in the consideration for the sale of Sibneft to Gazprom assumes that that consideration relates to the participation interests (although if consideration was provided in some other way Yugraneft would claim to participate in that).

54. The accounting position was purportedly explained by Miss Tatyana Breeva, who was Sibneft's Vice President (Finance), but now works for Russdragmet, which operates the gold project of Highland Gold Mining Ltd ("Highland Gold"), in which Mr Abramovich has invested.

55. The gist of her evidence is that the first set of offshore companies was not consolidated in the 2002 accounts because Sibneft did not then control, and had no legal interest in,

them, or in their interest in Sibneft-Yugra, which was liable to be returned to Yugraneft if Yugraneft secured the necessary finance. But after the transfer the position was different. This appears to be because by the time of the transfer the likelihood was that the interest would remain with them. Accordingly the second set of companies was consolidated in the Sibneft 2003 accounts.

56. The accuracy and appropriateness of this treatment is in dispute: see the letter from Grant Thornton of 26th June 2008. In particular it is suggested, inter alia, (i) that, if all six companies were nominees for Sibneft, the first set should have been included in the December 2002 accounts; (ii) that, if Yugraneft had a right to repurchase the 49% interest that interest should not have been included in either the 2002 *or* the 2003 year end accounts; (iii) that, if included, there should have been a note referring to the right of redemption; and (iv) that if that option was, as Ms Breeva suggested, no longer a relevant factor because the actions taken by Yugraneft since March 2004 had confirmed that it was not going to fulfil the terms of the Security Agreement, that was, in respect of the 2003 accounts, a *non-adjusting* post balance sheet event.

The transfer to the second set of offshore companies

57. However that may be, in November 2003 the participation interests in Sibneft-Yugra held by Carroll, Shaw and Tranquillo were sold by them to three other companies for nominal consideration. They were: Richard Enterprises S.A. ("Richard"), Gregory Trading S.A. ("Gregory") and Ferenco Investment & Services Limited ("Ferenco") - collectively "*the second set of offshore companies*". Richard and Gregory were each incorporated in the BVI; Ferenco was incorporated in Cyprus. Richard & Gregory had held Mr Abramovich's interest in two Cypriot companies which held part of his interest in Sibneft. They and Ferenco appear to be Abramovich investment vehicles.

58. According to Miss Breeva on 1st October 2003 (and as recorded in the agreement of 26th November referred to in paragraph 60 (iii) below) Sibneft acquired from Shaw, Carroll and Tranquillo the debts owed to them by Sibneft-Yugra and this was done through separate assignments of which she had located that between Shaw and Sibneft: see paragraph 68 below.

59. All of the offshore companies are alleged by Yugraneft to have been owned, directly or indirectly by Mr Abramovich and controlled and managed by Millhouse on his behalf: PoC paras 35 and 49.

60. The sale of the participation interests of Sibneft-Yugra by the first to the second set of offshore companies occurred as follows:

i) On 28th/29th October 2003, each of Carroll, Shaw and Tranquillo (by their directors) issued notifications to the other participants in Sibneft-Yugra (Sibneft and Yugraneft) of their intention to sell their respective

participation interests (16.34% of the authorized capital of Sibneft-Yugra valued at 85,000) roubles at a price of US$2,700 to, respectively, Richard, Ferenco and Gregory. On 29 October 2003, Mr Matevosov, on behalf of Yugraneft, signed notices on behalf of Yugraneft in which he declined to exercise Yugraneft's pre-emption rights to purchase the 16.34% interest. Mr Poltorak, President of Sibneft, signed similar notices on the part of Sibneft.

ii) The three agreements for the sale and purchase of the participation interests in Sibneft-Yugra for nominal consideration were concluded in Moscow[6] and were governed by Russian law (clause 6.1 and 9.2).

iii) On 26th November 2003, Richard, Gregory and Ferenco purportedly concluded an agreement with Sibneft and Yugraneft under which they each undertook to assume the obligations of Carroll, Shaw and Tranquillo under the Security Agreement. These included the obligation to restore the 49% interest to Yugraneft on repayment of the loan. Mr Matevosov signed on behalf of Yugraneft.

iv) On 26 November 2003, there was an EGM of Sibneft-Yugra. The meeting approved the amendment of the Charter and Articles of Association of Sibneft-Yugra recording the transfer of the participation interests to the second set of offshore companies. Clause 3.2. was now to provide that Sibneft had a nominal share value of 260,000 roubles and that that constituted 50% of the authorised capital; and appropriate amendments were made for the second set of offshore companies each to have shares of 85,000 roubles constituting 16.34% of the capital.

61. Yugraneft's evidence is, as appears to be the case, that none of the documentation which brought about or records the dilution of its interest in Sibneft-Yugra was signed by anyone who was independent of entities associated with Mr Abramovich; and that all those who acted for the six offshore companies were employed by or connected with Millhouse.

62. Sibneft's accounts for the year ending 31st December 2003, issued in mid 2004, contain the following note:

6 See Mr Kotov's criminal complaint at p.8 section 5.

"In December 2003 the Company increased its share in Sibneft-Yugra up to 99% for the nominal consideration"

There was no reference to any equity of redemption (or equivalent) existing in Yugraneft's favour until November 2004 under the agreement of 26th November 2003.

63. Between December 2003 and April 2004 Sibir learnt of the dilutions.[7] In December 2003 an employee of Ernst & Young, who were Sibneft's auditors, hinted to Mr Betsky of Sibir that the dilutions may have occurred and followed that up with an e-mail of 6th December which suggested that he should check the ownership status of Sibneft-Yugra. By April 2004 due diligence by the City of Moscow in the course of negotiations for a joint venture with Sibir had revealed what had occurred. According to Mr Davidovich's evidence, in April 2004 Yugraneft started publicly to allege that it had been defrauded by Sibneft and made clear that it had no intention to repay the loans.

64. On or about 28th September 2005 the majority shareholding in Sibneft held by Mr Abramovich's Cypriot offshore companies was purchased by Gazprom, the Russian state oil company for about $ 13.1 billion and renamed "*Gazpromneft*": see paragraph 129 below. About $ 2.9 billion of the proceeds was invested (indirectly) in a Russian based steel company called Evraz and a Jersey company called Highland Gold, whose business is in Russia: see paragraph 132 below.

The disputed area

The defendants' contentions

The Co-Financing Agreement

65. According to Mr Davidovich[8] Mr Chalva Tchigirinsky had approached him in the spring of 2002 with a view to changing the financing arrangements for Sibneft-Yugra. He wanted to reduce the interest rate that Sibneft-Yugra was then paying on Sibneft's loans of 17% in order to improve the valuation of the company and thus allow Yugraneft to realize an earlier return from the project. In April and May 2002 a series of meetings took place at Mr Tchigirinsky's offices in Moscow. Mr Tchigirinsky proposed that Yugraneft should become a 50% co-financier of the project and that both parties would provide finance to Sibneft-Yugra at the lower rate of 6%. A record of the timing of telephone calls from the Representative Office to Mr Tchigirinsky from October 2002 onwards has been produced which, according to Mr Davidovich, represents calls in relation to the second dilution. On Mr Tchigirinsky's account these calls are likely to have been dealing with a dispute about the Moscow Oil Refinery (see paragraph 72 below).

7 See Mr Cameron's Affidavit in the BVI at paras 65 – 66.
8 This appears first from his statements in the BVI proceedings.

Sibneft agrees to lend to Sibneft-Yugra and Yugraneft becomes a debtor to Sibneft

66. Towards the end of May 2002 it became apparent that Mr Tchigirinsky would be unable to obtain financing to put the contemplated arrangements into effect. Accordingly, the parties agreed that Sibneft would, for an interim period until Yugraneft could borrow the necessary funds to lend to Sibneft-Yugra, itself provide 100% of the financing to Sibneft-Yugra at 6% interest and Yugraneft would owe Sibneft 50% of the money lent ("the Co-Financing Agreement"). In order to secure the loan from Sibneft to Sibneft-Yugra (for which Yugraneft was responsible) Mr Tchigirinsky agreed to transfer Yugraneft's participation interests in Sibneft-Yugra to Sibneft (or companies acting on its behalf) subject to a right of repurchase by Yugraneft if its borrowing was repaid within a year. In particular, Sibneft (or a company acting for it) would enter into a new loan agreement at 6% in return for the transfer to it of Yugraneft's participation interests in Sibneft-Yugra.

67. The Security Agreement of 28th September 2002 was part of the agreed arrangements. What happened at the EGMs put into effect the agreements that had been reached in April and May 2002. The first set of offshore companies acting on behalf of Sibneft entered into agreements to provide loans to Sibneft-Yugra of up to $ 38 million and did provide about $ 33.8 million. They received their participation interests by way of security. This was new money. By an amendment dated 17th February 2003, the Loan Agreement of 25th July 2001 was amended so as to provide for interest at 6% instead of 17%.

68. The defendants rely, by way of corroboration of their case upon (i) certain documents evidencing payments which purport to show that the loans were made to Sibneft-Yugra's bank account in Russia; and (ii) the record of the timing of telephone calls between Mr Davidovich and Mr Tchigirinsky between October 2002 and August 2003, to which I referred in paragraph 65 above; (iii) an assignment agreement of 1st October 2003 whereby Shaw assigned its rights under its loan to Sibneft-Yugra to Sibneft and (iv) a payment order for the benefit of Shaw of $ 12.3 million, the value of the loan.

69. Yugraneft failed to repay and after various warnings and extensions of time Yugraneft lost the opportunity to repurchase its interest in Sibneft-Yugra.

Yugraneft's contentions

70. Yugraneft contends that what has happened is nothing less than fraud on a grand scale. Its 50% interest in Sibneft-Yugra has been reduced to less than 1% by meetings called by individuals in the Sibneft/Abramovich camp giving notice to other individuals in the same camp but not to anyone at Yugraneft (or elsewhere) who was in the Sibir camp. In colloquial terms almost all of its interest has been stolen from it.

71. Yugraneft and Mr Tchigirinsky deny that the Co-Financing agreement was ever entered into, and assert that the Security Agreement of 28th September 2002 is a sham or a

"*concoction*" as was the transfer agreement to the second set of offshore companies. They contend that it is incredible that the alleged co-financing agreement with Mr Davidovich has no documentary record; that there is no correspondence about the Co-Financing agreement or the Security Agreement (nor trace of the fax allegedly sending it to Mr Tchigirinsky); nor any documentation recording Yugraneft's acceptance of the issue of the new participation interests. Nor is it credible that Yugraneft should risk the foreclosure of the whole of its extremely valuable interest in Sibneft-Yugra (as to which see paragraph 128 below) in support of a loan of much less than the value of that interest. It was also odd to have removed all the Sibir nominee directors from Sibneft-Yugra at the first EGM, a matter not said to have been discussed with Mr Tchigirinsky. In addition, after the dilutions came to light Mr Korsik of Sibneft made a number of statements suggesting that they were part of some "*broader set of agreements*" (never explained) without indicating that they were in effect the enforcement of security for a loan.

72. In April 2004 Mr Abramovich is said to have told Mr Yuri Luzhkov, the Mayor of Moscow, that the reason he had diluted Yugraneft's interest in Sibneft-Yugra was to repay Mr Tchigirinsky for his having blocked attempts by Sibneft in 2001 and 2002 to take over the Moscow Oil Refinery.

10th September 2002

73. Yugraneft has produced a document dated 10th September 2002 which purports to be the minutes of a meeting of the Board of directors of Yugraneft. Mr Tchigirinsky is described as being in the Chair and the other Board Members present are said to be Mr Cameron and a Mr Tolley, who is an Australian and who was the technical director, but not on the board, of Yugraneft from April 2000 to April 2004. Mr Cameron is recorded as saying that the company needed a new Director General and recommended Mr Mark Tolley. Motions were carried to remove Mr Matevosov from his position as Yugraneft's Director General from 10th September and to elect Mr Tolley to that position as from that date and to sign an agreement with him.

74. Mr Cameron's evidence both in the BVI and these proceedings is that the meeting took place as recorded in the minute. Mr Tchigirinsky's evidence in the present proceedings is to the same effect. Mr Kotov, in one version of his complaint to the Russian Senior Investigator, which may well be an earlier draft (see paragraphs 133-4 below) also suggested that Mr Matevosov was informed of the decision to remove him but "*kept on deliberately acting as if he were the sole executive body of Yugraneft*". The allegation that Mr Matevosov was removed as General Director at this meeting but continued to act as such was repeatedly made by Yugraneft in the Russian Courts in proceedings which I later describe.

75. Mr Matevosov disputes this account of events, as does Sibneft. He denies that he was removed as General Director in September 2002. His position has been upheld by a series of judgments in which the Russian Courts have ruled that Mr Tolley was never appointed as General Director of Yugraneft. Those decisions were based on Mr

Tolley's evidence before those courts. On 5th July 2005 Mr Tolley gave oral evidence before the Khanty-Mansiysk Arbitrazh Court that he was never appointed as General Director, and that he had not been approached in relation to the General Director role until September 2003, when he was approached by Mr Cameron - a full year after the meeting which he is supposed to have attended and at which he was supposedly appointed. He has confirmed that evidence in a statement in these proceedings.

76. In addition the Articles of Yugraneft provide that the quorum for a meeting of the Board is one half of the elected board members, of whom there were to be no less than 5. Accordingly the quorum would be at least 3. Mr Tolley was not a director at 10th September 2002, so that a Board consisting of Mr Tchigirinsky and Mr Cameron would have been unquorate.

77. In their evidence in these proceedings Mr Cameron and Mr Tchigirinsky state that they held the 10th September meeting, at which Mr Tolley was present, in Mr Cameron's office but thereafter took no steps to implement the decision in order not to declare war on Sibneft. According to a letter from Ashurst, who represented Sibir in the BVI, Mr Tolley told him in 2005 that he recalled being asked *in 2002* if he was prepared to take the position of General director but failed to recall the meeting even when prompted by Mr Cameron telling him that it had been "*informal in nature*" and had taken place when Mr Tchigirinsky "*popped in*" to Mr Cameron's office.

The position of Millhouse

78. Yugraneft claims that Mr Davidovich of Millhouse was, with Mr Matevosov of Sibneft, one of the key perpetrators of the fraud; and that Mr Tenenbaum must have been aware of it.

79. Millhouse was not a defendant in the BVI proceedings to which I refer in paragraphs 96 ff below. Yugraneft claims that it has become apparent since then that Millhouse's role was very much more than that of a service company dealing with the personal interests of Mr Abramovich and others. Instead it was, for all relevant purposes, Mr Abramovich's agent. Millhouse's role became clearer, it is said, partly as a result of documents disclosed in the course of the BVI proceedings, which revealed that the individuals who were officers of, or represented, the offshore companies were Millhouse personnel, and partly as a result of further researches, including extensive company searches, where that has been possible.

80. These have revealed more about the activities of Millhouse personnel and also, Yugraneft claims, that the offshore companies are investment vehicles of Mr Abramovich. Since, until Millhouse LLC was formed, Millhouse was legally responsible for the acts of all Millhouse employees both in Russia and England, the discovery of the extent of Millhouse's role is relied on by Yugraneft as materially altering the centre of gravity of the case, which thereby acquired a markedly more English flavour, particularly insofar as it points to the involvement of Mr Tenenbaum.

81. The product of these researches is complex. I set out in Appendix 3 to this judgment a summary of some of what Yugraneft claims the researches show.

82. The upshot is that there appears to be a web of companies, largely in the BVI and Cyprus, which hold various interests, personal and business, some very sizeable, of which Mr Abramovich is, or would appear to be, the ultimate owner. The Cypriot companies are ultimately owned, so far as the legal title is concerned, by Deloittes's or Mr Demetris Ioannides, who was a director of Meritservus Ltd and Meritservus (Trustees) Ltd, two Deloitte Cypriot service companies, or by other Meritservus personnel. Many of the companies in the web have directors who are officers or members of staff of Millhouse companies, or senior members of Meritservus' management team. The holders of the interests and the groupings change from time to time.

83. Ferenco was owned either by Esios Investments Ltd or Finservus (Trustees) Ltd, two Deloitte service companies, who presumably held their interests for Mr Abramovich. The owners and directors of the four BVI offshore companies do not appear on any public register. The ultimate legal owners of Tranquillo appear to be two Panamanian lawyers. But it seems likely that both sets of offshore companies are Mr Abramovich's direct or indirect investment vehicles. For the purposes of this application the defendants are prepared to proceed on the basis that the six offshore companies were beneficially owned by Mr Abramovich although, in respect of the second set, clearly within the Sibneft group[9].

84. Millhouse appears to have had (and was certainly understood to have had) an asset management role on behalf of Sibneft shareholders in relation to a number of very sizeable Russian transactions. Its representatives sat on the boards of companies such as Aeroflot and handled the sale of Sibneft to Gazprom. Whether or not it, itself, as opposed to Mr Abramovich or someone else, controlled the offshore companies, Mr Matevosov and Mr Davidovich, using Millhouse personnel, were able to orchestrate the two EGMs and the transfer of the Sibneft-Yugra participation interests from the first to the second set of offshore companies.

85. The exercise casts, however, only limited light on the extent to which the activities of Millhouse employees in *London*, such as Mr Tenenbaum and Mr Paul Heagren, a British chartered accountant, as opposed to the activities of its employees in *Moscow*, at the Representative Office, such as Mr Davidovich, played any active role at any material time in relation to (a) Sibneft, (b) the offshore companies, or (c) the sale of Mr Abramovich's interest in Sibneft to Gazprom. The matters principally relied on by Yugraneft to establish a London link are (see Appendix 3) firstly the fact that Mr Tenenbaum, previously of Sibneft, was Managing Director of Millhouse, which was an English company, and a close business associate of Mr Abramovich, and that Mr Shvidler settled in London in 2004. Secondly, it is said that the six offshore companies are investment vehicles for Mr Abramovich, which were intrinsically likely to be administered and dealt with offshore – where Mr Abramovich's interests would be sheltered – and could easily be dealt with by a relatively small English staff under the

9 Until the proposed merger with Yukos in 2003, Mr Abramovich had a 92% interest in Sibneft,

command of Mr Tenenbaum, Mr Abramovich's trusted confidant.

86. The directors of Sibneft-Yugra who replaced Mr Cameron and others at the first dilution meeting included Millhouse people. Millhouse people were involved as officers and representatives of the two sets of offshore companies. Millhouse then handled the sale of Mr Abramovich's 72 per cent shareholding in Sibneft and the reinvestment of part of the proceeds in Evraz. The investment in Evraz was made by a BVI company called Greenleas International Holdings Ltd taking a 48% interest in Lanebrook Ltd, an English company, which had an 82.61% interest in Evraz. Mr Shvidler and Mr Tenenbaum went on the board.

87. As a result there are, according to Professor Sergeev, the Russian law academic instructed by Yugraneft, a raft of claims in Russian law (subject to the Russian time bar point) against Millhouse: see paras 31 ff of his first report. There is also, he contends, a claim against Mr Abramovich in delict and in unjust enrichment under Article 1102 of the Civil Code which obliges

> *" a person who has acquired .. property (the recipient) ... without grounds, established by the law, other legal acts or a transaction, at the expense of another person (the victim) shall be obliged to return to the latter the property acquired".*

"*Property*" is widely defined and interpreted so as to cover even the use of a building of a claimant or the value of work carried out on the defendant's building. He also expresses the view (which Mr Rozenberg, the Russian law practitioner instructed by the defendants, does not share) that, logically (there being no authority), it is immaterial that there are a number of steps between the wrongdoing in question and the enriched party so long as the trail from the claimant to the defendant establishes that the latter has been enriched without legal basis at the expense of the former. That could apply to Mr Abramovich's receipt of the proceeds of the sale of Sibneft shares.

Previous proceedings *Overview*

88. Yugraneft and Sibir between them have brought three previous sets of proceedings (i) in the BVI; (ii) before the Russian arbitrazh courts; and (iii) before the Russian criminal investigation authorities.

Russian civil procædings

89. From May 2004 onwards Yugraneft has launched a series of proceedings in Russia challenging, in various different ways, the lawfulness of the increases in the charter capital of Sibneft Yugra at the two EGMs and the resulting diminution in Yugraneft's share in Sibneft-Yugra. Despite some initial success they have not succeeded in establishing either that the meetings were unlawfully convened or that Mr Matevosov or Mr Davidovich acted in an unlawful manner.

90. I set out in an appendix to this judgment (Appendix 1) the details of the various actions. I summarise the upshot of those proceedings below.

Khanty-Mansiysk

Defendants: Sibneft-Yugra, Carroll, Shaw & Tranquillo

91. Yugraneft brought separate actions in or about May 2004 in the Arbitrazh Court of the Khanty-Mansiysk Autonomous District against Sibneft-Yugra and against each of Carroll, Shaw and Tranquillo. Yugraneft's claim against Sibneft-Yugra was that the resolutions passed at the EGMs were invalid because they were not attended by authorised representatives of Yugraneft which had only learned of the increase in charter capital on 12th March 2004. Yugraneft filed the alleged minutes of 10th September 2002 in support. Between May 2004 and November 2005 the case went up the appellate ladder twice, firstly from the Arbitazh Court to the Arbitrazh Appeal Court and then to the Federal Arbitrazh Court of Western Siberia, which ordered a new trial; and then up the same ladder but including this time a regional appellate court immediately below the Federal Arbitazh Court. The result was a conclusion that Mr Matevosov had continued as General Director of Yugraneft after 10th September 2002 and was its duly authorised representative at the EGMs and that it was not established that Mr Tolley was ever appointed General Director of Yugraneft.

Moscow

Defendants: Gregory and Tranquillo

92. In 2004 Yugraneft first brought an action in the Moscow Arbitrazh Court against Gregory and Tranquillo. This case went from the Arbitrazh Court to the Arbitrazh Appeal Court to the Federal Arbitration Court. The Courts held that Yugraneft's pre-emption rights had not been violated, as Yugraneft alleged, by the issue of the capital of Sibneft-Yugra to Gregory and Tranquillo that Mr Matevosov had continued as general director of Yugraneft until 4th March 2004 and had acted as such when signing the notices on 29th October 2003.

Defendants: Ferenco and Shaw

93. Yugraneft next brought a claim in the same court against Ferenco and Shaw alleging that the sale by Shaw to Ferenco was a breach of Yugraneft's pre-emption rights because Mr Matevosov had been dismissed and in any event his acts were not in accordance with the interests of Yugraneft. This case also went up the curial ladder. Yugraneft was successful in May 2005 when the judge accepted that Mr Matevosov had been dismissed but, with the production of Mr Tolley's statement of 23rd June 2005 the appeal court accepted that he had not been replaced by Mr Tolley and that Yugraneft's rights had not been violated; and this was upheld by the Federal Court.

Defendant: Richard

94. Yugraneft brought a further claim against Richard alleging that its pre-emption right to purchase was violated by the disposition by Caroll of its stake in Sibneft-Yugra. This was rejected at first instance and on appeal on the ground that Yugraneft had not produced original minutes of the 10th September 2002 meeting and the documents showed that Mr Matevosov had continued to act as managing director thereafter.

Defendants: Sibneft-Yugra and the first set of offshore companies

95. At some date in 2005/6 Yugraneft commenced an action against Sibneft-Yugra, Sibneft and the first set of offshore companies alleging that the increase in the authorised share capital of Sibneft-Yugra at the EGMs did not take place in that the additional contributions were not provided. This claim also failed.

The BVI proceedings

The issue of proceedings

96. On 11th July 2005 Sibir, then advised by a different legal team, issued proceedings in the High Court of the BVI against (a) the six offshore companies; (b) Sibneft and (c) Mr Abramovich. Sibir claimed in the body of the Statement of Claim that Sibneft (together with Mr Abramovich) and the offshore companies were liable to account to Sibir for the value of shares in Sibneft-Yugra with a nominal value of 255,000 roubles (in the case of Sibneft and Mr Abramovich) and 85,000 roubles (in the case of the offshore companies) which they had acquired as a result of the improper dilution of Sibneft-Yugra's capital.

97. Sibir alleged that Sibneft had breached its fiduciary duties to Sibir under what was described as "*the joint venture agreement*" (JV), i.e. the agreement of 23rd November 2000, by instituting and orchestrating the two EGMs and the subsequent transfer of the shares in Sibneft-Yugra to the second set of offshore companies, and that Sibneft had acted in bad faith and fraudulently for its own benefit. Sibir relied on the fact that the EGMs took place at Sibneft's offices, that Mr Matevosov was a vice-president of Sibneft who acted on its instructions and that Mr Davidovich was, so it was alleged, acting on Mr Abramovich's instructions. Reliance was placed on the fact that he was an associate of Mr Abramovich and a director of the Moscow representative office of Millhouse, which was said to be the company through which Mr Abramovich owned his beneficial interest in the majority of the capital of Sibneft.

98. Mr Abramovich was said to have dishonestly procured, incited, or assisted Sibneft's breaches of fiduciary duty: paragraph 37.2.

99. The six offshore companies were said to have received their interests in the charter

capital of Sibneft-Yugra knowing that those interests represented the proceeds of Sibneft's breaches of its fiduciary duties to Sibir. The first set of offshore companies was said to have parted with its interest to the second set for no consideration and the second set to have received them as a volunteer.

100. The relief claimed was an order against the offshore companies to account to Sibir for the value of their 16.34% interests in Sibneft-Yugra, and that Sibneft and Mr Abramovich account for 49%.

The freezing order

101. When the Claim Form and Statement of Claim were issued Sibir applied without notice for various forms of injunctive relief against the second set of offshore companies, Sibneft and Mr Abramovich (including in their case a freezing order), and for permission to serve the non BVI defendants outside the jurisdiction. On 13th July 2005 Sibir was granted interim relief against the defendants, including the appointment of a receiver of the 85,000 roubles interests of the second set of offshore companies in Sibneft-Yugra and a freezing order against Sibneft and Mr Abramovich for $ 1 billion. Permission was given to serve the non BVI defendants out of the jurisdiction.

102. In the affidavit in support sworn by Mr Cameron and the accompanying skeleton argument Sibir made plain that they claimed that the dilutions of Sibir's interest in Sibneft-Yugra was a "*truly egregious*" fraud committed by Sibneft, which had abused the power conferred on it by the joint venture agreement; that Mr Abramovich instigated the fraud with Sibneft; that in resolving to increase Sibneft-Yugra's capital Messrs Matevosov, Davidovich and Korsik were acting on behalf of Sibneft and also for Mr Abramovich, with whom they were closely associated. The six offshore companies were said to be Sibneft's nominees, Sibneft in turn being controlled, and, for the most part, beneficially owned by Mr Abramovich.

103. At this stage Sibir appears to have been under the impression that the second set of offshore companies had received share certificates in Sibneft-Yugra somewhere. In its skeleton argument Sibir asserted that the result of the dilutions was that Sibneft increased its interest in Sibneft-Yugra, and that, as it had been publicly admitted that it was the beneficial owners of the shares held (sic) by the second set of offshore companies, all three were nominee vehicles owned and/or controlled by Sibneft.

104. Sibir contended that the law governing the receipt based claims against the second set of offshore companies was the law of the country where they received the shares. It stated that it was unaware where that was but invited the BVI court to apply BVI law either on the presumption that any foreign law was the same as BVI law or as the law of the forum. In respect of the first three offshore companies, Sibneft and Mr Abramovich, Sibir suggested that the claims (in knowing assistance and against Sibneft in contract) were governed by Russian law.

105. The claims against the first set of offshore companies were said in the skeleton to be fault based claims[10] in relation to which the court should ask itself what was the proper law of the relationship between the claimant and the defendants, whether under that law the claimant would have an actionable claim against the defendants in respect of breach of duty and whether that duty would be regarded by the BVI courts as giving rise to a liability to account as a constructive trustee. Sibir was content to assume that Russian law applied to the relationship between Sibir and the first set of offshore companies, Sibneft and Mr Abramovich, and asserted, relying – at that time – on the expert evidence on Russian law of Dr Eva Micheler of the LSE that Sibir had an actionable claim under Russian law, including a claim in delict under Article 1064[11] against those defendants.

106. Sibir accepted that, if Sibneft could establish (a) that the profit sought to be claimed from Sibneft was reflective of the loss suffered by Yugraneft and (b) that Yugraneft had available to it, both in law and in fact, a cause of action against Sibneft to recover the loss, then Sibir could not bring its present claim. But it contended that Yugraneft was prevented from pursuing its claim because Sibneft was attempting in Russia to gain control of Yugraneft, then in bankruptcy, relying on acknowledgments of debts executed by Mr Matevosov at Sibneft's behest. If those attempts failed, Yugraneft could be joined as a co-claimant to the proceedings, thereby affording a complete answer to the defence.

The expert evidence

107. Sibir then filed further expert evidence from Professor Butler, a Professor of Law at Pennsylvania State University and Professor Emeritus of Comparative Law at the University of London. The defendants filed evidence from Mr Mikhail Rozenberg of the Moscow office of Chadbourne & Park. The former is a distinguished expert on, and the latter a distinguished practitioner of, Russian law. Mr Rozenberg has also produced four expert reports for the purpose of these applications.

108. Mr Rozenberg expressed the view in his first affidavit of 12th August 2005 that the JV agreement was not binding in Russian law and that *no contractual claim* could be made under it. He thought that the only potential tort claim was a claim by Yugraneft or Sibir (in which case the damages would be awarded to Yugraneft) against Mr Matevosov or his nominee as the actual tortfeasor, and those who facilitated or induced the fraud who might be criminally liable as conspirators and might also be held liable for compensation, if conspiracy was established. But this could only be done in the course of or after criminal proceedings and on the basis of a criminal conviction.

109. Professor Butler took the place of Dr Micheler, who had produced a short report on 7th July 2005 under time pressure. He expressed the view that the JV agreement was

10 Despite the fact that the first set of offshore companies had received the 49% interest in Sibneft-Yugra and then transferred it to the second set, the skeleton did not advance a receipt based claim against them, whereas the Statement of Claim did.

11 *"Harm caused to the person or property of an individual, and harm caused to the property of a legal entity shall be subject to full compensation by the person who caused the damage".*

contractually binding in Russian law and that Sibir could claim against Sibneft under it. He also expressed the view that, in the absence of any development of the law on Article 1064 so as to embrace recovery for economic loss, neither Sibir nor Yugraneft had any claim in tort against any of the defendants, since Sibir's claim was not for physical damage. Nor was there "*on present facts*" any claim by Sibir or Yugraneft against Mr Matevosov or Mr Davidovich. Apart from proceedings alleging irregularities in the resolutions passed at the EGMs the only claim was by Sibir against Sibneft under the JV agreement.

110. Mr Rozenberg agreed in his responding affidavit that tortious claims by Sibir and Yugraneft against the defendants would fail for the reasons expressed by Professor Butler i.e. because the claim was for economic damage (para 42 and 51). But he also said that Yugraneft might have a legitimate claim against Mr Matevosov for damages based on (inter alia) Article 1064 (para 50). These propositions appear inconsistent. In the present proceedings Mr Rozenberg repeats his agreement with Professor Butler that Yugraneft has no claim against any of the defendants, or Mr Matevosov or M Davidovich. He referred to paras 52, 51 and 54 of his second affidavit.

111. No one addressed the possibility of a claim in unjust enrichment under Article 1102.

112. The BVI defendants sought to strike out the proceedings on the ground that the claim against them was bad and that Russia was clearly the more appropriate forum. The other defendants sought to set aside service of the Claim Form and the Statement of Claim on the ground that the court had no jurisdiction to hear it or should not exercise any jurisdiction that it had.

113. By this time it had become apparent that there were no physical shares in Sibneft-Yugra. The participation interests were issued, held, recorded, varied, transferred and received in Russia where the constitutional documents and the variations thereof were held. In its skeleton argument for the hearing in September 2005 (paras 45 – 48) Sibir now argued (influenced, no doubt, by its realisation of the position) that the claim in *knowing receipt* against the second set of offshore companies should be determined by whether the court of the forum regarded the conduct of the defendant as unconscionable (rather than the law of Russia where the proceeds of the breach were received – para 46) ; and that the court's conclusion on knowing receipt should be the same as its conclusion on knowing assistance. It submitted that there should be no stay of the claims against the BVI companies because there was no claim against them in Russia.

114. At the hearing Sibir asserted, in the words of the judge, that all of its claims against the offshore companies were "*consistent with its pleaded case in "knowing receipt*"", and that the Court's conclusion in knowing receipt should be the same as in regard to dishonest assistance. It was not necessary to support a claim in dishonest assistance that the assistance was actionable under the applicable foreign law, and it should not be necessary in knowing receipt either.

The first instance judgment

115. Hariprashad-Charles, J (hereafter Charles, J) held that the causes of action in knowing receipt against all the BVI defendants, which, as she rightly observed was the claim pleaded, were governed by Russian law. She considered the jurisprudence relating to the English law choice of law rules (which BVI law follows) for claims both in knowing receipt and dishonest assistance. She rejected the submission that both claims were governed by BVI law as the *lex fori.* She found that the claims in knowing receipt were governed by Russian law as the law of the obligation because Russia was the place where the relevant property – the participation interests - was held, received, transferred and existed. As Aldous, LJ, said in *Macmillan Inc v Bishopsgate Investments Ltd* [1998] 1 WLR 387 "*shares are property in the nature of a chose in action which is immoveable in the sense that it remains at the place of the company's incorporation*". Since there was, as was common ground, no claim in Russian law against the BVI defendants they were entitled to judgment.

116. In respect of dishonest assistance the judge found that:

> *"115 Sibir is wrong to suggest that the principle of double actionability does not apply to equitable claims. On the contrary, whilst the Court of Appeal rejected "full blown double actionability", it did not tenuously suggest that "double actionability" did not apply. The judgment in Grupo Torras is wholly inconsistent with Sibir's current position.*
>
> *116 The result of applying the rule is that Russian law must be the proper law of the dishonest assistance claim, as it was entirely in Russia that the assistance was rendered. It is not denied that in Russia the BVI defendants are under no civil liability."*

117. Despite the phraseology of paragraph 116 I take the judge to be saying that double actionability applied and that, therefore the claim had to be actionable under both English and Russian law.

118. Having held that the knowing receipt and dishonest assistance claims were governed by Russian law, the judge found, in the light of the common ground, that they all failed. That left the claim against Sibneft as the only claim with any real prospects of success in Russian law against any of the defendants. Since the only arguable claim was against Sibneft under a contract governed by Russian law and Sibneft was not a BVI resident there was no 'gateway' to jurisdiction against any of the foreign defendants (including Mr Abramovich and Sibneft) and so service against them was set aside. Permission to serve out had been sought on the basis that the non BVI defendants were necessary and proper parties to a claim against the BVI defendants.

119. In addition, Charles J considered whether, if there had been a good cause of action against the BVI defendants, and hence jurisdiction to hear the claim against the other defendants, the Court should, in any event, stay proceedings on the grounds of *forum non conveniens*. Sibir maintained that Russia was not the appropriate forum because

under Russian law neither it, nor Yugraneft, had any claim against anyone except Sibneft. It was unjust that it should be forced to bring proceedings in a jurisdiction where it had no arguable case against 7 out of the 8 defendants.

120. The judge rejected the contention that this meant that the claims should not be brought in Russia. She held that the case was "*overwhelmingly concerned"* with Russia. Accordingly, she would, in any event, have stayed the proceedings on the basis that BVI was *forum non conveniens*. As it was she dismissed the claims against the BVI defendants and set aside the order giving permission to serve the foreign defendants.

The appeal

121. Sibir appealed. In its skeleton argument on appeal it relied on the fact that all the acts giving rise to the claims pleaded against the BVI defendants took place in Russia and that under Russian law none of the BVI defendants was under any civil liability to Sibir.

122. The Court of Appeal of the Eastern Caribbean dismissed the appeal. It found that the claims in knowing receipt against the BVI defendants were governed by Russian law and, as was common ground, would therefore stand no chance of success. By this stage the claims against the BVI defendants were put only in knowing receipt, as pleaded[12].

123. The Court found that Russian law applied (and not BVI law as the law of the forum, as Sibir had claimed) on the basis that the proper law of the obligation to restore an enrichment obtained at someone else's expense was the law of the country with which the obligation had the closest and most real connection.

124. As to that Barrow, JA, said (para 24):

> *"In the instant case all the connecting factors are with Russian law. These are listed by the Respondents as follows:*
>
> *– Russia is the country where the enrichment (in the sense of both immediate receipt and of the place of enjoyment of the ultimate benefit) took place;*
>
> *– Russia is the country where the Claimant suffered its alleged loss (where its participation interests were allegedly diminished);*
>
> *– Russia is the country of habitual residence and centre of*

12 The appellant's argument on appeal focused on the dismissal of the claim against the BVI defendants (or the stay that would have been granted in the alternative) – I infer upon the footing that, in the event of success, the judge's order setting aside her previous order giving permission to serve out would, itself, be set aside. The question as to the law of dishonest assistance (directly applicable to Mr Abramovich) was subsumed by the appellants into their argument on the law applicable to knowing receipt because they said that the lex fori was applicable to a claim in knowing assistance, as the law of the court which judges unconscionability, and that the same should apply to knowing receipt.

operations of both the Claimant (which does business only in Russia) and all of the Defendants (all of which operate solely in Russia and have Russian directors);

– Russia is the country where any allegedly fiduciary relationship (or its Russian equivalent) was created and Russian law was the law governing any such relationship (i.e. by virtue of the alleged JV Agreement and/or the appointment of Matevosov as director of Yugraneft);

– Russia is the country where any original "constructive trust" or "equity" (or its Russian equivalent) arose (by virtue of the alleged breach of the alleged JV Agreement in Russia);

– Russia is the country where the original fiduciary relationship (or its Russian equivalent) was alleged to have been breached (by virtue of the alleged breach of the alleged JV Agreement);

– Russia is the country where the "participation interests" were issued and hence where the disposal and loss was allegedly caused;

– Russia is the country of incorporation of the company in respect of the alleged loss of whose participation interest the Claimant seeks restitution (Sibneft-Yugra is Russian company, as is Yugraneft)."

125. The Court concluded that:

"……the situation in the instant case is as uncomplicated as clarity could desire. As shown by the respondents' listing of connecting factors, all connections are with Russia. …In the instant case there are no factual circumstances and particular issues that could possibly permit the application of any other law but Russian law. It seems clear to me that whatever reference point may be chosen, the law that has the closest connection (indeed, any connection) with the claim or the issue is Russian law."

The sale to Gazprom

126. In about June 2005, representatives of Gazprom (in particular, Alexei Miller, its CEO) approached Mr Abramovich in Moscow with a view to Gazprom purchasing the majority shareholding in Sibneft (amounting to 72.663%) held by the five Cypriot companies referred to in paragraph 129 below. The detailed negotiations for the sale were conducted in Russia, led by Mr Davidovich for the sellers, and Mr Chiuchenko, a member of Gazprom's board and the head of its legal department for Gazprom. Mr Shvidler was also involved. The price was over $13 billion. Yugraneft claims that Millhouse *in London* organised and concluded the contract for the sale. There is nothing

that amounts to evidence to that effect and the evidence of Mr Abramovich, Mr Davidovich, Mr Matevosov, Mr Shvidler and Mr Tenenbaum is to the contrary. There is also no evidence that the sale was prompted by the dispute about Sibneft-Yugra.

127. According to the evidence of Mr Davidovich, as a result of the ongoing legal dispute between Sibneft and Yugraneft over Sibneft-Yugra, no consideration was paid by Gazprom for the disputed participation interests in Sibneft-Yugra and, correspondingly, no warranties were given by the sellers. This is corroborated by a valuation by Citigroup of 27th September 2005 presented to Gazprom. This assumes a net holding of 50% only.

128. Whether it is correct that no part of the consideration was, or should be treated as being, attributable to the disputed interest is debatable. The total Priobskoye field was described by one analyst in June 2008 as the "*pearl of Western Siberia*" and the South field, which is about 40% of the field, was producing 125,000 bpd in 2007. In 2006 Sibneft-Yugra was reporting a post tax profit of about $ 138 million. According to Mr Cameron the value of Yugraneft's interest in Sibneft-Yugra is $ 2 billion. In June 2004 Sibir referred to a valuation of $ 115 million, which is said not to reflect the true commercial value on the grounds that it was made in the context of a proposed joint venture between Sibir and the City of Moscow to establish the Moscow Oil and Gas company which would be an integrated production, refining, and distribution company. The $ 115 million is said to have been artificially low because it was prepared on a "*formalistic basis*" involving taking a discretionary view of various different valuation methods. One of those focused only on the acquisition cost of licences, which was relatively low; and another element was discounted cash flow, which assumed lower production figures than have been achieved and aggressive discounting of the income stream. Sibir was content not to argue for a realistic commercial value in order not to depress the City's proportionate interest in the venture to such an extent that it was put off embarking upon it: see Mr Cameron's statement of 26th June paras 3-8.

129. The agreement between the five Cypriot companies and Gazprom Finance S.A. for the sale of the majority interest in Sibneft was concluded by a Sale and Purchase agreement dated 28th September 2005. As is apparent from that agreement the Sibneft group included Richard, Gregory and Ferenco. Those 3 companies are specified in Schedule 1 as subsidiaries of Sibneft. Gazpromneft, as Sibneft is now known, continues to hold through Richard, Gregory and Ferenco, the disputed participation interests in Sibneft-Yugra to this day.

130. Charles J delivered judgment on 29th November 2005. The next day she considered and rejected applications for relief, pending the appeal, against the second set of offshore companies, restraining them from disposing of their interest in Sibneft-Yugra. No application was made to restrain any disposition of the proceeds of sale of Sibneft.

131. Some of the proceeds of the sale have been invested in acquiring a substantial interest [about 37%] in Evraz Group S.A. ("Evraz") a Luxembourg company traded on the LSE with interests in Russia and North America for about $ 2.9 billion and an interest in

Highland Gold, a Jersey company, that only does business in Russia, where its gold mines and management are, for about $ 400 million.

132. Mr Tenenbaum's evidence is that the proceeds of the sale of the Sibneft shares to Gazprom were paid to the Cypriot companies offshore and that the vast bulk of those proceeds has not been brought into England. However, monies received from Gazprom were paid into accounts with other monies in them, from which Millhouse was paid. The only transfers that he can recall falling within this category are payments made to Millhouse for services in the UK since October 2005, certain payments made in relation to property owned by or on behalf of Mr Abramovich and monies spent in the operation of Chelsea FC. The maximum amounts are about £ 13.2 million in the case of Millhouse, £ 247 million in respect of Chelsea, and £ 76 million on property. None of the monies are retained by Millhouse. The accounts from which Millhouse was paid appear to have been accounts of companies known as Aretino Holdings Ltd ("Aretino") and Calmera Trading & Services Ltd ("Calmera") (see paragraph 23 of Mr Heagren's witness statement and the accounts of Millhouse). Calmera and Aretino were in 2005 and thereafter owned by Finservus.

The Russian criminal proceedings

The complaint

133. In September 2006 Mr Kotov, Yugraneft's liquidator, lodged a formal criminal complaint in Russia with the Office of the Public Senior Investigator of the City of Moscow. The complaint runs to just over 20 pages and attached over 70 supporting documents. It alleges (according to one version) that Mr Abramovich, Mr Matevosov, Mr Davidovich and Mr Korsik:

> "*and other persons, guided by lucrative impulse, formed an organized group and by means of fraud and breach of trust caused an extensive property damage to the owner* [Yugraneft]".

134. This may well be an earlier draft (see paragraph 136 below). Another draft, which may be the final one, asserts that:

> "[*Mr*] *Matevosov, being the person forming the management functions in the commercial organisation Yugraneft…together with other persons forming the organised group, used his powers contrary to the lawful interests of the organisation with the aim of gaining profit and advantage for himself and other persons and to harm other person, which caused serious property damage to Yugraneft and its shareholders"*

135. The criminal complaint specifies a large cast of persons involved, wittingly or otherwise, in the affairs complained of, including employees or officers of Sibneft and Millhouse's representative office. So far as I can see they are all Russian.

136. Surprisingly Mr Kotov does not appear to have retained a copy of the complaint in Russian as filed. Two copies of the draft complaint were provided to Clyde's, one in Russian and one in English. The English version records that the Board decided to

dismiss Mr Matevosov as director on 10th September 2002, and so informed him. The Russian version does not. Mr Kotov believes that the Russian version is a later draft and that the complaint, as filed, did not contain that contention.

137. The complaint also stated that the members of the organised criminal group abused the trust of the board of Yugraneft, succeeded in getting Matevosov elected as managing director of the company and by so doing got the opportunity to manage Yugraneft operationally and to dispose of the funds entrusted to it. However, according to the minutes of the board meeting of 23rd March 2001 when Mr Matevosov was appointed, Mr Cameron recommended his election and the only persons present were connected with Sibir. The complaint also suggests that the offshore companies never fulfilled their obligations to provide financing for Sibneft-Yugra. It attributes the conduct of the offshore companies to Sibneft.

138. The Russian authorities investigated the claim. This included a lengthy interview of Mr Tchigirinsky and Mr Davidovich (who submitted his own documents).

The first ruling

139. On 9th February 2007, the Senior Investigator of the Department of Internal Affairs of the 2nd Department of the Investigation Division of GSU (Head Investigation Department) of GUVD (Head Department of Internal Affairs) of the City of Moscow, Lieutenant Colonel of Justice R.G. Fedorov, issued a "*Ruling on Refusal to initiate Criminal Prosecution*" ("the first ruling").

140. The first ruling rejected the complaint. The first ruling accepted that the increase in the charter capital in Sibneft–Yugra had been agreed between Mr Tchigirinsky and Mr Davidovich in order to provide security for the loan made by Sibneft in respect of the Claimant's share of the costs of development of the project. It rejected Mr Tchigirinsky's evidence that there had been no such agreement. The Senior Investigator also noted that the legitimacy of the increase in the charter capital had been upheld by the civil courts. He decided that the files submitted by the Claimant were "*devoid of elements essential to the crimes stipulated*" in the criminal code.

141. His conclusions included the following:

(a) No representative of Sibneft or its affiliated companies was a member of the Board of Directors of Yugraneft and there were no facts that showed any pressure on the part of Sibneft on the directors of Yugraneft.

(b) There was an agreement between Mr Tchigirinsky and Mr Davidovich that, in summary: (i) Yugraneft would take over 50% of the requisite investment needed by Sibneft-Yugra and Sibneft and Yugraneft would co-invest in the development of fields at a lower interest rate of 6%; (ii) in view of the insufficiency of Yugraneft's funds, Sibneft would cover the financing for an interim period and Yugraneft would repay 50% of the loans in due course and (iii) the 49% participation interest in Sibneft-

Yugra was to serve as collateral security for the loans. Notwithstanding the claim of Mr Tchigirinsky that there was no such agreement, "*the events to follow, which were recorded in the documents under the verification, prove the fact that there had been such agreement between Mr Tchigirinsky and Mr Davidovich and that the members of Sibneft-Yugra and the persons under their control performed their activities strictly within the framework of this agreement*".

(c) It was "*confirmed by the results of the verification that the aggregate amount of the share participation in the authorized capital of Sibneft-Yugra granted to the creditors as a collateral security on the loans approximately equalled 49%, which was exactly planned through the initial agreement between Mr Davidovich and Mr Tchigirinsky*".

(d) "*The legality of the resolutions taken at the general meetings, the actions taken by Mr A.R. Matevosov to convene and hold the said meetings, his issue of powers of attorney on behalf of Yugraneft in favour of Mr Davidovich, the powers and authorities and actions of the other participants of the meetings and, in particular, those of Mr A.L. Korsik, have been confirmed by the rulings of the arbitration courts of the first and appeal instances in Khanty Mansiysk autonomous region and the Federal [State] Arbitration court of Western Siberian circuit.*"

(e) "*The legality of the sale of shares in the authorized capital of Sibneft-Yugra to [Ferenco], [Richard] and [Gregory] and also the legitimacy of Mr A.R. Matevosov's actions to waive the preemptive right to buy the shares for sale in the name of Yugraneft have been confirmed by the awards of the first and appeal instances of the [State] Arbitration court of the city of Moscow and the Federal [State] Arbitration court of the Moscow circuit.*"

(f) "*The holding of the 49% of the share participation in the authorized capital of LLC Sibneft-Yugra by the foreign company creditors was the result of the due performance of the civil law obligations and this was established in the arbitration court rulings.*"

(g) "*The General Director of Sibneft-Yugra Mr A.R. Matevosov acted within the range of the powers and authorities granted to him under the Company Articles of Association in the interests of the Company and its shareholders and provided for the production activity and the respective financing of its costs within the scope of the civil law obligations which are not prohibited by the Russian Federation law.*"

142. A copy of the ruling was sent to Mr Kotov with an explanation of his right to appeal.

143. On 20 June 2007 the Deputy Senior Investigator for Moscow rescinded the decree of refusal to initiate criminal proceedings and the evidence was returned to the Investigation Unit for further examination. The Senior Investigator re-opened his

investigation and again interviewed Mr Davidovich.[13] He appears to have done so in response to enquiries from a member of the Duma.

The second ruling

144. On 22 October 2007, the Main Internal Affairs Directorate issued a second decree of refusal to initiate criminal proceedings ("the second ruling"). This ruling reiterated the conclusions reached in the first ruling and provided further grounds for those conclusions. It noted the following:

(1) "*On the basis of further examination it has been established that the statement of the Arbitration Administrator of OAO "ANK Yugraneft", M S Kotov, that A R Matevosov employed his authority in conjunction with other persons against the lawful interests of that organisation and with a view to obtaining benefit and advantage for himself and others and causing harm to OAO "ANK Yugraneft" and its shareholders is not borne out by the documents and evidence obtained in the course of examination*".

(2) "*Thus, the actions of A R Matevosov in concluding the loan agreements…were not unlawful in nature, do not represent the exercise by A R Matevosov of his authority against the lawful interests of OAO "ANK Yugraneft", and were not aimed at infringing the lawful rights and interests of that organisation and its shareholders*".

(3) "*…an agreement did exist between D L Davidovich and Sh P Tchigirinsky, and [that] the stakeholders in OOO "NK Sibneft'-Yugra*" *and the individuals controlled by them acted in strict compliance with that agreement*".

(4) "*… the actions of A R Matevosov, V V Tsitsinov and D L Davidovich, do not display the attributes of criminal offences as envisaged by Articles 201, 159, 160 and 196 of the UK RF* [the Russian Federation Criminal Procedural Code]."

145. Again the ruling was sent to Mr Kotov with an explanation of his right to appeal. Mr Kotov has not done so.

Sibir petitions the English Companies Court

146. On 12 November 2007, Sibir (together with its subsidiary, MOGC) petitioned the Companies Court for an order winding up Yugraneft as an unregistered company in England and seeking the appointment of a provisional liquidator. Clyde & Co (Yugraneft's current solicitors) acted for Sibir for that application. The petitioners also applied for the appointment of a provisional liquidator.

147. The application was supported by a Skeleton Argument and two affirmations of Mr

13 Mr Davidovich's 1st witness statement at para 64.

Friedman of Clyde & Co, which exhibited a number of supporting documents including a report by Professor Sergeev of Saint Petersburg University.

148. The skeleton and the affirmation in support made (amongst other things) the following points:

i. Sibir was the ultimate controlling shareholder of Yugraneft. Between it and its subsidiaries, Sibir owned 99.368% of the shares in Yugraneft;

ii. Sibir represented just over 71.5% (and, with related entities, slightly over 75%) of claims against Yugraneft eligible to vote in its liquidation;

iii. Sibir annexed a draft Particulars of Claim identical to the Particulars of Claim subsequently served in the Commercial Court proceedings which it proposed to issue in England;

iv. Sibir would be funding the costs of pursuing the claims and providing an indemnity in respect of any adverse order for costs;

v. Mr Friedman made the petition having obtained information from Mr Tchigirinsky (described as "*the individual with the principal interest in the First Petitioner*" – Mr Friedman's First Affirmation, para 3), Mr Cameron and Mr Luzkhov; and

vi. Mr Kotov consented to and supported the petition for winding up.

149. The first and second defendants contend that the application was misleading in a number of important respects. I consider these contentions in a separate judgment in relation to the application to set aside the appointment of the provisional liquidator.

The Commercial Court proceedings

150. The present proceedings were issued on 14th November 2007. Yugraneft claims that its 50% participation interest in Sibneft-Yugra:

> "*has been stolen by means of dilution and sold to Gazprom as part of the sale of [Mr Abramovich's] controlling interest in Sibneft*"

and that Millhouse Capital, inter alia through Mr Davidovich, and Mr Abramovich knew of the fraud on Yugraneft, and that "*the proceeds of sale of Yugraneft's interest within the sale of Gazprom derived from the fraud*".

151. The defendants do not contend that Yugraneft has failed to raise a good arguable case that the dilution of its interest in Sibneft-Yugra was fraudulent. If, which is hotly disputed and cannot presently be decided, there never was an undocumented co-financing agreement, and the dilutions came about secretly so far as anyone not in the Millhouse/Abramovich/Sibneft camp was concerned, in order to punish Mr

Tchigirinsky for the position he had taken in the Moscow Oil Refinery dispute, the whole arrangement was dishonest. As will become apparent the defendants' case is that, for a number of specific reasons, Yugraneft's claims are not maintainable.

Yugraneft's claims

152. Yugraneft puts forward three sets of claims. Firstly, it puts forward a claim in dishonest assistance in English law or, in the alternative, if Russian law governs, a tort claim in Russian law against Millhouse and Mr Abramovich. Secondly, it advances an equitable proprietary claim against Mr Abramovich and in part against Millhouse in English Law. Thirdly, it puts forward a claim against Mr Abramovich alone in knowing receipt or unjust enrichment in English law or, in the alternative, if Russian law governs, unfounded enrichment in Russian law.

The claims in dishonest assistance against Millhouse and Mr Abramovich

English law

153. In English law, the Claimant claims against each of the Defendants on the basis of the English 'equitable wrong' of dishonest assistance. The claim is founded on the activities of Mr Matevosov and Mr Davidovich. The appointment by the former of the latter as representative of Yugraneft at the EGMs where the dilutions occurred is said to be part of a dishonest scheme orchestrated by Millhouse to steal Yugraneft's interest in Sibneft-Yugra for the benefit of Mr Abramovich.

154. Mr Matevosov and Mr Davidovich are alleged to have breached the following provisions of Russian civil law (PoC 91-92 & 99):

(i) *Article 53(3)* of the *RF Civil Code* (obligation to act in the interests of the entity you represent in good faith and reasonably);

(ii) (Mr Matevosov) *Article 71(1)* of the *RF Law on Joint Stock Companies* (similar obligation specific to directors);

(iii) (Mr Davidovich) *Article 182(3)* of the *RF Civil Code* (a representative is not to enter into transactions on behalf of the person he represents in the interests of another person whose representative he is at the same time);

(iv) *Article 1064(1)* of the RF *Civil Code* (causing harm to property)

(v) *Article 1080* of the *RF Civil Code* (joint infliction of harm to property)

(vi) (Mr Davidovich) *Article 10(1)* of the *RF Civil Code* (obligation not to act with the sole purpose of inflicting harm).

The obligations in (i) (ii) (iii) are said to be duties towards Yugraneft which English law

would characterise as fiduciary.

155. Each of them is also alleged to have committed crimes in Russian law contrary to Chapter 21 of the RF Criminal Code (PoC 99) namely:

(1) *Theft,* contrary to Article 158;

(2) *Swindling,* contrary to Article 159;

(3) *Misappropriation or Embezzlement*, contrary to Article 160;

(4) *Infliction of Damage on Property by Deceit or Breach of Trust*, contrary to Article 165.

156. On the basis of these breaches of Russian law by Mr Matevosov and Mr Davidovich the claims in dishonest assistance against Millhouse and Mr Abramovich are then expressed in paragraphs 104 to 106 of the Particulars of Claim as follows:

> *"104. Further or alternatively, Millhouse Capital has been guilty of dishonest procurement of and assistance in the breaches of fiduciary duty by Mr Davidovich and Mr Matevosov set out above. More particularly:*
>
> *(1) Their acts were part of a scheme orchestrated by Millhouse Capital to steal and dispose of the interest in Sibneft-Yugra stolen from Yugraneft; and*
>
> *(2) The conduct of Mr Davidovich was part of his role as head of the Moscow Representative Office of Millhouse Capital and Executive Investment Manager of Millhouse Capital in managing Mr Abramovich's investments, including Mr Abramovich's controlling shareholding in Sibneft; and*
>
> *(3) Millhouse Capital has orchestrated the sale of Yugraneft's interest in Gazprom and the holding and reinvestment of the proceeds.*
>
> *105. Mr Abramovich is vicariously liable for the conduct of Millhouse Capital as aforesaid.*
>
> *106. Further or alternatively, since the dilution scheme would only have been implemented with (at the least) Mr Abramovich's prior approval, he is liable in his own right for dishonestly procuring the breaches of fiduciary duty of Mr Matevosov and Mr Davidovich as aforesaid."*

The relief sought in respect of the dishonest assistance claim includes "equitable damages" against each of Millhouse and Mr Abramovich.

Russian law

157. The counterpart in Russian law of the English dishonest assistance claims against the First and Second Defendants are the claims alleged against them under Article 1064 of

the Russian Civil Code in tort or delict (PoC paras 121-122). That article provides:

> *"Harm caused to the person or property of an individual, and harm caused to the property of a legal entity shall be subject to full compensation by the person who caused the damage."*

158. The claim in tort against Millhouse in Russian law relies principally on the acts of Mr Matevosov and Mr Davidovich in the alleged theft of the bulk of Yugraneft's participation interest in Sibneft-Yugra and the disposal thereof. Millhouse is said to be vicariously responsible for Mr Davidovich's actions under Article 1080 of the Russian Civil Code (liability of a legal entity to compensate for harm caused by its employees while carrying out their duties). In the alternative it is alleged that Millhouse Capital subsequently "*ratified*" the actions of Mr Davidovich.

159. As regards Mr Abramovich, it is alleged that, since Millhouse was operating under Mr Abramovich's "*broad mandate*", Mr Abramovich is jointly liable for its conduct (PoC 122(8)) and, accordingly, that he, too, is liable in tort or delict under Article 1064.

The equitable proprietary claim

160. The Particulars of Claim (paragraphs 107-109) allege that the assets of Mr Abramovich managed by Millhouse represent in significant measure the interest in Sibneft-Yugra stolen from Yugraneft or dividends derived from that interest. To that extent Yugraneft, it is said, can trace its property ("*the proceeds of the fraud"*) "*into the hands of Mr Abramovich and/or Millhouse*". Accordingly, it seeks "*appropriate declarations and accounts*" and/or claims that "*the proceeds"* are held on *"constructive trust*" and/or claims that "*the assets of Mr Abramovich held by Millhouse Capital*" are subject to an equitable proprietary lien. Yugraneft thereby asserts a claim to what is said to be traceable trust property that has been applied in breach of trust and is now in "*the hands*" of Mr Abramovich and/or Millhouse. It seeks to establish either (a) a constructive trust of such monies or (b) to enforce an equitable proprietary lien to secure its personal claim against the (constructive) trustee in respect of its receipt of property.

161. On these grounds, Yugraneft seeks an order:

> "*for an account of all the monies and assets of Mr Abramovich and/or all of the monies and assets controlled by Millhouse Capital which derive from the interest stolen from Yugraneft… and a declaration that such monies and assets and any product thereof or accretions thereto are subject to a constructive trust and/or equitable proprietary lien in favour of Yugraneft*" (PoC para 128).

In addition, it claims to be entitled to a declaration that such a constructive trust or lien binds Millhouse, and to the appointment of a receiver over the assets controlled by Millhouse Capital (PoC para 129).

The personal 'receipt based' claims

English law

162. The third category of claims is the 'receipt based' claims. In English law, two 'receipt based' claims are brought against Mr Abramovich: (i) knowing receipt and (ii) unjust enrichment.

163. The claim in *knowing receipt* is brought on the basis that the proceeds of the fraud have been received into or into the control of "*entities*" which are controlled by Millhouse or its agents on behalf of Mr Abramovich; and that both Mr Abramovich and Millhouse knew of the provenance of the proceeds of the "*fraud*". (PoC paras 102-103).

164. The claim in *unjust enrichment* is brought on the basis that Mr Abramovich has been enriched unjustly at the expense of Yugraneft in consequence of the breaches of fiduciary duty of Messrs Davidovich and Matevosov and/or their breaches of Russian criminal and civil law, and he is liable to account for the proceeds of the fraud and holds the proceeds as constructive trustee for Yugraneft. (PoC para 110).

Russian law

165. In Russian law, on which Yugraneft relies in the alternative to English law, the corresponding claim is brought in "*unfounded enrichment*" under Articles 1102-1105 of the Russian Civil Code (the obligation to return unfounded enrichment). The basis of this allegation is that Mr Abramovich:

> "*has been enriched to the extent that the proceeds of sale of his interest in Sibneft to Gazprom represent the interest stolen from Yugraneft and to the extent that he has received dividends referable to the stolen Yugraneft interest*" (PoC para 116(1);

and that:

> "*What happened in substance was that Mr Abramovich received the benefit of the bulk of Yugraneft's participation interest in Sibneft-Yugra*" (PoC para 116(2)).

The claim against Mr Berezovsky

166. Yugraneft's claim against Mr Berezovsky is based on the fact that Mr Berezovsky is suing Mr Abramovich alleging that the sale of his interest in Sibneft to Mr Abramovich was procured by unlawful pressure and claiming an interest in the proceeds of the sale by Mr Abramovich of a controlling interest in Sibneft.

167. Yugraneft claims that, if and to the extent that Mr Berezovsky is entitled to part of the proceeds of sale of Mr Abramovich's controlling interest in Sibneft he is not entitled to do so at the expense of Yugraneft and would hold any proceeds received by him which derive from the inclusion in Sibneft's assets of Yugraneft's (stolen) interest in Sibneft-Yugra on constructive trust for Yugraneft.

The reverse summary judgment application

168. Millhouse and Mr Abramovich contended that:

a) all the claims made against them are either governed by Russian law or must be civilly actionable by that law;

b) under that law the claims have no realistic prospects of success because with one possible exception they are all time barred, since under Russian law civil claims are time barred after 3 years from knowledge of the violation of the right. These claims were brought in November 2007, over 3 years after Yugraneft knew of the essential facts, which it did by no later than April/May 2004;

c) the only possible claim under Russian law would be a claim based on a finding that a crime has been committed made by the Russian court or investigating authority. No such finding has been made. The Senior Investigator has twice issued reasoned rulings, binding in Russian law, that there are no grounds for suspecting that a crime has been committed and Yugraneft has chosen not to appeal those rulings; any Russian court would dismiss any claim in civil proceedings because, in the absence of a criminal finding it would be time barred, and because the court would defer to the rulings of the Senior Investigator;

d) if the claims were governed by English law then all of the receipt based claims and part of the dishonest assistance/tort claim against the first two defendants are bound to fail because the claimant's restitution and related claims depend upon an ability to trace into the increased charter share capital issued to the offshore companies and thence through Sibneft into the increased value of Mr Abramovich's shares in Sibneft. This cannot be done for a number of reasons, the first of which is that no proprietary interest arose in Yugraneft in the increased share capital at the outset;

e) Yugraneft is in any event estopped by the decision of the High Court of the BVI and the Supreme Court of the Eastern Caribbean from pursuing the receipt based claims against Mr Abramovich or it would be an abuse of process to allow it to do so;

f) These proceedings are in any event an abuse of process because :

> *"all of the claims ... are premised upon alleged crimes in Russian law or alleged breaches of fiduciary duties in Russian law against individuals (Mr Davidovich and Mr Matevosov) that are citizens of, and resident of Russia where they are alleged to have committed the crimes or breaches of fiduciary duties under that foreign law. It is obviously wrong that a Claimant should be permitted to bring such claims in circumstances where (a) in a host of claims and applications, the courts and criminal authorities of the foreign jurisdiction have consistently held that these individuals' conduct*

was lawful and ruled that there is no evidence that they have committed any crimes; (b) in further proceedings brought in another jurisdiction (the BVI) the Claimant (or its privy) conceded and relied upon the assertion that there were no valid civil claim against those individuals and (c) to the extent that any of the civil claims (or crimes) alleged to exist under the foreign law have not been specifically adjudicated upon by the foreign courts that is purely because the Claimant has chosen not to bring those specific claims in the proper jurisdiction or has chosen not to appeal. In all these circumstances, this claim is an instance of forum shopping and an abuse of process."

Governing laws

169. I turn then to consider the governing law of the claims.

The governing law of the dishonest assistance claim

The rival submissions

Yugraneft

170. Yugraneft contends that where a claim in dishonest procurement/assistance is raised in English proceedings, relating to obligations owed by directors or agents of a foreign company, the issue as to what those obligations are and whether they have been breached will be determined by the foreign law. English law will, then, determine whether the duties in question should be categorised as fiduciary in nature. If they are, English law will apply its own approach to dishonest assistance, save that regard will be had to the law and custom of the foreign jurisdiction in considering whether a defendant has acted dishonestly. In the alternative Yugraneft claims that double actionability applies.

The defendants

171. The defendants submit that the *lex fori* cannot be the appropriate choice of applicable law for a number of reasons.

172. Firstly, such a choice is contrary to the well established general principle that a civil wrong committed elsewhere must be civilly actionable under the law of the place where the wrong occurred: ***Phillips v Eyre*** (1869) LR 4 QB 225; (1870) LR 6 QB 1; ***Carr v Fracis Times & Co*** [1902] AC 176.

173. In ***Boys v Chaplin*** [1971] AC 356 the majority of the House of Lords held, overruling ***Machado v Fontes*** [1897] 2 QB 231, that a claim for damages in tort arising out of events in a foreign country had, in addition to being actionable in English law, to be civilly actionable (and not just the subject of criminal liability) in the foreign jurisdiction. Lord Wilberforce gave the reason:

"The broad principle should surely be that a person should not be permitted to

claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed."

174. The principle and the decision was approved by the Privy Council in ***Red Sea Insurance Co Ltd v Bouygues SA*** [1995] 1 AC 190. It is subject to two exceptions (i) where the foreign law of the place where the wrong was committed has no real connection with the proceedings the foreign law will be displaced in favour of the law with the most substantial connection to the circumstances of the case: see ***Boys v Chaplin*** [1971] AC 356, 391-392 and ***Kuwait Airways Corp v Iraqi Airways*** [2002] UKHL 19 at [157] – [158][14] and (ii) where liability does not exist under the foreign law because of the existence of a provision of that foreign law which is wholly repugnant to English "public policy"

175. Secondly, the defendants submit, it is contrary to the general approach in English conflict of law rules which is to subject claims in the law of obligations to the law with which the obligation has its closest and most real connection: see ***Dicey*** (14th Edn) at 34-014. The law of the forum may well not satisfy that test (sometimes by a large margin). To choose it as the applicable law would divorce private international law from its underlying justification that justice requires that the court should apply that law which is consistent with the reasonable and legitimate expectations of the parties to the transaction or occurrence involved and, secondly, that, in the interest of promoting international comity and transactions, uniformity should be achieved where possible: **Dicey** 1 - 005-6

176. The ***Private International Law (Miscellaneous Provisions) Act 1995*** abolished the double actionability rule in the case of tort in favour of the *lex causae*: see paragraph 220 below. It would be paradoxical if the correct approach is to abandon the *lex causae* in favour of the *lex fori.*

177. Thirdly, equitable claims are not intrinsically different. The need to adjudge whether a defendant's conduct is unconscionable should not free the claimant from the need to prove civil liability under the law of the place where the events giving rise to liability took place. In the absence of some compelling reason there should be no difference of approach in private international law as between legal and equitable claims. As Tipping J, giving the leading judgment of the New Zealand Court of Appeal in ***Attorney General of England and Wales v R*** [2002] NZLR 91 at 103, said :

"It is difficult to see the logic or overall desirability of making a distinction between legal issues and equitable issues when deciding which legal system should govern the contract in question. The making of such a distinction can lead to quite unnecessary difficulties and potential inconsistencies. It would also tend to depart from the general direction in which most legal systems comparable to ours have been moving in recent times.

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14 In ***Red Sea Insurance v Bouygues SA***, the Privy Council was prepared to operate the exception by dispensing with the requirement for any liability under the law of the forum and only applied the *lex causae.*

Law and equity should be viewed as a consistent whole. The individual influences of the earlier discrete streams now work together to produce the appropriate outcome. While many doctrines are still recognisable as legal or equitable and an understanding of their historical origins often remains helpful, the focus now should be on their combined influence rather on their originally separate functions. It would be anomalous to apply one system of law to an issue which would have arisen at law, and another to an issue which would have been for the Courts of Equity to deal with. I make these remarks simply to note the point and to endorse the acceptance of the parties that all issues fall to be determined according to English law."

178. Fourthly, reliance is placed on **Dicey**'s comment at 2-035:

> ***"Equitable claims.*** *It will be apparent from what has been said that there may well be a lack of exact correspondence between the internal divisions of English domestic law and those of the conflict of laws. One area in which the problem of characterisation may be seen to be particularly acute is when an English court is called upon to deal with a claim which, if it were wholly domestic, would be regarded as equitable. When such a case contains a foreign element, the question arises whether there is a category of issue labelled "equitable issues" for the purpose of choice of law. In some cases, such as where an application is made for specific performance of a contract, it will be clear that the issue is contractual, or contractual in part and procedural in part. In others, such as where it is alleged that a defendant has committed a wrong which corresponds to the equitable wrongs of knowingly receiving trust property, or dishonestly assisting another in a breach of trust, it is arguable that the issue of substantive liability is to be characterised as tortious. In still others, such as where it is alleged that a company director owes duties of loyalty to the company, it is arguable that the issue of substantive liability is to be characterised as falling within the category of issues reserved to the law of incorporation. These instances lend no support to the proposition that the term "equitable" has a discrete role to play in the characterisation of issues for the purpose of choice of law."* [15]

179. Paragraph 34-033 of **Dicey** observes:

> *"Though it has been said that, as equity acts in personam, equitable claims are governed by the lex fori, this almost certainly means no more than that a court may order equitable remedies in accordance with its own procedural law over a defendant subject to its personal jurisdiction in respect of rights which have been found to arise under the law identified by its choice of law rules. Given the similarity between equitable wrongs on the one hand, and torts, and breaches of contract on the other, it may be appropriate to regard claims which would in domestic law be equitable wrongs as being governed by the choice of law rules applicable to these areas of law, rather than by Rule 230 [the rule for restitution], at least where the measure of recovery is not determined by reference to the enrichment of the defendant."*

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15 The text goes on to state that "*But other cases, principally Australian, tend to suggest that there may be a category of issues which, being labelled as "equitable", are as such governed by the lex fori.*" However, commenting on this sentence, footnote 62 remarks: "*the Australian approach finds little support in England*".

180. Footnote 12 comments on the proposition that equitable claims are governed by the *lex fori,* noting that "*this would be tantamount to saying that there is no choice of law applicable to equitable claims*".

181. Further, insofar as it is said that equity acts when it regards the acts of a defendant as unconscionable and that, *therefore*, the unconscionability of actions should be judged by an English court of equity (if the defendant is properly before it) the conclusion does not necessarily follow from the premise. If susceptibility to the jurisdiction means that English law is applicable as the lex fori, there will be many defendants against whom claims are determined under English law when they and their actions may have nothing to do with England. Mr Swainston submitted that the rules on domicile meant that a defendant would only be brought before the court if he had some substantial connection with this country. But that cannot be guaranteed. Jurisdiction may be founded on service whilst temporarily present or on the basis that the individual is a proper party to a claim brought against another in circumstances where a stay may not be obtainable.

182. Other academic writers have rejected the lex fori as the applicable law for equitable restitutionary claims. The authors of ***Cheshire & North's Private International Law*** (13th Edn, 1999) note that to choose the *lex fori* (at 677):

> *".. encourages forum shopping; bears a parochial appearance; the applicable law would be uncertain until the place of trial had been determined; it can lead to injustice to the defendant who may be liable under English law in a case involving events having little connection with England and which may involve no liability under the law of the country abroad where the relevant events took place."*

183. Other anomalies would arise. If the lex fori applies to a claim against the defendants for dishonest assistance governed by English law Yugraneft would find itself with a more favourable limitation period than that applicable against, say, Mr Davidovich whose breach of fiduciary duty, which the defendants are said to have abetted, is subject to Russian law.

184. Fifthly, the constituent elements of a claim in "knowing assistance" provide no reason why it should be treated as governed by the *lex fori*. The difference between such a claim and a claim in knowing receipt has often been stated. As Hoffmann LJ put it in ***Polly Peck International v Nadir & Others*** (Judgment of the Court of Appeal dated 17 March 1993, Lexis Transcript):

> *"Although both knowing assistance and knowing receipt give rise to the equitable remedy of accountability as a constructive trustee, the two causes of action are very different. Liability for knowing assistance is based upon wrongful conduct, namely knowing participation in a fraudulent breach of trust or fiduciary duty. Its common law analogy is conspiracy to defraud. Liability for knowing receipt is restitutionary based upon the beneficial receipt of money or property known to belong in equity to someone else. The equitable remedy depends upon the existence of a trust or fiduciary duty, but the breach of trust or duty need not have been fraudulent. The nearest common law analogy is*

money had and received."

185. There is no reason why the lex fori should be the applicable law in respect of an accessory liability for dishonest participation in a breach of trust particularly given that in an action of the tort of conspiracy to defraud a claimant must show (under common law and now under statute) that the acts constituting the conspiracy are civilly actionable under the law of the place where the conspiracy was, in substance, committed. See, for example, per Mance J in ***Grupo Torras SA v Al-Sabah*** [1999] CLC 1469 at 1653-1654. In the Court of Appeal the judgment (paragraph 123) while recording that the notion that dishonest assistance could be regarded as a tort had been firmly rejected in ***Metall und Rohstoff AG v Donaldosn Lufkin & Jennette Inc*** [1990] 1 QB 391, 474 in the context of RSC O.11 r. 1(1) (f) recalled that in ***Dubai Aluminium Co Ltd v Salaam*** [1999] Ll Rep 415, 467 Rix, J had recognised that equitable wrongdoing, although not a tort in the eyes of English law, had marked similarities with it.

The authorities

186. A series of recent authorities bear on the question whether actionability according to the law of the place where the events occurred is required for a claim in dishonest assistance: ***Arab Monetary Fund v Hashim***; ***Dubai Aluminium***; and ***Grupo Torras*** (at first instance and on appeal).

Arab Monetary Fund v Hashim

187. In ***Arab Monetary Fund v Hashim*** (29th July 1994), upon which Yugraneft particularly relies, Chadwick J was concerned with a contribution claim brought by First National Bank of Chicago and its affiliates ("FNBC") against Dr Hashim. The claimant, the Arab Monetary Fund ("AMF"), had sought damages against FNBC on the grounds that it had knowingly assisted Dr Hashim, AMF's former director-general, to misappropriate AMF's money. FNBC settled with AMF for $ 13.45 million and sought contribution from Dr Hashim, who had earlier been found liable to the AMF. Chadwick J addressed the question:

> "*whether and in what circumstances an English Court ought to recognise and enforce an equitable claim for monetary compensation based on fault where the fault alleged lies wholly in things done or not done in a foreign jurisdiction. This is a question to which the authorities provide no easy answer".*

He went on say (at pp.22-23) that "*The general rule is that the English court applies its own law; but, in so doing, takes into account (for the purposes of negating liability) the law of the country in which the act was done*" and added that this principle applies not only to "*tort (in the strict, common law, sense)*" but also to "***Barnes v Addy*** *constructive trust*" claims.

188. Then, having expressed a first requirement that the cause of action must be actionable as a matter of English law, Chadwick J went on to state (at pp.23-24):

> *"The second requirement as it seems to me, was that the English Court must have satisfied itself that there is no rule of any relevant foreign law which ...*

would provide a defence to the AMF's cause of action; or – as it might, perhaps, be put in the context of a Barnes v Addy constructive trust claim – would make it inequitable to hold that an FBC defendant should be treated as if it were a trustee. If, as the authorities show, the basis of such a claim is dishonesty or lack of probity on the part of the defendant, then it must be right to judge honesty or dishonesty in the light of all relevant circumstances; and those circumstances must include relevant provisions of the local law.

It follows that I think the appropriate course, in the present case, is to examine the evidence as to Swiss law not for the purposes of identifying any rule of that law which the English court would have been concerned to enforce, but rather for the purposes of deciding whether, having regard to the legal framework within which FNBC and its affiliates were conducting the operation of the numbered accounts at its Geneva branch, there was such dishonesty or lack of probity as would have made it equitable for the English court to treat those defendants as if they were trustees."[16]

189. The defendants submit that the passage in bold risks confusing two separate issues. The first issue is whether the claim is civilly actionable under the applicable foreign law. If the claim is not civilly actionable under the applicable law, that will provide a complete defence to the English claim. The second issue is whether there was such dishonesty or lack of probity as would have made it equitable for the English court to treat those defendants as if they were trustees as a matter of English law. The two issues are distinct. Whilst it may be appropriate to adjudge dishonesty "*in light of all relevant circumstances*" including the "*local law*" or "*legal framework*", that is separate and additional to the requirement that the claim should also be actionable where the events giving rise to the claim took place.

190. Chadwick J then considered the submission of counsel for Dr Hashim that the AMF could not have succeeded in a claim against FNBC unless it was shown that "*the conduct complained of would have been actionable as a civil wrong in the Swiss courts*" and counsel's reliance upon the statement of principle of Lord Wilberforce that "*a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed*".

191. Chadwick J then said (at p. 24):

"Lord Wilberforce was, of course, making those observations in the context of a claim for the recovery of damages for personal injury. Although the obligations in the passage cited are general in nature, ***I am not at all sure that Lord Wilberforce would have taken the view that conduct which was properly to be regarded as dishonest in the light of the relevant provisions of the local law – but, in respect of which the local law gave no civil remedy – ought not to be the subject of a successful Barnes v Addy constructive trust claim in England.*** *That was not a question which he can be taken to have had in mind. It is reasonably clear that Lord Donovan and Lord Pearson would not have*

16 Bold added as in other citations.

taken that view – see, ibid, at pages 383 D and 405F…."

192. It is not clear why exactly Chadwick J was not at all sure of this. If conduct which amounted to dishonesty in English eyes was not actionable by the foreign law, e.g. because it only involved economic loss, it is difficult to see why that would not be covered by Lord Wilberforce's reasoning. Lords Donovan and Pearson would not have taken that view because they accepted that it was sufficient that the conduct was criminal (even if not civilly actionable) – a view that was rejected by the Privy Council in **Red Sea**, a case to which Chadwick, J referred: p 21.

193. In the event Chadwick J did not have to resolve his doubts, which remained obiter. Instead, he expressed himself:

> *"….. content to assume that [counsel] is correct in his submission that the AMF would not have succeeded against the AMF Defendants in the English court if it were established that the conduct complained of was not actionable as a civil wrong under Swiss law. For the reasons which I shall explain below I am satisfied that the conduct of [the defendant] in relation to the operation of the numbered accounts…in relation to the disposal of those accounts – would have been actionable as a civil wrong in the Swiss courts. It is unnecessary, therefore, to decide whether that was a necessary requirement."*

194. The defendants submit that, if Chadwick J was suggesting that Lord Wilberforce's statement of "*broad principle*" was applicable only to claims "*for recovery of damages for personal injury*", he was incorrect. There is no good reason to suppose that Lord Wilberforce would not apply his "*broad principle*" equally to an equitable claim for dishonest assistance which is analogous to a tort. I agree.

Dubai Aluminium Co Ltd v Salaam

195. In ***Dubai Aluminium Co Ltd v Salaam*** [1999] 1 Lloyd's Rep 415, Rix J cited the passage from Chadwick J's judgment set out in paragraph 188 above. Rix J went on to consider dishonesty *"as a matter of English law"* against the background of Dubai *"custom and practice"* that might *"in theory"* be relevant (although not in practice as most of the acts were carried on outside Dubai). The case is, however, of no real assistance because, as the Court of Appeal observed in ***Grupo Torras v Al-Sabah*** [2001] CLC 221 at 134:

> *"Rix J did not find it necessary to go further into the appropriateness of double actionability to a claim for dishonest assistance, since he had no evidence of Dubai law (and it is therefore reasonable to infer that this point was not raised on the pleadings)."*

Grupo Torras v Al Sabah

196. In ***Grupo Torras v Al Sabah*** [1999] CLC 1469, Mance J. had to determine conflict of laws questions in respect of claims against the defendants alleging conspiracy to defraud and liability as a constructive trustee (in dishonest assistance or knowing receipt). First, he held (at p 1653) that the choice of law rule for conspiracy claims was

the double actionability rule in tort[17] and that the question for the courts was to "*look back over the series of events constituting it [the alleged tort] and ask themselves "Where in substance did this cause of action arise?"* On that basis, he found (at 1654H-1657) that the claims in conspiracy were, depending upon the particular transactions, governed in some cases by Spanish law, in other cases by English law and in one case by the law of Switzerland. He then considered actionability under Spanish law and found, *inter alia*, that the defendant Mr Folchi, who was GT's lawyer, was contractually liable in Spanish law (at 1662G-1663D). The claims against Mr Folchi included claims in conspiracy (which the judge rejected) and dishonest assistance (which he upheld) in respect of all the transactions with which he was said to be involved.

197. In a subsequent passage Mance, J considered the claim for liability as a constructive trustee. He referred, inter alia, to the judgment of Chadwick J of 29th July in ***AMF v Hashim.*** He said at 1670H-:

> *" Chadwick J expressly rejected as irrelevant to a dishonest assistance claim whether or not the relevant foreign law recognised the concept of proprietary rights under a trust: see p.42. A dishonest assistance claim is based on fault, and is not a claim to enforce a proprietary interest against the holder of the fund.*
>
> *The approach taken by Chadwick J at pp.45-46* [i.e. to judge honesty or dishonesty in the light of, inter alia, relevant provisions of the local law] *was adopted by Rix J in* ***Dubai Aluminium Ltd v Salaam*** *[1999] 1 Ll Rep 415 at pp. 452-453. The alternative approach, which Chadwick J identified and evidently did not prefer (although on the facts before him, he did not have to decide whether it was correct) would require full actionability under the relevant foreign law as well as under English law. I call this the full double actionability approach. I propose, sitting at first instance, simply to follow the view which Chadwick J preferred and Rix J adopted in these two previous first instance cases. But in this case also, it seems to me unlikely that the difference between that and the full double actionability approach would be decisive.*
>
> *In judging whether there is any role at all for foreign law, it seems appropriate to apply a similar 'substance' test to that applicable in tort. Mr Folchi's assistance was in substance rendered in Spain, although his activity in Geneva on 2/3 October 1990 was significant. Having regard to what I have said earlier in this judgment about his conduct, his knowledge and attitude, the conclusion which I reach is his conduct would be regarded as displaying a lack of honesty or probity in Spain."*

198. It is unclear precisely what Mance J took the "*full double actionability approach*" to mean. He may have meant, as I think he did, no more than that the action complained of must be actionable (to the same extent) as a civil wrong in the place where it occurred. That was the alternative approach which Chadwick, J, did not prefer.

Grupo Torras – *Court of Appeal*

17 The age of the case was such that the ***Private International Law (Miscellaneous Provisions) Act 1995*** was inapplicable.

199. Two defendants appealed to the Court of Appeal: Sheikh Khaled who was successful, and Mr Folchi who was not. Mr Folchi appealed against the finding of dishonest assistance in respect of all of the transactions on which claims were maintained against him.

200. It was common ground on the appeal that Mr Folchi was, as a matter of Spanish law, civilly liable to AMG for breach of contract. The Court noted at 260D-E: "*Mr Davies accepted that Mr Folchi would, on the judge's findings, have been liable to civil proceedings brought in Spain for breaches of his contractual duty as GT's lawyer.*" The Court of Appeal also upheld Mance J's findings that Mr Folchi had acted dishonestly in respect of each one of the transactions: see paragraphs 83 to 113.

201. The Court referred to **Dicey**'s expression of the double-actionability rule (then in Rule 205) viz:

> *"(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both:*
>
> *(a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and*
>
> *(b) actionable according to the law of a foreign country where it was done.*
>
> *2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties"*

202. The Court then referred to ***Boys v Chaplin***, and the different approach taken by Lord Wilberforce and Lord Pearson. It then referred to the judgment of Chadwick, J in ***Arab Monetary Fund v Hashim***. It first recorded that Chadwick, J had stated the basic reasons why the English court inquires into and acts on the law of a foreign country, as stated by Selwyn LJ in ***The Halley*** [1868] LR 2 PC 193**:**

> *"in these and similar cases the English court admits the proof of the foreign law as part of the circumstance attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and then it applies and enforces its own law so far as applicable to the case thus established".*

and went on to observe that Lord Wilberforce and Lord Pearson had cited this with approval in **Boys v Chaplin** and that Chadwick J had treated the principle as being "*general, and not restricted to claims in tort in the strict common law sense".*

203. The court then cited the passages of Chadwick, J's judgment referring to the two requirements, to which I have referred in paragraph 188 above. The formulation of these two requirements appears to me to constitute a form of double actionability. In

referring to the need to have "*no rule of any relevant foreign law which ... would provide a defence to the AMF's cause of action*" Chadwick, J appears to have had in mind rules which might render Dr Hashim's actions not unconscionable; but, as he recognised, there are other potential rules which would provide a defence.

204. The Court then referred to the fact that Mance J had indicated that he proposed to do the same as Chadwick, J. The Court then proceeded to set out the arguments of Counsel for Mr Folchi. Those were, so far as presently relevant, that the dishonest assistance claim had a closer connection with Spanish law than any other system, including English law. The submission was that, under Spanish law, which the judge should have applied, Mr Folchi was not liable for loss unless caused by his breach (he being liable under Spanish law for breaches of his contractual duty as GT's lawyer) and that it had not been so caused. The rival submission for GT on the issue of causation was that no foreign law could be relevant "*because the English court is concerned with English causes of action*".

205. The Court recorded (para 141) the submission that the judge was wrong not to apply

> *"the test of "full double actionability" (meaning, as we understand it, that Mr Folchi could not be held liable in the English court for dishonest assistance if the evidence of Spanish law showed that it did not recognise a liability with essentially the same ingredients and basis of liability). But Mr Davies produced no authority in support of that proposition and it appears to us to be contrary to a line of binding authority, including the decision of the House of Lords in* ***Boys v Chaplin*** *and the decision of this court in* ***Kuwait Oil Tanker Co v Al-Bader*** *[2000] 2 All ER (Comm) 27. In delivering the judgment of the Court in the latter case Nourse, LJ said (para 171):*
>
> > *"The rationale of the rule that the act or omission of the defendant must be actionable abroad in civil proceedings between the same parties is by way of safeguard against imposing liability upon a defendant in England as the lex fori for acts in respect of which there would be no liability in the lex loci delicti. However it is not necessary for the act or omission to be characterised as a tort or delict under the foreign law, provided that there is a right of recovery to a similar extent by civil action. The reasons of policy which dictate that the defendant should not be held liable in circumstances where, or to the extent that, he would not be held civilly liable in the country where the relevant acts or omissions took place, do not dictate that the legal basis of such liability should be the same. Indeed, the degree to which systems of civil law differ the world over, and the diversity of conceptual routes by which they impose liability on a defendant to compensate or otherwise make restitution to a claimant in respect of a civil wrong, militate against the requirement that the court of the lex fori should enmesh itself in an exercise of characterisation and fine distinction as between the remedies afforded by different jurisdictions to achieve a similar result".*

206. The Court later said:

" 142 ……Neither side challenged the judge's inevitable finding that Mr Folchi's assistance was substantially rendered in Spain, or his fining as to where the conspiracies were carried out (Croesus and Wardbase in Spain, Oakthorn I and II in England, Pincinco in Switzerland). Neither side sought to use the latter findings as a basis for varying the usual non-statutory tort rule cf rule 203(2) in the 12th and 205 (3) in the 13th editions of Dicey and Morris... *The position which Mr Davies most stoutly defended , and sought to hold to the last, was his point as to the need for individual liability and a sufficient causal link between individual fault and the ensuing loss.*

143. This was a point which Mr Davies had already taken in relation to an accessory liability for dishonest assistance under English law, regardless of any foreign element. We have already considered and rejected it, so far as English law is concerned (para 119).

144. However, the point become rather more formidable, at any rate as a theoretical point, when the Spanish dimension is added. Mr Folchi's putative liability under Spanish law would be for loss caused by breaches of his individual contractual duty to GT. It would not, on the judge's findings as to Spanish law, be an accessory liability for the wrongdoing of the conspirators. The need for a sufficient causal link between the defendant's fault and the claimant's loss cannot be regarded as a procedural rather than a substantive matter. The line of reasoning (based on ***The Halley****) which led Lord Pearson in* ***Boys v Chaplin****, to award general as well as special damages, seems not to have prevailed over the alternative line of reasoning followed by Lord Wilberforce and adopted and extended by the Privy Council in* ***Red Sea Insurance****.*

145. However in s V.1 (f) of his judgment, dealing with Spanish law, the judge did make a clear finding about Mr Folchi's individual responsibility for loss suffered by GT…"

207. The judgment then sets out a passage from Mance J's judgment dealing with Spanish law. Mance J had recorded that it was common ground that, in respect of contractual or extra contractual liability, individual causal responsibility would have to be shown. He then held that Mr Folchi was the lynch-pin of arrangements which were made for, and the instructions which were given in respect of, the relevant transaction and that had he taken any steps to stop them, their further implementation would have been impossible.

208. The judgment of the Court of Appeal concludes:

"*This passage is expressed hypothetically because it is part of the judgment dealing with Spanish law in relation to the conspiracy claims. The judge was not prepared to hold that Mr Folchi was a conspirator. But his findings of fact about what Mr Folchi did know, or shut his eyes to, take his conclusion out of the sphere of hypothesis. The assistance that Mr Folchi gave in all the transactions was crucial and without it they could not have taken place as they did. He was just as much a linchpin giving dishonest assistance as he would have been if he was a conspirator. It was the obvious duty of an honest lawyer to make more enquiries as to why very large sums of money were being dealt*

with in highly questionable ways, and to stop the transactions if he did not receive satisfactory explanations. Mr Davies' point on causation fails on the facts".

209. I draw the following conclusions from the judgment.

210. Firstly, the Court did not proceed upon the basis that it was sufficient to found liability that Mr Folchi was properly before the English Court and would have been under an accessory liability under English law whether or not his acts or omissions caused the loss claimed, i.e. GT's argument that "*the English court is concerned with English causes of action*" (see paras 142 – 144)[18]. If it had done so it would not have been necessary to consider any question of double actionability, full or otherwise, or whether the need to prove a causal link between fault and loss was a procedural or a substantive matter. If English law alone governed, then, once dishonest assistance was established, any other substantive law would be irrelevant and the argument for Mr Folchi would have failed *in limine*.

211. Secondly, the Court rejected a test of "*full double actionability*", in the sense in which it used that term, i.e. that Mr Folchi could not be liable in an English court for dishonest assistance if Spanish law did not recognise a liability with essentially the same ingredients and basis of liability: para 141.

212. Thirdly, the Court recognised the need for double actionability in the sense that Mr Folchi had to be shown to be civilly liable under Spanish law to the same extent as in English law: see the citation from *Kuwait Oil Tanker* in para 141. I see nothing in the judgment which indicates that the Court was doing no more than decide that, if it was necessary to apply Spanish law, GT would still succeed. It would have been odd for the Court to set out the double actionability rule and decide that *full* double actionability was not necessary, citing a judgment that indicated that "ordinary" double actionability was sufficient, if it meant that double actionability of whatever kind might not be required at all.

213. Fourthly, it found that double actionability had been shown. The appeal failed, not on the law i.e. that it was irrelevant to consider Spanish law, but on the facts, namely that the individual causal responsibility required by Spanish law had been established.

214. The Court of Appeal did not hold that all that the Court needed to do, in a case of dishonest assistance, was to make its assessment of *"dishonesty"* against the *"background"* of the local law or custom. It had already concluded that Mr Folchi's conduct was dishonest before embarking upon its analysis. It proceeded to consider causation under Spanish law because the claimant needed to establish civil liability "*to a similar extent*".

KOTC v Al Bader

18 In that case it would be necessary to prove, in a case of dishonest assistance that the defendant was an accessory to the breach of trust but not that the acts which made him so were, themselves, causative of the loss caused by the breach.

215. Yugraneft also placed reliance on ***KOTC v Al Bader*** [2000] 2 AER (Comm) 271 which was referred to by the Court of Appeal in ***Grupo Torras*.** In that case claims were made against directors, and another defendant who owed equivalent duties to the claimant, for misappropriation of the claimant's monies. The Court of Appeal approved a passage in Chadwick, J's judgment of 15th June 1994 in ***AMF v Hashim***, in which he said – in a case in which the claimant sought to recover from Dr Hashim on the ground that he had acted in breach of fiduciary duties which he owed under the law of Abu Dhabi - that the correct questions were:

> "(i*) What is the proper law which governs the relationship between the Defendant and the person for whose benefit those powers have been conferred, (ii) what, under that law, are the duties to which the Defendant is subject in relation to those powers, (iii) is the nature of those duties such that they would be regarded by an English court as fiduciary duties, and (iv) if so, is it unconscionable for the Defendant to retain those assets."*

216. I do not regard that passage, or the Court's approval of it, as touching upon the question of double-actionability in a claim in knowing receipt or knowing assistance. The Court of Appeal had made it plain before the citation that, although the trial judge had approached this claim on the basis that the defendants were constructive trustees (as would be the case in a claim in knowing receipt) they "*plainly*" were not. They were directors, or the equivalent, who were to be *treated* as if they were *actual* trustees. They owed obligations under the law of Kuwait to make restitution to the claimant of the funds misapplied by them. Chadwick, J, had held that the law of the UAE was the law of the relationship between Dr Hashim and that under that law Dr Hashim owed duties which would be characterised in England as fiduciary: see pages 319 and 328. He had referred to and relied on **Dicey** Rule 201 (2) (a), the predecessor rule to Rule 205, and decided that, giving effect to Rule 201 as a whole, there was nothing in it inconsistent with the formulation cited in the previous paragraph.

217. Accordingly, as I hold, in order to succeed in a claim in dishonest assistance it is necessary at common law for Yugraneft to show that the defendants are civilly liable under Russian law to the same extent as in English law.

218. There remains for consideration (a) the applicable test for determining whether or not there is any applicable role for foreign law; and (b) the impact of the ***Private International Law (Miscellaneous Provisions) Act 1995***.

219. As to the former, the test adopted in ***Grupo Torras*** in relation to the claim for dishonest assistance was to ask where in substance the cause of action was committed i.e. the same test as for tort[19]: see Mance J at 1671B. The Court of Appeal recorded at para 142 that no one challenged the "*inevitable*" finding that Mr Folchi's assistance was substantially rendered in Spain.

Private International Law (Miscellaneous Provisions) Act 1995

19 *Metall & Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 291.

220. Part III of the Act provides as follows:

CHOICE OF LAW IN TORT AND DELICT

9 Purpose of Part III

(1) The rules in this Part apply for choosing the law (in this Part referred to as "the applicable law") to be used for determining issues relating to tort or (for the purposes of the law of Scotland) delict.

(2) The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum.

……..

(4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort or delict has occurred.

(5) The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned.

(6) For the avoidance of doubt (and without prejudice to the operation of section 14 below) this Part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country.

(7) In this Part as it extends to any country within the United Kingdom, "the forum" means England and Wales, Scotland or Northern Ireland, as the case may be.

(8) In this Part "delict" includes quasi-delict.

10 Abolition of certain common law rules

The rules of the common law, in so far as they–

> *(a) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable; or*
>
> *(b) allow (as an exception from the rules falling within paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question,*

are hereby abolished so far as they apply to any claim in ***tort or delict*** *which is not excluded from the operation of this Part by section 13 below.*

11 Choice of applicable law: the general rule

(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being–

> *(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the*

country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant element or elements of those events occurred.

(3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

12. Choice of applicable law: displacemnt of general rule

(1) If it appears, in all the circumstances, from a comparison of–

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

221. Although for domestic purposes a claim in dishonest assistance is not a tort; ***Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*** [1990] 1 QB 391.474; ***Dubai Aluminium Co Ltd v Sallam*** [1999] Ll Rep 415, 467, it may be that its proper characterisation for the purposes of private international law is as a tort. If so, the court would have to apply only the law of the country in which the events constituting the dishonest assistance occurred or, if they occurred in more than one, the law of the country in which the most significant element or elements of those events occurred, unless section 12 applies.

222. I do not think it is necessary to determine the question of characterisation. The only matter that is relevant for the purposes of the defendants' application is whether Russian law is applicable, either by itself or in combination with English law.

223. If it was necessary, I would strongly incline to holding that a claim in dishonest assistance was, for the purposes of the 1995 Act a "tort". In ***Harding v Wealands*** [2006] UKHL the House of Lords assumed that Parliament intended that the expression "*questions of procedure*" used in Part III should be understood in the way that it would be understood in the field of private international law; and that the scheme of Part III would not work on any other basis[20]. The same must apply to the expression

20 The House held that the quantification of damages was to be regarded as a matter of procedure for private

"*tort*". Dishonest assistance, a form of equitable wrongdoing, is so closely analogous to a claim in tort (as characterised for purely domestic purposes) that it should, I would have thought, be so characterised for private international law purposes.

Where was the wrong committed?

224. I am also satisfied that in substance the cause of action was committed in Russia. The result would be the same if the question was where the most significant elements covering the wrong occurred, or which law had the closest and most real connection to the facts giving rise to the claim (the tests in restitution and trusts). The connecting factors with Russia are set out in the judgment of the Court of Appeal of the BVI: see paragraph 124 above. In the BVI proceedings Sibir contended (not without justification) that "*All the acts giving rise to the claims pleaded against the BVI defendants took place in Russia*". Much the same applies to the present claim. I set out in Appendix 2 to this judgment a further list of specific matters (derived, like that in paragraph 185, from a list of the defendants) establishing the overwhelmingly Russian connection.

English factors

225. If one looks for factors that connect the claim to England, they are few and far between. Millhouse was incorporated in London, but Mr Davidovich operated out of its Moscow Representative Office (which later became a separate Russian company), of which he was head. Yugraneft contends that the instructions to carry out the dilutions may have been given by Mr Abramovich from London. But this is belied by the evidence of Mr Abramovich's movements. Mr Abramovich has given very detailed evidence as to his movements, which, partly because of the security protection he enjoys, are a matter of record, which there is no reason to doubt. The EGMs took place in September 2002 and February 2003. Mr Abramovich spent only one full day in England in 2002, on 18 March 2002, and two part days on 17th and 19th March. He spent only 25 full days in England in 2003 (and 72 part days) – but none before 23 March 2003. Between the EGMs and around the time of the EGMs he was largely in Russia: see Mr Abramovich's Second Statement at paragraphs 57-59.

226. Yugraneft contends that it is inconceivable that Mr Davidovich and Mr Matevosov acted without the knowledge and approval of Millhouse Capital in London and Sibneft in Russia, and, in particular, Mr Shvidler of Sibneft and Mr Tenenbaum of Millhouse Capital. Mr Tenenbaum is a Canadian accountant, experienced in corporate finance and mergers and acquisitions. According to his evidence his role at Sibneft was to assist with Western orientated corporate finance such as Eurobonds, syndicated loans and pre-export finance. He was not involved in any Russian financing or Russian M & A deals. He had already moved to London by the time the Sibneft-Yugra licences were confined. He has no operational experience in oil and gas.

227. Mr Davidovich is a Russian businessman resident in Russia, who, on his evidence, did not visit England until July 2003. Mr Tenenbaum was paid considerably less than the $ 7 million paid to Mr Davidovich.

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international law purposes

228. No document or witness statement produced shows that Mr Tenenbaum was involved in or aware of Mr Davidovich's actions. Mr Tenenbaum's evidence, and that of Mr Heagren and Mr Davidovich, is that at the time of the EGMs (in September 2002 and February 2003) Millhouse in London was a very small operation. It was set up because of Mr Tenenbaum's desire to move to London from Moscow. Millhouse was established as a consultancy service and provider of administrative support to the major shareholders of Sibneft, their shareholders and ultimate beneficial owners including Mr Abramovich, in relation to their *personal* i.e. private assets owned or leased outside Russia. In the case of Mr Abramovich these were, in September 2001 principally a château in France, some real estate in England and elsewhere, a yacht, a plane and a helicopter. They now include assets worth hundreds of millions of dollars, with properties, acquired and renovated, in the UK, France, Sardinia, the USA and St Barts, and Chelsea FC.

229. In 2002 Millhouse had a small office in Weybridge, Surrey. It housed Mr Tenenbaum and 2 employees. In 2003 this grew slightly to Mr Tenenbaum and 5 employees. It has now increased to 28, providing consultancy services including analysing possible acquisitions of personal assets (such as a property in Colorado) and Mr Abramovich's personal affairs including his complicated travel arrangements by yacht and aeroplane. About 6 of them work on matters connected with Chelsea. Millhouse has never owned any significant assets or shares (as its accounts confirm) or controlled any companies.

230. By contrast the Moscow Representative Office (formed in February 2002) had 40 people working for it and 80 employees in 2003. Mr Heagren and Mr Tenenbaum have listed all of the employees of Millhouse Capital over the period.

231. The evidence of Mr Tenenbaum and Mr Davidovich is that Mr Davidovich operated under a general power of attorney, which has been produced, and which gave him power to run the Moscow operation autonomously. That is what he did. There was little regular contact between them about business matters during 2002-4. Millhouse in London and its Representative Office in Moscow were in practice two different organisations. Mr Tenenbaum was principally responsible for providing consultancy services to clients on matters relating to their private assets and interests. In the case of Mr Abramovich that was his varied real estate, Chelsea FC, and extensive travel arrangements. Mr Davidovich was responsible for providing corporate support and services in connection with their clients' business interest in Russia. The only two instances where, at the relevant time, Mr Tenenbaum had any material business dealings in Russia were (i) when he handed over to his successor at Sibneft; and (ii) when he was involved in the ultimately abortive Sibneft-Yukos merger. The intention was to merge the new Yukos/Sibneft entity with, or sell it to, an international oil and gas company. He gave some advice on international matters. He also assisted Sibneft in 2003 with regard to a proposed joint venture between Sibneft and Royal Dutch Shell. Mr Heagren describes in his witness statement (paras 17-19) how the two offices operated:

> *"...from the time that Millhouse Capital was established, there was a clear division of responsibilities between the English office and the Representative Office in Moscow. Any consultancy services with regard to any Russian*

transactions or investments would be dealt with by employees of Millhouse's Representative Office in Moscow. Already shortly after its establishment, the Representative Office was a much more significant operation with a much larger team of employees than Millhouse Capital in London. All the people who worked for the Representative Office always carried out their duties completely independently from Millhouse Capital in England. No directions or supervision or instructions came from our side. Apart from the obvious fact that the handful of us working at Millhouse Capital in England did not have the requisite background and experience to instruct the Russian employees about Russian business, it would have been impractical if the Representative Office had to answer to or take directions from people in England. Each office had its own remit and carried out its duties and responsibilities independently of the other. In addition, until quite recently, only a few of the Millhouse Capital employees in England spoke any Russian and only very few of the employees of the Representative Office in Moscow had a working command of English. To the limited extent that there has been any communication between the two offices, it has, therefore, at times been rather difficult.

The operations of the Representative Office essentially became the operations of a separate Russian company, Millhouse LLC in April 2006. However, little has changed in a practical or operational sense. Mr Tenenbaum and I (and our colleagues at Millhouse Capital) play no role in the duties or operations of Millhouse LLC just as we played no role in the duties or operations of the Representative Office.

Neither I, nor, to the best of my knowledge, anybody else at Millhouse Capital in England had, therefore, any involvement in any domestic Russian projects in 2002 or 2003. We certainly had no involvement in anything to do with the Sibneft-Yugra project which, as I understand it, was a Sibneft project in any case. I do not recall any operational or other Sibneft issues being addressed from the office in England."

232. Mr Tenenbaum's evidence, which is to the same effect, is that he was not in a position to give and did not give any directions or instructions to Mr Davidovich in relation to Sibneft-Yugra and that he only became aware of Sibneft-Yugra in Spring 2004, when Sibir published various statement sin the press complaining of the dilution of its interest. He adds (para 31 of his first statement):

> "*I have searched my files, emails and documents from 2002 to 2004 and I can confirm that I have in my possession no records or documents or other communications that relate to Sibneft-Yugra. I have asked the other officers and employees of Millhouse Capital from the relevant period to do so as well and they have confirmed the same to me*".

Mr Heagren has also undertaken a search of his relevant files and, as expected, found nothing related to Sibneft-Yugra. Mr Tenenbaum's evidence is that he has had no communications with any of the officers or directors of the six offshore companies in the relevant period (Mr Heagren's evidence is the same); nor the lawyers working for the Representative Office. Some of the new appointees to the Sibneft-Yugra board he had never met. Some he had met from his time at Sibneft but either had no

communication with in 2002 or 2003 or only on matters unrelated to Sibneft-Yugra. At the time most of the London office's efforts were devoted to the acquisition of Chelsea.

233. This evidence of Mr Tenenbaum's non-involvement is corroborated by that of Mr Shvidler, Mr Davidovich, and Mr Abramovich. In those circumstances and in the absence of any cogent evidence to the contrary, it seems to me that there is no realistic prospect of establishing that Mr Tenenbaum in England procured or instructed Mr Davidovich in relation to his acts at the EGMs in Russia or that he ran the dilution companies or managed the dilutions. A mass of documentary material shows, and the evidence of Mr Tenenbaum and Mr Heagren attests, that almost all of the individuals employed by Millhouse who were involved in the acts of the six offshore companies were Russians acting in Russia: see the list of Millhouse people connected to the six offshore companies and Sibneft-Yugra compiled by Yugraneft. Further, even if all the companies in the charts of company structures produced on behalf of Yugraneft are taken to be Mr Abramovich's nominees, it does not follow that Mr Tenenbaum in London was ordaining what they, and, in particular, the two sets of offshore companies, should do. Nor does the fact that Ms Maria Elia was a director of Millhouse and works for Meritservus show that that was so.

234. Even if Mr Tenenbaum had been involved, that would not in my judgment, even arguably, be sufficient to make the place where in substance the wrong took place as England.

235. The last matter for consideration is the significance, if any, of the sale of the shares in Sibneft to Gazprom. I do not regard this as taking the matter any further. Firstly, as will be apparent hereafter, I do not accept that the sale of the shares in Sibneft to Gazprom may be regarded as part of any dishonest assistance. Yugraneft may have (or have had) a claim against Sibneft, Gregory, Richard and Ferenco, as asserted (in effect for it) by Sibir in the BVI. But it cannot trace into a proportion of the shares in Sibneft held by Mr Abramovich (through the six Cypriot companies). Even if it could, the relevant events took place in Russia, where the sale to Gazprom was negotiated and implemented. That is the evidence of Mr Shvidler and Mr Abramovich which there is no reason to doubt. The proceeds of the Sibneft sale amounted to $ 13.1 billion of which only a small proportion has been expended in England. According to the evidence of Mr Heagren and Mr Tenenbaum it amounts, since October 2005 to, at most, £ 13.2 million on services from Millhouse, and £ 325.23 million on Chelsea Football club and property in England.

236. Accordingly, if the claim in dishonest assistance is to be regarded as a claim in tort for the purposes of the 1995 Act, the applicable law is that of Russia.

The governing law of the receipt based claims

237. Yugraneft's claims include three receipt based claims against Mr Abramovich: (i) knowing receipt; (ii) unjust enrichment; and (iii) a claim to a proprietary interest which seeks the imposition of a constructive trust or a proprietary lien over assets. The first two are personal "restitutionary" claims (see **Dicey** 34-041) which do not assert any proprietary right over the defendant's assets as the latter claim does. Yugraneft

contends that these claims are governed by English law: PoC 100. The receipt based claims are not brought against Millhouse, save to the extent that certain related relief is sought against Millhouse in the event that the proprietary claim against Mr Abramovich is established.

238. The basis for these claims is the allegation that the six offshore companies are to be regarded as Mr Abramovich's nominees, holding their property for him. On that footing Mr Abramovich received the participation interests in 2002 and 2003. The transfer of the interests from the first to the second set of offshore companies merely transferred an already received interest from one hand to another.

239. Rule 230 of **Dicey** (14th Edition) provides:

> *"(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.*
>
> *(2) The proper law of the obligation is (semble) determined as follows:*
>
> *a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract.*
>
> *b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);*
>
> *c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."*

240. The commentary explains that the general principle of English law is:

> *"to subject claims in the law of obligations to the law with which the obligation has its closest and most real connection*" i.e. "*of identifying the law which has the most significant connection with the claim*".

241. The principle in Rule 230 (2) has been so interpreted in ***Cheshire & North's Private International Law*** (13th Edn 199) at p 685 and by the Outer House of the Court of Session in ***Baring Bros & Co v Cunninghame DC*** (1996) TLR, 30th September where Lord Penrose held that a restitutionary obligation is governed by the law of that obligation and noted expressly that this meant the law of the country with which, in light of all the facts and circumstances, "*the critical events had their closest and most real connection*".

242. A number of dicta support the view that claims in unjust enrichment (absent a contractual relationship between the parties and other than claims to land) are governed by the law of the place of enrichment: ***In re Jogia*** [1988] 1 WLR 484, 495-6 (per Sir Nicolas Browne-Wilkinson); ***Arab Bank New York Ltd v Barclays Bank*** [1952] 2 TLR 920, 924; ***El Ajou v Dollar Land Holdings plc and another*** (Millett J) [1993] 3 All ER 717 (rev'd though not on restitution and private international law issues [1994]

2 All ER 685); ***Hongkong and Shanghai Banking Corp v United Overseas Bank*** [1993] 3 All ER 717 at 736; ***Thahir v Pertamina*** [1994] SLR 257.

243. But as **Dicey** points out at paras 34-030 ff there may be cases in which there is a divergence between the place of enrichment and the law which has the closest connection with the claim.

244. In ***Barros Mattos Jnr v Macdaniels Ltd*** [2005] EWCH 1323 Lawrence Collins, J, examined a number of authorities, including some of the above, and concluded that the weight of dicta on the applicable law of receipt-based restitutionary claims supported the application of the law of the place of receipt. But he also said that:

> *"117 ……There is, however, no decision of the Court of Appeal in which approval of Rule 200(2) (c)[21], or the application of a similar principle, is the ratio. Rule 200(2) (c) is a tentative formulation of the application of the basic principle in Rule 200(1) where the parties have no prior connection. There is no decision that Rule 200(2)(c) must be treated as a free-standing rule mechanically applying the law of the place where bank accounts are kept irrespective of the factual circumstances and irrespective of the particular issue.*
>
> *118 Here parties in Nigeria agreed that one was to sell to the other dollars for delivery in Switzerland in exchange for Nigerian currency in Nigeria. This is just the kind of case where the law of the place of the enrichment will not necessarily give an answer which corresponds to the law which has the closest connection with the claim or with the issue"*

245. The Court of Appeal of the Eastern Caribbean approached the matter thus:

> *"Lawrence Collins J showed in that review that it is not in all instances the law of the place of enrichment will be the proper law and stated so in his conclusion. As I understand the cases this is essentially because the law of the place of enrichment will not invariably be the law that has the closest connection with the claim.* ***Dicey and Morris*** *makes this very point.* ***Cheshire & North*** *makes the point even more firmly and argues against the tentative Rule 200(2) (c) and in favour of "a flexible solution". However, while there may be debate whether the principle contained in Rule 200(1) is to be applied by reliance upon even a tentatively advanced clause (2)(c), in my respectful view the review by Lawrence Collins J and the discussion of the cases in both of the leading texts put it beyond argument, not just that the obligation to restore the benefit of an enrichment obtained at another's expense is governed by the proper law of the obligation, which the appellant accepts, but (to use again the language of Cheshire and North) that "The proper law of the obligation refers to the law of the country with which the obligation has the closest and most real connection." That was the premise on which all the treatments proceeded."*

246. I agree with this view. I reject the suggestion that a claim in knowing receipt with a foreign element is to be regarded as determined simply by asking whether or not the receipt is such that, in the eye of English equity, it cannot in conscience be kept or

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21 Rule 200 was the corresponding rule in the 13th edition.

disposed of otherwise than by restoration to the equitable owner. Any obligation to restore an unjust enrichment, including a claim in knowing receipt as well as a claim in unjust enrichment itself, must in principle be determined by its proper law, which is, intrinsically, that law which has the closest connection with that obligation. Rule 230 (2) (a) – (c) indicates what, in the instances to which it refers, is likely to constitute that law. But the indicators of the likely result of the application of the principle cannot replace the principle itself. In the case of (c) the place of enrichment may, depending on the facts, be of the greatest importance or very little importance at all.

247. If there is a contractual or similar relationship between the claimant and the defendant, the law of that relationship is likely to govern. If the parties are complete strangers and the defendant is a recipient from a wrongdoer, the place of receipt is likely to be relevant, although that may well not be so if, for instance, the place of receipt is a transitory home. If the defendant is the primary wrongdoer or the instigator of, or someone vicariously responsible for, the wrongdoing, it is likely to be relevant to examine where the wrongdoing and its effects took place. As **Dicey** puts it at 34-06:

> *"[2 (c)] is not to be applied whenever the centre of gravity of the factors relevant to the obligation indicates that the proper law is different; and this will be more likely when the claim arises in connection with a wrong committed by the defendant against the claimant"*

Application of the test

248. In ***El Ajou v Dollar Land Holdings*** [1994] 2 AER 685 Hoffmann, LJ, explained the elements of a cause of action in knowing receipt. The plaintiff must show:

> *"…first, a disposal of the assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff[22]; and, thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of his fiduciary duty"*

The defendants' submissions

249. The defendants submit that, in the light of that exposition of the matters giving rise to a claim in knowing receipt, the closest connection of all of them is with Russia. As to the first, the *fiduciary duty* relied on by Yugraneft is said to arise from the duties owed in Russian law as a result of the position of Mr Matevosov as director, and Mr Davidovich as representative of Yugraneft, a Russian corporation. Further the disposal of assets relied on occurred in Russia where the EGMs took place and where the additional participation units were issued. The entity deprived of a beneficial interest in Sibneft-Yugra was Yugraneft, both of them Russian corporations.

250. As to the second, the beneficial *receipt* of the assets took place in Russia where the offshore companies and/or Sibneft obtained the participation interests that were allotted to them. Those interests exist in Russia and are vouched only in the form of entries in

22 In that case the tracing was possible because the bank accounts through which the proceeds had passed were charged in equity with the repayment of the claimant's money.

the records in Russia. Insofar as it is relevant to look at any enhanced value received by Mr Abramovich in respect of his shares in Sibneft that arose in Russia.

251. As to the third, *knowledge* on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty was acquired in Russia where Mr Abramovich (and Mr Matevosov) were at the material time.

Discussion

252. Since the law applicable to the receipt based claims is the proper law of the obligation to make restoration, it is not in my view necessary to examine the elements of the English action for knowing receipt in order to determine the nexus between those elements and Russia. That would be to assume that English law is applicable in order to determine whether Russian law was. Nevertheless the exercise is not without value insofar as it illustrates the factors likely to be material in a restitutionary claim.

The claimants' submissions

253. Yugraneft alleges that English law applies because Mr Abramovich has been enriched in England and, as Rule 230 (2) (c) indicates, that should be treated as the proper law of the obligation to restore. The basis upon which this is said to be so is that Mr Abramovich has elected to make England "*the major base of his personal and business affairs from which he enjoys and controls his wealth*" (PoC 100 (5); his affairs are, so far as presently relevant controlled by Millhouse, an English company; which is said to control "*the proceeds of the fraud*" on his behalf (PoC 100(2)); his "*real enrichment*" has been in England from which the sale of his stake in Sibneft to Gazprom was managed; he has invested some of the proceeds of the sale of the Sibneft shares in England.

254. I do not accept this analysis. Any unjust enrichment in this case took place upon the acquisition of additional participatory interests in Sibneft-Yugra in September 2002 and February 2003. If Mr Abramovich was the person enriched because the offshore companies are entities which hold their assets as nominees for him or for Millhouse as his agent (PoC 102), this happened in September 2002 and February 2003. Any obligation to restore arose then. What he did with his riches thereafter is nothing to the point on that question, save that the benefit which, in economic terms, he derived from the participation interests or their economic value, may be a measure of the value of his enrichment.

255. In determining which system of law is applicable, it is, therefore, necessary to focus on the events of 2002/2003. When I do so, it seems to me clear that the proper law of the obligation is Russia, where the wrongs occurred, where the new participation interests were issued, and where the relevant enrichment occurred. That is the country with which the obligation has its closest and most real connection.

256. There is an issue, with which I deal hereafter, as to whether Mr Abramovich was resident in England at the date of the service of the claim form in 2007. But, whatever the answer to that question, there is, in my view, no realistic prospect of establishing that Mr Abramovich was resident in England in 2002 and 2003. He was at that time resident in Russia and not in England.

257. On his evidence, which I see no reason to doubt (see para 468 - 470 below) he spent practically no time in England in 2002 or before March 2003 and only 25 full days in England in the whole of 2003. Thus, even if his place of residence in 2002/3 is to be regarded as the place of his enrichment, that place was not, for Mr Abramovich, England. The fact, if it be such, that Mr Abramovich subsequently became resident in England would not alter the position.

258. If the arrangements for the dilutions were being made by Millhouse *in London*, the position would not alter. Those arrangements were being made, on Yugraneft's case, at the behest of Mr Abramovich in Russia. In any event, as I have said, in the light of the evidence of Mr Tenenbaum, Mr Heagren and Mr Davidovich, and in the absence of any cogent evidence to the contrary, there does not seem to me to be any realistic prospect of establishing that the dilutions were managed by Mr Tenenbaum in England.

259. Even if Mr Abramovich was resident in England (as well as Russia) in 2002/3 I would not have regarded that as a compelling factor in favour of English law. That would not alter the place where the wrongs were committed or where the relevant enrichment occurred.

260. The fact that in September/October 2005, some three years after the first EGM, Mr Abramovich sold his shares in Sibneft does not alter the position. Even if the proceeds of the sale of the Sibneft shares represent the traceable proceeds of the participation interests (which they do not: see paragraphs 348 - 372 below) any obligation to make restitution or to account arises, as I have said, from the unlawful enrichment in 2002 and 2003. The law of the putative obligation to make restoration cannot alter retrospectively according to the manner of disposition of the interest received.

261. In any event the realisation of the proceeds took place in Russia (by the sale of shares in Sibneft to Gazprom by a sale agreement made in Russia and subject to Russian law). But there is no evidence, or reason to believe, that the bulk of the proceeds are held in London. The evidence is that only a very small proportion of the proceeds may have returned to London. Yugraneft seeks to say that the sale of Sibneft and the disposition and reinvestment of the proceeds was managed from Millhouse *in London*; but there seems to be no realistic prospect of establishing that. Even if there was it would make no difference.

262. Accordingly, as I hold, the knowing receipt claims are subject to the law of Russia. Exactly the same considerations as are set out in paragraphs 240 to 263 above apply to the claim in unjust enrichment, which falls squarely within Rule 230.

Actionability under Russian law

263. In the BVI Sibir accepted that Sibir and Yugraneft had no claims under Russian law and that the only feasible claim under that law was a claim by Sibir under the joint venture agreement. Yugraneft now claims that, on the contrary it does have good claims under that law. The defendants dispute that on several grounds. However, they accept that, without prejudice to their estoppel and abuse of process claim, the points of law that are in dispute cannot be resolved upon a summary application. They claimed, however that there are two grounds upon which the claims in Russian law are bound to fail. The first ground is that the claims are time barred. The second was that they would be bound to fail in the light of the rulings of the Senior Investigator.

Time bar

264. Section 1 of the ***Foreign Limitation Periods Act 1984*** provides as follows:

> *"1. Where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter--*
>
> *(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and*
>
> *(b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.*
>
> *(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.*
> ……
>
> *(4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.*
>
> *(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act.*

265. The effect of this section is that the limitation period is governed by the *lex causae*, or, if there are two *leges causae*, the limitation periods of both laws apply. In respect of the dishonest assistance claim Russia is one of the *leges causae*, and probably the sole one. In respect of the knowing receipt claim it is the only *lex causae*.

266. Section 2 of the Act provides :

> "*2. Exceptions to s. 1*

(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause ***undue hardship*** *to a person who is, or might be made, a party to the action or proceedings..."*

Russian law of limitation

267. Articles 195-6 and 198- 200 of the Civil Code of the Russian Federation provide:

*"**Article 195 The Concept of the Limitation Period***

The limitation period shall be recognised as the term fixed for the protection of the right by the claim of the person whose right has been violated.

Article 196 The General Term of the Limitation Period

The general term of the limitation period shall be laid down as three years

Article 198 Invalidity of the Agreement on Changing the Terms of the Limitation period

The terms of the limitation period and the order of their counting shall not be changed by an agreement between the parties.

The grounds for the suspension and the interruption of the proceeding of the terms of the limitation period shall be laid down by the present Code and by the other laws

Article 199 Application of Limitation Period

1. *The court shall accept a claim seeking to protect a right for consideration irrespective of expiration of the limitation period.*

2. *The limitation period shall be applied by the court only upon the application of the party to the dispute, filed before the court has passed the decision*

A counterparty to a dispute may demand the application of a limitation period, in which case the court would be bound by such a demand by the defendant and would have to dismiss the claim

Article 200 The Start of the Proceedings of the Term of the Limitation Period

1. *The proceeding of the term shall start from the day when the person has learned or should have learned about the violation of his right. Exceptions to this rule shall be established by the present Code and by the other laws."*

268. It is not disputed that, subject to the question as to when the limitation period starts, the mandatory 3 year limitation period applies to the claims in Russian law alleged against the defendants: see the reports, commissioned for the defendants, of Mr Rozenberg (Report 1, paras 22-56) and Professor Maggs (Report 1, para 18). Mr Rozenberg did not, in his first report, address any question of limitation in the event of a criminal finding. In his second report he said that this was, inter alia, because a criminal conviction is currently impossible. The instructions given on behalf of the claimant to Professor Sergeev in respect of his first report invited him to consider "*Whether any claim that Yugraneft may have against Millhouse Capital or Mr Abramovich would be time barred on the basis of limitation*". His report did not answer that question.

269. There can be no doubt but that Yugraneft was aware of what it asserts to be the violation of its rights more than 3 years before these proceedings were issued on 14th November 2007. It was so aware in or around March or April 2004. It began its first proceedings in Russia seeking to invalidate the decisions at the EGMs on 21st May 2004. Mr Cameron described 21st May in an affidavit submitted to the Eastern Caribbean Supreme Court as "*less than six weeks after Sibir learned of the dilution*".

Professor Sergeev's second report

270. In his second report Professor Sergeev accepted that the provisions set out in paragraph 268 above were the general Russian law provisions on limitation. He said that his conclusions on the issue of limitation were not included in his first report of 12th November 2007 (although he had explained his position to Clyde & Co[23]) "*because of the clear view that I had formed that there was no limitation problem with Yugraneft's claims*". Given the existence of the general 3 year limitation period and the fact that his reasons, given in the second report, for saying that it was not applicable are somewhat recondite, his failure to express his "*clear view*" is surprising.

271. In his first report (paras 45) Professor Sergeev had explained that Russian civil law does not recognise a free standing claim of "*civil fraud*":

> *"In reality and as a matter of **practice**, civil claims based on an allegation of fraud[24] can only be brought once a "finding" that such conduct has taken place has been made in criminal proceedings. This is because it is most difficult to persuade a Russian civil court to consider claims based on allegations of criminal conduct unless that conduct has been the subject of a ruling in criminal proceedings or as part of a criminal investigation or is supported by evidence produced in such proceedings or investigations. The civil court's*

23 As expounded in para 40 of Mr Friedman's first witness statement of 14th March 2008.
24 Both experts have used "fraud" in this context as meaning fraudulent behaviour which amounts to criminal conduct.

*reluctance in this regard is not based on any **substantive** provision which prevents then from making such findings. Nor is it based on any procedural requirement to this effect reflected in any provision of the Russian Civil, Arbitration or Criminal Procedural Codes. It is merely a matter of 'court practice' that stems from the civil courts' traditional 'dislike of trespassing on issues which it considers to be more appropriately the subject of criminal proceedings"*[25].

272. He then went on to state that a civil claim of fraud may be brought against anyone against whom a finding in criminal proceedings is made even if that person was not the accused, as is explicitly recognised in Article 54 of the Criminal Procedural Code which states that:

> *"An individual or a legal entity who pursuant to the Civil Code of the Russian Federation bears liability for damage caused by an offence, may be summoned as a civil defendant"*

Thus, if criminal proceedings are commenced, and result in a finding, against A & B, a civil claim may be brought against C under Article 1102, based on that finding, even though C was not a defendant in the criminal proceedings and no finding was made that he was the beneficiary of the fraud.

273. He had also explained that there are a number of circumstances in which criminal proceedings will be terminated without either a conviction or an exonerative decision. This may be on account of the death of the accused, an amnesty, or the expiry of a time limit or a change of circumstances. The termination of the criminal proceedings will not result in the dismissal of any civil claim made in those proceedings but such a claim will then not have been considered. The claimant would have to commence, and will be entitled to commence, a claim on the same basis in the civil courts. When proceedings are brought to an end for such a reason it is open to a court to make findings of fact on the evidence it has considered e.g. that a crime has taken place and the claimant will be able to rely upon such findings in support of his civil claim. In the absence of a court finding a claimant may be able to rely upon the conclusions of the investigator or prosecutor – in reality accusations based on the investigation carried out and evidence collected by the prosecuting authorities. In such a case – see footnote 6 to Mr Rozenberg's second report - the statute of limitation will be calculated from the moment the criminal investigation authorities "*render the respective act*".

274. In the case of a conviction the sentence of a criminal court establishing the circumstances of the crime is binding for the purposes of subsequent civil proceedings whether in the arbitazh courts or the courts of general jurisdiction: Article 69 (4) of the ***Arbitrazh Procedure Code***[26] and Article 61 (4) of the ***Civil Procedure Cod***e. If the relevant defendant is acquitted no question of bringing a claim based on his alleged crime can arise[27].

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25 It is not clear to me, but it is unnecessary to decide, how far this practice extends. Taken to its logical conclusion it would mean that every day wrongs (such as assaults or negligent road traffic accidents) were not civilly actionable absent a prosecution.

26 "*A criminal court sentence that came into legal force is mandatory for an arbitration court on the issues of whether certain actions took place and whether such actions were committed by certain individuals".*

27 ***Article 306 (2)*** of the ***Criminal Procedure Code*** requires the criminal court to dismiss a civil claim brought in

Professor Sergeev's views on limitation

275. In his second report Professor Sergeev explained that :

> *"**As part of the same practice** the Russian courts in such cases link the commencement of the limitation period to the date on which the competent authority makes a finding that the relevant activities constituted a crime. This is **deemed** to be the date on which the person whose rights are infringed became aware or should have become aware of the infringement within the meaning of paragraph 1 of Article 200 of the Civil Code."*

276. Professor Sergeev stated that the rationale for this special approach is this. The practice of the court only to allow civil claims based on an allegation of fraud to be brought once a "*finding*" that such conduct has taken place has been made in criminal proceedings limits the victim's ability to prove the infringement of his rights in a civil court as long as the relevant violations have not been determined to have constituted a crime. So the court considers, "*justly*", that the moment when the victim becomes aware or should become aware of the infringement of his right is the moment when the finding is made in the criminal proceedings. This is the case even if the actions that are construed as a civil offence have already been the subject of a civil claim that has been dismissed.

277. He gives as an example a shareholder who brings a civil claim contesting a decision allegedly made at a meeting of the company which the shareholder claims does not exist. The shareholder may fail to prove that and have his claim dismissed. But if the non-occurrence of the meeting is established in a criminal trial there can be either a re-trial or a fresh trial on the basis of that finding. In the latter case the limitation period will begin from the date when the relevant actions are construed as an offence by the competent authority in the subsequent criminal proceedings. As Professor Sergeev puts it:

> *".. in terms of its legal significance the classification of an infringer's actions as a criminal offence is equivalent to the party's awareness that his right has been infringed and therefore a circumstance which the law links to a commencement of the limitation period"* (para 16 2nd report).

278. Russian law provides time limits (6 – 10 years) within which criminal proceedings must be concluded. Yugraneft claims that in respect of some of the criminal conduct alleged the period is 10 years. The effect of the practices described in the previous paragraph is, thus, that a relevant finding may be made at any time up to the end of the criminal limitation period in which case the limitation period for the related civil claim may not expire until three years after the relevant finding.

279. Applying these principles Professor Sergeev concludes that the alleged actions of Messrs Matevosov and Davidovich amount to criminal offences under **Articles 159** and **165** of the **RF Criminal Code**; that the limitation period for liability for such offences

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criminal proceedings if those proceedings result in a not guilty verdict or the court terminates the proceedings on the grounds that no offence has been committed or that, although the offence was committed the defendant was not involved.

is "*at least*" 6 years and that, **if** the actions of the parties involved in the dilutions were construed by a criminal court or other competent authority as a fraud or some other criminal offence, the civil limitation period would commence from the date of that finding and only expire three years after that date: 2nd Report para 18.3. The decision of the Senior Investigator may be reviewed at any time and on unlimited occasions until the expiry of the limitation period for criminal liability.

Mr Rozenberg's response - Reports 2 and 3

280. In his second report Mr Rozenberg claimed that a distinction had to be made between (a) the statute of limitation applicable to a civil law claim for compensation; and (b) the statute of limitation applicable to a claim for compensation for damages inflicted by a crime[28]. The latter claims can only succeed where the competent court considering the criminal case finds that a crime has been committed.

281. Civil claims for compensation of losses inflicted by a crime may be filed (a) as part of ongoing criminal proceeding; or (b) in the civil courts following a criminal conviction. Claims in the former category are usually resolved by a criminal judge at the same time as he gives a (guilty) verdict in the criminal case. But he may leave the claim to be adjudicated upon by a civil judge after the verdict if, for instance, the claim is complex and its resolution would delay the verdict. It is rather uncustomary for claims to be filed in the second way.

282. The latter statement is in dispute. Professor Sergeev says that in about every fourth criminal case the civil claim is transferred for consideration in civil proceedings and that lodging a civil claim following the results of a criminal case is commonplace.

283. Theoretically it might be possible to file a civil claim for compensation for losses inflicted by a crime before the initiation of criminal proceedings and in anticipation of such proceedings. But, if this were done, the civil court would probably be bound to stay the claim pending the resolution of the criminal proceedings unless there is some delict independent of an allegation of crime that may give rise to civil liability on the part of the defendant. (Professor Sergeev's view is that, while suspension is possible, this would be an exceptional step). If, however, the competent state authorities have issued a ruling refusing to initiate the anticipated criminal proceedings on the basis that no crime has been committed, the civil claim for compensation of losses inflicted by a crime would be dismissed by the civil court. Other claims not based on the commission of a crime could, however, be brought.

284. Accordingly the time limit for a civil claim not based on the commission of a crime is the general three year period which begins when the claimant has or ought to have knowledge of the violation of his right. But he agrees with Professor Sergeev that the limitation period with respect to a claim for compensation for damages inflicted by a crime starts to run from the moment that the criminal conviction becomes effective. But there are no reasonable prospects of such a conviction.

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28 Mr Rozenberg cannot have been referring to two different limitation statutes but to the limitation provisions as applicable to the two different sets of circumstances.

285. Mr Rozenberg expresses the latter view on the basis that there have been two refusals to initiate proceedings. Mr Kotov has a right to ask for a review of these decisions by the prosecutor or head of the investigating body and a right of appeal to the court under *Articles 123-5* and *Article 148* of the *RF Criminal Procedure Code*. The court cannot direct the commencement of a prosecution. But it can declare the actions or failure to act of the relevant official unlawful or improper and "*state his or her obligation to correct the committed violation*". Section 1.5 of *Article 27 of that Code* provides that a criminal prosecution of a suspect or an accused shall be terminated where there is an unchallenged ruling against the suspect or accused refusing to initiate criminal proceedings which was issued by the competent criminal investigation authority.

286. No such challenge has been made to the refusals, which have legal effect as an expression of the authoritative will of the competent authorities as to the absence of any grounds to initiate criminal proceedings against Messrs Davidovich and Matevosov on the basis of the dilutions. In the light of the content of the rulings any further application for the initiation of criminal proceedings would have no realistic prospect of success; and in the absence of any criminal conviction for fraud no civil law claim against them may be brought.

Professor Sergeev's third report

287. Professor Sergeev returned to the fray in his third report. In it he expressed agreement with the statements in Mr Rozenberg's second report that "*The limitation period for civil claims based on a criminal conviction starts to run from the moment that the relevant conviction enters into force*" and "*from the moment that the relevant act is issued by the criminal prosecution authority*". He summarised his views thus:

(1) When a fraud occurs, the period within which a criminal verdict or finding can be made in respect of the fraud commences;

(2) A civil claimant who wants to bring a civil claim in respect of the fraud and any consequent damage needs, **in practice**, a criminal finding in order to support his case, which may be brought either within criminal proceedings, or separately and later in civil proceedings;

3) Accordingly, the first procedural step is for the civil claimant to make a complaint to the investigating authorities to encourage them to investigate the fraud;

4) Assuming that it is found in the course of the criminal proceedings that the crime has indeed taken place, the criminal process which is set in motion will provide a relevant finding or conviction qualifying the relevant actions as criminal conduct, subject to the circumstances.

5) The last effective finding in the case will be the trigger for a 3-year period (for unjust enrichment and damages claims) within which a civil claim can be brought against the defendant (both the person who has committed the crime and the relevant third party).

6) If the proceedings terminate for reasons other than conviction (say, the

death of the accused or an amnesty or the expiry of the period for criminal liability) the decision terminating the proceedings will ordinarily recite the state of the investigation and the evidence collected. If that includes evidence suggestive of fraudulent conduct, that will be taken as crystallising the claimant's knowledge and as starting the 3 year period for a civil claim. It will also be sufficient to interest a civil judge in the case, so that a claim can be brought;

7) The overall limit for bringing a civil claim is the criminal litigation period plus 3 years, on the basis that a relevant finding could be made in the criminal proceedings until the last day of the criminal limitation period which would initiate the 3 year period.

In his view "*the commencement of the limitation period does not begin before a competent body or a court issues a finding qualifying the relevant actions ... as criminal*"

Mr Rozenberg's fourth report

288. In his fourth expert report Mr Rozenberg produced a summary of his three earlier reports. In it he stated that the requirement of a finding of crime by a Russian criminal court or Russian investigative authorities in criminal proceedings as the pre-requisite for a successful civil claim based on allegations of fraud:

> "*derives from the **substantive jurisprudence** and practice of the Russian court based on the fundamental provision of the RF Constitution and RF Criminal Procedure Code (i.e. the principle of presumption of innocence, see Art 49 of the RF Constitution and Article 14 of the RF Criminal Procedure Code) that, unless and until there has been an actual finding of criminal liability in criminal proceedings in Russia, civil claims based on allegations of criminal conduct will not succeed*"

cp Professor Sergeev: see paragraph 272 above.

289. He also contended that

> *"In the absence of a criminal case or criminal charges, a civil claim (including a civil claim based on allegations of fraud or other criminal acts) which has not been brought within a limitation period of 3 years, **would be considered as time barred**"*

Professor Sergeev's last word

290. In a letter of 7th July 2008 Professor Sergeev commented on certain paragraphs of Mr Rozenberg's fourth report. In it he insisted that a relevant criminal finding is **not** a condition precedent in relation to a fraud related claim (or any other civil claim based on a criminal offence). It is merely a ***practical*** hurdle (unidentified in any substantive or even procedural law) that has to be met for reason of court practice, which is not a source of law in Russia. It is purely ***evidential*** in nature as is illustrated by the fact that a civil judge may accept findings in a criminal case which is terminated without a verdict. A criminal conviction is not part of the cause of action in Article 1064 (delict)

or 1102 (restitution):

> "*The argument that civil claims based on criminal conduct will not succeed on the ground that there is no civil cause of action before an actual finding of criminal liability in criminal proceedings in Russia .. is completely incorrect".*

291. He then expresses disagreement with the view that a fraud based claim would be time-barred after three years if no relevant criminal finding confirming the alleged fraud was made:

> *"4. As I have repeatedly stated, in a fraud based claim a victim's knowledge of the violation of his rights within the meaning of Article 200 (1) of the Russian Civil Code* ***becomes legally effective*** *on the date of a relevant finding. This is the fundamental rationale of the court practice by which the three year limitation period for bringing a claim is not deemed to commence until such a finding has been made. So, for example, if in this case a relevant criminal finding is made on the last day of the criminal liability period applicable to the actions alleged by Yugraneft, the limitation period in relation to its claims would not expire until three years after that date..*
>
> *5. It follows* ***logically*** *that, if there is no such finding[29], Yugraneft's possible knowledge about the violation of its rights would not be deemed in law to have crystallised* and therefore *the limitation period in relation to its civil law claims would simply not be triggered. If a claim based on the alleged fraud were brought at this point****, the claimant would fail for evidential reasons because he would not be able to get the civil court to entertain the fraud allegations in his case without a relevant criminal finding****. In this case on the basis of legislative provisions on the commencement of the limitation period currently in force* ***and taking into account the particularities of their application to civil law claims*** *based on criminal conduct, the court* ***should not dismiss the claim on limitation grounds".***

292. He ends by observing, in effect, that the 3 year limitation period does not run from actual knowledge of the fraud regardless of whether that knowledge is crystallised by a criminal finding. If that were so it would be impossible to explain what happens if a finding of the relevant conduct to be criminal is made later than 3 years after the crime since there is no basis under the Civil Code for a limitation period that has expired to start running anew. There are provisions in Chapter 12 of the Russian Civil Code for the suspension of the limitation period but none of them are applicable here.

Submissions

293. The defendants submit that the special approach of the Russian Courts in respect of convictions or findings in criminal proceedings is inapplicable in present circumstances

29 The antecedent to "*no such finding*" in paragraph 5 appears to be "*[no] relevant criminal finding ...[by] the last day of the criminal liability period*" rather than "*[no] relevant criminal finding*".

since there have been none.

Discussion

294. It is apparent from this summary of the experts' views that they are divided as to whether, if a claim were brought in Russia now, relying on conduct that amounts to a crime, it would or should be dismissed (i) on the ground that there has been no criminal finding *and* that the limitation period has expired, as Mr Rozenberg claims; or (ii) only on the former ground, as Professor Sergeev claims, the limitation period not having begun.

295. That issue seems to be one which is unlikely to arise in Russia. If, as Mr Rozenberg claims, a Russian court will not, as a matter of *substance*, entertain a claim based on conduct which amounts to a crime in the absence of a criminal finding, then, any such claim will be dismissed if there is no such finding. If, as Professor Sergeev states, it will not do so as a matter of *practice*, a Russian court is likely either to dismiss such a claim or at least to stay it. In each case it would not be necessary for the court to determine whether the claim was also statute barred.

296. In relation to each of the claims it is necessary for Yugraneft to show that the defendants are civilly liable in Russian law. That involves showing (a) that they are substantively valid and (b) that they are not time-barred.

297. As to (a) the defendants do not contend that, if there is no applicable time bar, Yugraneft still has no claim. But it is common ground that, insofar as the claims are founded (as they all are) on criminal conduct they would, in the absence of a criminal finding, fail either as a matter of substance (Mr Rozenberg) or practice (Professor Sergeev)[30]. But, although they would fail either way, different consequences would attend the manner of their failure.

298. In determining whether or not a defendant would be liable under a foreign law an English court will ignore any bar to recovery which is purely **procedural.** Thus, as *Dicey* points out at para 35-050, by reference to ***General Steam Navigation Co v Guillou*** (1843) 11 M & W 877, if the foreign law regards the defendant as under *no liability* unless other persons are sued first that rule is substantive and must be applied to English proceedings. If the foreign law regards the defendant as *liable* but makes that liability conditional on others being sued first the rule is procedural only and is to be ignored. Similarly if the foreign law provides that civil proceedings cannot be brought until a criminal prosecution has been brought, that requirement would be treated by an English court as procedural and a matter for the *lex fori*; ***Scott v Seymour*** (1862) 1 H & C 219, 230 and 234-7. See, also ***Grupo Torras SA v Al-Sabah*** [1999] CLC 1469 at 1661-1662.

30 There may be a dispute as to whether the Russian Court's refusal to entertain cases based on criminal conduct arises only if the pleadings specify that the conduct is criminal and identify a particular crime; or also arises if the facts pleaded amount to a crime. The defendants are content to proceed on the basis that the latter is, as Yugraneft claims, the case. That is, in any event, what I understand the experts to be saying.

299. According to Professor Sergeev, under the *substantive* law a civil action is maintainable for what amounts to a crime without a criminal finding, provided that the facts amounting to a crime give rise to liability under the Civil Code. If Professor Sergeev is right, the position in this respect is similar to that in ***Scott v Seymour***. Indeed the present case is, if anything, stronger in favour of the lex fori than ***Scott v Seymour***. In the latter case the law of the Kingdom of Naples required a prosecution (for assault) to precede a claim for compensation. Here it is the practice of the court that does so.

300. I am wholly satisfied that Professor Sergeev's view is a tenable one. Indeed it seems to me likely to be right. If so, the absence of any criminal finding does not mean that Yugraneft's crime-founded claims cannot, in an English court, be regarded as civilly actionable.

301. It is not clear to me whether Mr Rozenberg is, in truth, intending to say that, as a matter of substantive law, there is no liability for claims founded on criminal conduct, rather than that a claimant will not succeed in his action without one. If the former, then, since there has been no such finding, Yugraneft would not have had, when proceedings were commenced, and does not have now any cause of action based on facts which amount to a crime.

302. Under both approaches the three year limitation period would never in practice run from actual awareness (if it preceded the date of the criminal finding). If the matter is one of substance the law precludes a civil recovery based on a crime without a criminal finding; and, so soon as there is such a finding, the claimant's knowledge will be treated as arising upon conviction. If the matter is one of practice, the court will not entertain a claim based on a crime until there is a criminal finding, when the position on knowledge is the same.

The Russian law of limitation

303. The facts which amount to a crime may, as in this case, be ones which the victim knows as soon as the crime occurs. A victim's knowledge of the crime, actual or constructive, is not dependent on whether the relevant authorities have secured a criminal conviction or given a finding in respect of the offence.

304. Yugraneft contends that the special limitation period (applicable in the event of a criminal finding[31]) has not expired in Russia because the date of its deemed knowledge has not occurred and will not occur unless and until there is such a finding. So the starting point for the limitation period is not and cannot yet be determined. It cannot be said that the period has expired until such a finding occurs and three years elapse thereafter. As a result (a) the limitation period may never begin (if there never is a finding); (b) if it begins the date of its beginning is uncertain, save that it cannot begin later than the date of expiry of the relevant criminal time limit; and (c) whether and when it begins is dependant on whatever decisions are made to bring criminal proceedings and whatever rulings are made within them.

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31 i.e. a conviction or a ruling which is regarded as sufficient to enable a Russian civil court to entertain a civil claim based on criminal conduct.

305. If, therefore, a crime was committed in Russia, of which the claimant was aware, on January 1st 2000, and of which the defendant was convicted on 1st January 2004, and proceedings were commenced in England on 1st January 2005, the English Court would not regard the claim as time barred in Russian law. If Article 200 alone applied that would be so. But, for English law purposes, the Russian law of limitation includes, Yugraneft submits, the practice which the Russian courts apply that, in the event of an established crime, the Article 200 period is applicable only from the date of the conviction.

306. That example does not, however, address the position where there is no criminal conviction or finding. Since a Russian court will not entertain claims based on criminal conduct without a criminal finding, and, if there is such a finding, will treat knowledge as "*crystallising*" at its date, it can, in one sense be said that, for practical purposes, the limitation period for a civil claim based on criminal conduct is 3 years from the date of conviction and that, in such cases, Article 200 in practice applies only from the date of conviction.

307. Professor Sergeev's evidence makes clear that, in the event of a criminal finding, the court will deem the claimant's knowledge of the underlying criminal conduct to arise at the date of the conviction, regardless of whether he *in fact* had it before. This formulation suggests that such deeming will only be done *if* there is a criminal *finding* and not if there is only an *allegation* of a crime or even a finding in an English civil court of facts which would amount to a crime in Russian law. It will be made when a Russian court, applying Russian standards of proof and evidence, convicts. On that basis, in the absence of such a finding, the practice is inapplicable so that the only limitation period laid down in the law is Article 200.

308. However, in his letter of 7th July Professor Sergeev refers to the victim's knowledge becoming "*legally effective*" or "*crystallizing*" on the date of a relevant finding, and his overall conclusion appears to be that, even upon the expiry of the criminal liability period, the court should not dismiss the claim on limitation grounds. He would seem to be saying not only that, in the event of a finding, the victim will be deemed to have acquired knowledge only at that date, but also that, in the absence of a finding, he will be deemed *not* to have acquired it at all. I can think of no other grounds upon which, after the expiry of the criminal limitation period without a finding, the court should not dismiss the claim on limitation grounds, unless, as a matter of practice, when criminal conduct is in issue, and no criminal finding has been made, the Russian Court will simply decline to address any question of limitation.

309. That this is what Professor Sergeev may be saying, at any rate impliedly, appears in particular from paragraph 5 of his letter, which I set out again:

> *"It follows **logically** that, if there is no such finding Yugraneft's possible knowledge about the violation of its rights would not be deemed in law to have crystallised and **therefore** the limitation period in relation to its civil law claims would simply not be triggered. If a claim based on the alleged fraud were brought at this point**, the claimant would fail for evidential reasons because he would***

not be able to get the civil court to entertain the fraud allegations in his case without a relevant criminal finding. *In this case on the basis of legislative provisions on the commencement of the limitation period currently in force* ***and taking into account the particularities of their application to civil law claims*** *based on criminal conduct, the court* ***should not*** [32] ***dismiss the claim on limitation grounds".***

310. With due respect to Professor Sergeev, the logic does not seem to me to follow. The fact that, if there is a criminal finding, the victim is *deemed* to have acquired his knowledge of it at its date, does not necessarily mean that, in the absence of such a finding, he is deemed to have been ignorant – a presumption that is otiose if there is no criminal finding in existence and singularly otiose at the expiry of the criminal liability period. The rule of practice about knowledge can be regarded as a special provision applicable in the event of a criminal finding, but irrelevant in its absence.

311. If the sole matter at issue was whether or not the Russian courts, applying Russian law and procedure, would or could dismiss a claim based on criminal conduct on the ground of limitation, in the absence of a criminal finding, at any rate at the end of the criminal liability period, I would not have thought it appropriate, despite my doubts about Professor Sergeev's logic, to attempt to resolve the question on a summary application.

312. But the question for decision is, in my judgment, somewhat different. Yugraneft's claims would be unmaintainable in Russia for want of a criminal finding. However, for private international law purposes it is necessary to ignore the Russian practice not to entertain civil claims based on criminal conduct in the absence of a finding, as being a procedural matter. Yugraneft invokes that principle. But, if the Court is to ignore the practice then, as it seems to me, it should ignore the whole of it. Professor Sergeev's report makes clear that the practice of deeming the victim's knowledge to crystallize upon the event of a criminal finding is part and parcel of its practice not to entertain a claim based on criminal conduct in the absence of a criminal finding. This is not surprising. The need to deem (often contrary to the fact) that knowledge only arose when the criminal finding was given is necessitated, as a matter of justice, by the court's refusal to entertain claims in the absence of a criminal finding. There is no need for such deeming otherwise.

313. In those circumstances the question for the English Court is: what, leaving aside the Russian practice not to deal with cases based on criminal acts in the absence of a criminal finding, but, in the event of a criminal finding, to assume knowledge arises only from its date, is the Russian law of limitation? To that question, there seems to me only one answer. The law is as laid down in Article 200 of the Russian Civil Code.

314. Such a conclusion seems to me to make good sense; and to avoid the curious result which is said otherwise to arise, namely that, under Russian law there is (i) in the event of an allegation of non criminal conduct, a three year time limit from knowledge of the violation of the claimant's right; (ii) in the event of a criminal finding a three year limit from the date of the finding, which is, in practice, a pre-condition for any claim at all;

32 I note that Professor Sergeev does not say that it could not.

but (iii) if the claim is brought in England under Russian law, there is no limit, at least until a Russian criminal finding is made, and if none is made then no limit ever.

315. I have not forgotten that *Section 4* of the *1984 Act* requires the Court to apply:

> "*so much of the relevant law of* [Russia] *as (in any manner) makes provision with respect to a limitation period being applicable to the bringing of proceedings in respect of that matter in the courts of that country* [including]-
>
> *(a) … so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period."*

It is, also, material to note that the relevant foreign law may provide that proceedings may be brought within an indefinite period: *section 4 (2).*

316. In my judgment the relevant law does not include a practice, or part of a practice, which, if the claimant is to have any claim at all, the English Court is bound to ignore.

317. Accordingly there is in my judgment no realistic way in which Yugraneft can establish that it has a cause of action in Russian law in respect of either criminal (or non criminal) conduct which is not time-barred.

Section 2 (2) of the FLPA

318. Yugraneft contends that the application of section 1 of the Act would cause it, at least arguably, undue hardship. Yugraneft has attempted diligently to pursue its rights but has been stymied by decisions of the Russian investigative authorities, which are only explicable on the basis of incompetence or improper influence. In this respect they rely upon reports made by Professor Eksarkhopulo, the professor of criminalistics and criminal procedure at the University of St Petersburg.

319. He explains that there are 3 phases of the criminal process. First there is a *pre-investigation examination* when the relevant authorities receive and consider a report of a crime. Then there is the *pre-trial investigation stage.* Then there are the *court proceedings* themselves. The *pre-investigation examination* can be made by an Investigator, a police body or a police officer. The general time for making a decision about whether to commence the pre-investigation examination is three days. This can be extended by the head of the investigative body for up to 30 days. The investigator has a power to request documentary inspection at the pre-investigation examination stage. But he has much wider powers at the next stage, including power to require witnesses to answer questions under threat of criminal liability if they refuse to give information or knowingly give false information. An investigator is bound to initiate a criminal case if there are grounds to do so. Grounds means: "*the existence of sufficient information indicating signs of a crime*": Article 140.2 of the *Criminal Procedure Code* i.e. grounds for suspicion of a crime, even though the exact crime is not known. An investigator is required to refuse to initiate a criminal case if there are no such grounds: Article 148. But in this case, according to many scholars, the information received must

prove with certainty that there are no signs.

320. Professor Eksarkhopulo expresses the view that both rulings were "*unjustified, unmotivated and unlawful*". The chief points of his evidence are as follows:

a) The first stage should last 3 days. During that time the purpose of the investigation is to see whether there could have been a fraud. It is extraordinary that the Investigators did not take the case beyond that stage but instead extended that period. The effect of so doing was that none of those involved was interviewed under penalty of perjury and no relevant criminal finding (including incriminating evidence) could emerge.

b) The Senior Investigator purported to weigh up and resolve acute conflicts of evidence, preferring the account of Mr Davidovich about the alleged oral co-financing agreement to that of Mr Tchigirinsky, without sufficient reasoning. He did not present to Mr Tchigirinsky for comment any of the documents which are said to corroborate Mr Davidovich's argument that the dilutions were part of a legitimate security arrangement. He chose to rely on those documents even thought they all emanated from persons associated with Mr Davidovich without inquiring whether any independent person representing Yugraneft's interests was aware of them. He failed to take account of the possibility that the documents had been created in order to conceal the fraud.

c) He relied on the findings of the Russian civil courts when he must have known of their practice not to determine allegations of fraud without a criminal finding. He relied on the fact that the transactions and document relied on by Sibneft had never been contested on the grounds of deception, abuse of trust and that their legality had not been challenged, when these contentions had been raised in the BVI and, in so far as they were not raised in the Russian civil courts, that was because of that practice.

d) After a legitimate enquiry from a member of the Duma, the investigating authority rescinded its initial decision on the grounds that it was flawed, but then delivered another one in virtually identical terms.

321. Professor Eskarkhopulo indicates that decisions of this inadequacy are common in relation to criminal cases in the commercial sphere; since investigators often lack practical experience in the sphere of economics; have an excessive caseload and low wages. It is common for inappropriate pressure to be exerted on them by influential people. Corruption is quite widespread. Between September 2007 and late 2008 some 23,000 rulings have been made by prosecutors in relation to refusals to initiate criminal proceedings. Particular difficulty arises in procuring the investigation of criminal cases against influential people and honest investigators who try to discharge their

responsibilities have been penalised by being dismissed, forced to retire, or prosecuted.

322. Yugraneft contends that the decision not to prosecute was perverse and that it would be most unjust, within the meaning of section 2 (2) of the 1984 Act that it should be precluded from making a claim in respect of an egregious fraud on account of such unacceptable inactivity.

323. This contention is inconsistent with Yugraneft's claim that the Russian requirement of a prior criminal finding is not a provision of substantive law but a practice to which the English court will not give effect. If so, the refusal of the authorities to prosecute, whether competent or not, has not deprived Yugraneft of the ability to sue in England within the three year time limit. There is, moreover, nothing unjust *per se* about a time limit of three years from knowledge. If, on the other hand, a prior criminal finding is a requirement of substantive law, its absence is fatal to the claims regardless of the limitation position.

324. In any event, I am not persuaded that Yugraneft will suffer undue hardship by reason of the two refusals. Professor Eksarkhopulo's strictures may or may not be well founded. But Yugraneft has a remedy by way of appeal to a court. It is far from apparent to me that any such right of appeal is illusory. The decision can be administratively reviewed at any time until the expiry of the criminal limitation period. I do not regard it as an undue hardship for Yugraneft, a Russian entity and regular Russian litigant, to be dependent, if a prosecution is to be achieved, on a successful appeal to a Russian court and a change of heart from the prosecuting authorities.

Abuse of rights

325. In his second report (at paragraphs 22-26), Professor Sergeev suggests that the Claimant might be able to invoke the doctrine of "*Abuse of rights*". *Article 10* of the *RF Civil Code* provides:

> *"(1) Actions of citizens and legal persons taken exclusively with the intention to cause harm to another are not allowed, nor is abuse of a legal right allowed in other forms ...*
>
> *(2) In the case of failure to observe the requirements provided by Paragraph 1 of the present Article, the court, commercial court or court of private arbitration may refuse the person protection of the right belonging to him."*

326. Professor Sergeev suggests that this provision applies to a defendant's right to rely on the expiry of a limitation period as a defence. He understood the facts to be that Millhouse Capital obstructed Yugraneft from protecting its infringed rights by pursuing appropriate claims against it. It did so (a) by concealing the fact that it controlled on behalf of Mr Abramovich all of the offshore companies that participated in the dilutions and subsequently held and then sold Yugraneft's stolen interest in the capital of Sibneft-Yugra; (b) by using complex corporate entities including those offshore companies; and (c) by doing so gave a semblance of lawfulness to the dilutions and obstructed

Yugraneft from discovering the full picture as a result of which it lacked reliable information as to what was happening and as to the connection of the relevant participants, and the involvement of Millhouse and Mr Abramovich.

327. Professor Sergeev cites a case from the North Caucasus District Federal Arbitration Court in which a claimant sought to invalidate a resolution made at a shareholders' meeting. The defendant wrongly failed to include the claimant in the register of shareholders. As a result the claimant was prevented from challenging the decision at the meeting until the mistake was corrected. The defendant refused to correct the register which meant that the claimant was forced to begin separate court proceedings seeking to establish its standing as a shareholder. This meant that the claimant was completely disabled from lodging its claim challenging the resolution at the shareholders' meeting within the limitation period. Since the claimant's own wrongful behaviour directly prevented the bringing of the claim within the limitation period, the Court regarded the defendant's reliance on the limitation period as an "abuse of rights".

328. Mr Rozenberg doubts whether the Russian courts can ever apply the abuse of rights doctrine in the context of limitation periods. The Northern Caucasus decision was not subject to review by the Supreme Arbitazh Court and he could find no other example of a court adopting a similar approach. In January 2002 the Federal Arbitrazh Court of the Ural District stated that the abuse of right concept was inapplicable to the defendant's petition to apply the statute of limitation. He states that it is beyond doubt that even if the doctrine, a concept rarely applied by the Russian courts, is applicable to a limitation defence, it would have to be applied narrowly only to very exceptional circumstances: see Mr Rozenberg's 3rd Expert Report at paras 14-22.

329. On that material it is arguable that Article 10 (2) is capable of applying to a limitation plea. But it does not seem to me that there is any realistic prospect of Yugraneft establishing that the abuse of right doctrine applies to preclude the defendants in the present case from relying on a limitation defence. Whatever information Yugraneft claims it lacked, there is no basis for the allegation that it did not have sufficient information to bring its claims against either Mr Abramovich, who was a party to the BVI proceedings, or Millhouse within the limitation period.

330. It has long been part of Yugraneft's claim that Millhouse and Mr Abramovich were involved in the dilutions. In Sibir's Statement of Claim in the BVI proceedings at paragraph 38.3 it alleged:

> "*Mr Davidovich is an associate of Abramovich, and the managing director of the Moscow representative office of Millhouse Capital Limited (the English company through which Abramovich owns his beneficial interest in the majority of the issued share capital of Sibneft) and accustomed to act on behalf of and in accordance with the instruction of Abramovich. It is to be inferred that Mr Davidovich voted for the resolutions proposed at each of the September 2002 EGM and the February 2003 EGM on the instructions and/or at the behest of Abramovich.*"

331. In the BVI proceedings Mr Abramovich was said to have procured Sibneft's breaches of duty. Messrs Matevosov, Davidovich and Korsik were said to be acting both for Sibneft and Mr Abramovich and the six offshore companies were said to be nominees for Sibneft which was controlled by him. The fact that Millhouse lawyers had helped draft the dilution documents and that Millhouse employees were directors or representatives of the offshore companies appeared in the course of the BVI proceedings.

332. Similar allegations were made in the Russian proceedings. In what may be the draft version of the Russian criminal complaint, (the final version being received by the authorities on January 31st 2007) several of the directors of the offshore companies were identified as Millhouse employees - see at p.10(c)-(d). The "*criminal gang*", including Mr Abramovich, is described as controlling the offshore companies – pages 11-12).

333. The company filings from which details were obtained to construct the charts of the corporate relationships put before me are publicly available.

334. The claims against Mr Abramovich in the present proceedings include a claim for unfounded enrichment. In the light of the allegations made in the BVI and the information gleaned therein and thereafter, and the allegations made in the Russian criminal proceedings, there was nothing to prevent Yugraneft making the present claim against Mr Abramovich in time. Whether the offshore companies were nominees for Sibneft, and hence for Mr Abramovich, or for Millhouse and hence for him, or for him by some other route, makes little difference to Yugraneft's case which has always been, in essence, that Mr Abramovich was the puppet master of the six offshore companies. Further, according to Professor Sergeev the unfounded enrichment claim is dependent only on Mr Abramovich having received the benefit of the alleged fraud following the sale of that benefit to Gazprom at the expense of Yugraneft, without legal basis: 1st Report paras 36-42. That has always been Yugraneft's case.

335. In short there was no obstacle to bringing the present claim in unjust enrichment in time sufficient to mean that the raising of a limitation point constituted an "*abuse of rights*". The same applies to a claim against Millhouse and Mr Abramovich in tort. Dishonest assistance by Mr Davidovich of Millhouse and by Mr Abramovich has been asserted from the start.

Ratification

336. In his 1st Report at paragraph 33, Professor Sergeev noted that if the power of attorney granted to Mr Davidovich was:

> "*of a general nature (in other words that it granted him the right to undertake any legal actions on behalf of Millhouse Capital in Russia) any votes he cast at the Dilution Meetings for the purposes of advancing the interests of Millhouse Capital would be regarded as actions falling within the scope of such power of attorney*".

At paragraph 34, he then went on to consider what the position would be if his acts "*fell outside the scope of his authority*". In this case, Professor Sergeev suggested that "*if*

[Millhouse] accepted the benefit of any fraud and sold it with knowledge of the fraud" (referring presumably to Millhouse's later acts in 2005, in assisting in the sale of the Sibneft shares), this could have amounted to a "*ratification*" in Russian law. Article 183 (2) of the Civil Code provides that:

> *"The subsequent approval of a transaction by the representee shall create, amend and terminate for him the civil rights and duties by the relevant transaction from the moment of its being effected".*

337. Yugraneft suggested in its skeleton argument that an act of ratification occurring in 2005 would be an act falling within 3 years of the bringing of the proceedings and hence within the limitation period. If so, this would mean that the claim against Millhouse might survive the time bar.

338. In fact, as it appears, Mr Davidovich acted for Millhouse under a general power of attorney. Accordingly, the possibility that Millhouse might have ratified in 2005 actions taken in 2002 or 2003 on behalf of Millhouse does not arise – as Professor Sergeev, who originally did not have access to the actual power of attorney, accepts: Report 2 para 33.4 and 35.

339. In his 2nd Report at paragraph 35, Professor Sergeev suggests that the ratification point might still arise if, as he takes Mr Rozenberg to be suggesting, "*Mr Davidovich did not act at the relevant participants' meetings of Sibneft-Yugra as a representative of Millhouse Capital (which appears to be M.A. Rozenberg's position*)". See also paragraph 67 of Professor Sergeev's 3rd Report.

340. The defendants contend that Professor Sergeev has misconstrued the position. Millhouse could only possibly have "ratified" Mr Davidovich's conduct if there was some absence of authority for him to act for Millhouse. There was no such want of authority – as he had a general power of attorney giving him very broad powers indeed. The Defendants' position is not that he did not represent Millhouse owing to a lack of authority but rather that, on that occasion, Mr Davidovich was not acting for Millhouse at all, but for other parties (i.e. for Yugraneft or for Sibneft). If this is correct, Millhouse cannot have "ratified" his conduct. As Professor Maggs explains in his 3rd report:

> "*It stands to reason that the existence of a general power of attorney means that no question of "ratification" can arise. There are only two possibilities: either (on the Claimant's case) it could be found that Mr Davidovich in acting at the meetings was acting for Millhouse; alternatively, on the Defendant's case, it will be found that he was acting for Yugraneft or Sibneft. In the former case (i.e. Davidovich acting for Millhouse) it is obvious that no later ratification would be required or could arise. In the latter case (Davidovich acting for Yugraneft and/or Sibneft), equally no "ratification" by Millhouse would be possible because, ex hypothesi, Mr Davidovich would have been found to have been acting at the meetings as a representative of a different party (viz. Yugraneft and/or Sibneft). If Mr Davidovich were to be found to have been*

acting at the EGMs for Yugraneft and/or Sibneft rather than Millhouse, the later acts of Millhouse in assisting with the sale of Sibneft's shares could clearly not alter that finding. I am sure that even Professor Sergeev's overly broad interpretation of "ratification" could not stretch to encompass later acts retrospectively changing the person for whom a representative has acted."

341. Save that it seems to me possible to argue that, in relation to the EGMs, Mr Davidovich was acting for Yugraneft/Sibneft *and* Millhouse, I see no answer to Professor Maggs' analysis. I do not think that any question of ratification by Millhouse realistically arises.

342. Accordingly, as I hold, the present claims, whether in knowing assistance, knowing receipt or unjust enrichment, or their Russian equivalents, cannot succeed. They were brought outside the 3 year limitation period laid down by Article 200 of the Civil Code. There is no basis for the allegation of "*abuse of rights*" and no question of ratification arises. The claims should be dismissed because they are bound to fail as a matter of Russian law, and Yugraneft cannot recover if its claims are not civilly actionable under that law.

English law

Has Yugraneft's property been taken?

343. In respect of the knowing receipt, unjust enrichment and proprietary claims, it is necessary to determine whether or not the defendants can be said to have received any property of Yugraneft. I turn, therefore, to consider the process of following and tracing in English law.

Equitable proprietary claims

344. Yugraneft asserts a proprietary claim to the proceeds of the sale of the shares of Sibneft which are said to be currently held by Mr Abramovich or by Millhouse. Those proceeds are identified as "*the proportion of the purchase price paid by Gazprom for Mr Abramovich's interest in Sibneft which was attributable to inclusion in the sale of Yugraneft's share in Sibneft-Yugra*" (para 89(6) PoC - see also para 64 PoC). Yugraneft alleges that these "*assets of Mr Abramovich managed by Millhouse Capital represent, in significant measure, the interest in Sibneft-Yugra stolen from Yugraneft and/or dividends derived from that interest since the theft of it*" (PoC para 107). It states that it is "*entitled to trace its property into the hands of Mr Abramovich and/or Millhouse*" (PoC para 109). On this basis, Yugraneft seeks declarations and accounts, as well as to assert a constructive trust or equitable proprietary lien over what it calls the "*proceeds of the fraud*".

345. Yugraneft also claims a proprietary right to the assets into which those proceeds have, it infers, subsequently been reinvested. In particular, it suggests that it has a proprietary right over the shares in Evraz or some part of them (see paras 67-74). It is on the basis of this proprietary claim that Yugraneft brings its contingent claim against Mr Berezovsky. In particular, it alleges that, if Mr Berezovsky were to have his claim

satisfied by Mr Abramovich out of the proceeds of the sale of Mr Abramovich's Sibneft shares, then Mr Berezovsky would "*hold any proceeds received by him which derive from the inclusion in Sibneft's assets of Yugraneft's stolen interest in Sibneft-Yugra on constructive trust for Yugraneft and/or subject to an equitable lien in favour of Yugraneft to the extent of such part*" (PoC para 126).

346. The defendants claim that Yugraneft has no such proprietary claim to the proceeds of the sale of the Sibneft shares because it cannot establish a right to trace from its original participation interest into the proceeds of the sale of the Sibneft shares or into any assets purchased with those proceeds. Accordingly, the Claimant's proprietary claim for a constructive trust/proprietary lien and consequential accounts, declarations and enquiries should be summarily dismissed.

Tracing

347. Tracing is a process by which one property is identified as the substitute of another. As Lord Millett explained in ***Foskett v McKeown*** [2001] 1 AC 102:

> *"Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a Claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner...*
>
> *Tracing is thus neither a claim nor a remedy. It is merely the process by which a Claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the Claimants' property. It enables the Claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim."*

348. In the same case Lord Millett and Lord Steyn approved the following passage from Professor Birks' article "*The Necessity of a Unitary Law of Tracing*":

> *"The tracing exercise once completed, it can then be asked what rights, if any, the plaintiff can, on his particular facts, assert. It is at that point that it becomes relevant to recall that on some facts those rights will be personal, on others proprietary, on some legal and on others equitable."*

From this: "[it] *follows that the tracing exercise must be carried out first. Only then can the court consider what rights (if any) the claimant has in the assets that have been identified as being trust property or their identifiable substitutes*" (per Lewison J in ***Ultraframe v Fielding*** [2005] EWHC 1638 (4) at [1464]). If, as a result of the exercise Yugraneft cannot establish that the proceeds of the sale of Sibneft to Gazprom are a substitute for an asset of its own, no proprietary claim to them will arise. If it can, its rights to the substitute thus identified will have rights in respect of the proceeds which are not discretionary but proprietorial: see Lord Browne-Wilkinson at 109.

349. In order to be able successfully to trace property it is necessary for the claimant, firstly, to identify property of his, which has been unlawfully taken from him ("a proprietary base"); secondly, that that property has been used to acquire some other new identifiable property. The new property may then have been used to acquire another identifiable asset ("*a series of transactional link*s"). Thirdly the chain of substitutes must be unbroken.

350. As to the first, as Millett LJ said in ***Trustee of the Property of FC Jones & Son (A Firm) v Jones*** [1997] Ch 159.170, tracing is the process *by which the plaintiff establishes what has happened to his property and makes good his claim that the asset which he claims can properly be regarded as representing his property".*

351. As to the second, Lord Millett summarised the matter in ***Foskett v McKeown****:*

> *"The simplest case is where a trustee wrongfully misappropriates trust property and uses it exclusively to acquire other property for his own benefit. In such a case the beneficiary is entitled at his option either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund...*
>
> *Both remedies are proprietary and depend on successfully tracing the trust property into its proceeds. A beneficiary's claim against a trustee for breach of trust is a personal claim. It does not entitle him to priority over the trustee's general creditors unless he can trace the trust property into its product and establish a proprietary interest in the proceeds. If the beneficiary is unable to trace the trust property into its proceeds, he still has a personal claim against the trustee, but his claim will be unsecured.*
>
> *The beneficiary's proprietary claims to the trust property or its traceable proceeds can be maintained against the wrongdoer and anyone who derives title from him except a bona fide purchaser for value without notice of the breach of trust. The same rules apply even where there have been numerous successive transactions, so long as the tracing exercise is successful and no bona fide purchaser for value without notice has intervened.*
>
> *A more complicated case is where there is a mixed substitution. This occurs where the trust money represents only part of the cost of acquiring the new asset. As Ames pointed out in 'Following Misappropriated Property into its Product' (1906) Harvard Law Review 511, consistency requires that, if a trustee buys property partly with his own money and partly with trust money, the beneficiary should have the option of taking a proportionate part of the new property or a lien upon it, as may be most for his advantage.*
>
> *Accordingly, I would state the basic rule as follows. Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee*

mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset."

352. It is not sufficient to show no more than that possession of the claimant's asset by the defendant enabled the claimant to make a profit or obtain an asset that he would not otherwise have earned. Thus in ***Satnam Investments Ltd v Dunlop Heywood*** [1993] 3 All ER 652, the defendants, who were the claimant's agents handed confidential information to a business rival which had used it to acquire a development site which the claimant had wanted. The Court of Appeal rejected the suggestion that the rival (Mobaine) was a constructive trustee of the site for the claimant: Nourse LJ said:

"Clearly, DH and Mr Murray can be regarded as trustees of the information and, clearly, Morbaine can be regarded as having been a knowing recipient of it. However, even assuming, first, that confidential information can be treated as property for this purpose and, secondly, that but for the disclosure of the information Morbaine would not have acquired the Brewery Street site, we find it impossible, in knowing receipt, to hold that there was a sufficient basis for subjecting the Brewery Street site to the constructive trust for which Satnam contends. The information cannot be traced into the site and there is no other sufficient nexus between the two."

353. As to the third, once a right to trace has been lost, it is extinguished.

The defendants' submissions

354. The defendants submit, and I agree, that the claimant's pleaded case involves the following tracing exercise:

1) "Tracing" from the original participation interest held by Yugraneft into the new participation interests in Sibneft-Yugra issued to Carroll, Shaw, and Tranquillo (PoC paras 34-37);

2) Imputing the receipt by Carroll, Shaw and Tranquillo to Mr Abramovich personally i.e. treating their ownership of the participation interests as his ownership; (See PoC para 36)

3) Imputing the receipt by Richard, Gregory, and Ferenco on 3rd November 2003 to Mr Abramovich i.e. treating their ownership as equally being his ownership (PoC paras 48-52);

4) Upon the supposed transfer of the participation interests held by Richard, Gregory and Ferenco into Sibneft,[33] "tracing" the "value" of the participation interests received by Sibneft, or owned or controlled by Sibneft, into the "increased value" of the shares in the consolidated Sibneft group, which shares were held by offshore companies (which offshore companies were themselves indirectly owned by Mr Abramovich);

33 Alleged in the Particulars of Claim to have taken place in December 2003: PoC paras 53-57.

5) "Tracing" into the increased value of any dividends issued by Sibneft attributable to the presence of the Sibneft-Yugra participation interests that are received by the offshore companies.

6) Imputing the receipt of the increased value of the shares and of any increased dividends received held by the offshore companies to receipt by Mr Abramovich personally.

7) Tracing from the Sibneft shares into the cash proceeds of the sale of those shares to Gazprom to the extent that those cash proceeds were allegedly inflated by virtue of the presence of participation interests in Sibneft-Yugra owned by the Sibneft group.[34]

8) Imputing the receipt of those cash proceeds by offshore companies to receipt by Mr Abramovich personally.

9) Tracing into the assets (or part of the assets) that have been purchased with that part of the cash proceeds of the sale of the Sibneft shares attributable to the increased value (PoC paras 63-74).

10) Imputing the ownership of those assets to Mr Abramovich personally.

355. The defendants contend that all 10 steps are fallacious but, for immediate purposes, confine themselves to steps (1) and (4).

356. As to (1), Yugraneft's original property was 5000 roubles of nominal charter capital. Its initial participation interest in Sibneft-Yugra was governed by Sibneft-Yugra's Articles of Association. Article 3 provided that Sibneft-Yugra's registered capital "*shall be made up of the nominal value of its Members* [participation interest]. *The Company's registered capital shall be 10,000…roubles".* . The chose in action represented by those participation interests remains where it always has been – with Yugraneft. No property has ever been substituted for it. No question of substitution can arise when nothing has taken the place of that chose, nor have the new participation interests been obtained by the use of, or in exchange for, Yugraneft's original interest.

357. Yugraneft contends that it may be regarded as having had 49.8%, part of its original 50% interest taken or converted so as to become an interest of the first, and then the second, set of offshore companies. But the reality is that Yugraneft had issued to it a participation interest in Sibneft-Yugra which, as with ordinary shares, was denominated in roubles and totalled 5,000 out of a total capital of 10,000 roubles. Mathematically 5,000 is 50% of 10,0000. So Yugraneft's interest could accurately be described, and defined adjectivally, as a 50% interest in Sibneft-Yugra. But a percentage does no more than express a ratio between two figures. What Yugraneft obtained was a 5,000 rouble

34 It will be recalled that the defendants' evidence is that there was, in fact, no increased value paid for Mr Abramovich's shares as a result of the inclusion of these assets within the Sibneft group.

participation interest, and that it has never lost.

358. The creation of the new participation interests, which were not issued to it, has meant that the ratio which Yugraneft's 5,000 rouble interest bears to the totality of the participation interests has greatly diminished. But that does not mean that there has been a transfer of Yugraneft's share; any more than there is a transfer of ordinary shares, when the company issues many more than the original number of shares to others. Creation (by issuing) and transfer of shares are two different things: ***Re VGM Holdings Ltd*** [1942] Ch 235 at 240-1.

359. Nor is there any basis for saying that when the new participation interests were issued to the offshore companies they were the property of Yugraneft. No provision of Russian law indicates that that is so.

360. Professor Sergeev draws attention (at paragraph 27 of his first report) to a number of provisions of the Civil Code and of the Articles of Sibneft-Yugra which refer to "*the size of the share*" of each participant in the company's share capital, which according to Article 14 (2) of the *Law on Limited Liability Companies* is to be "*determined as a percentage or in the form of a fraction ...[corresponding] to the ratio between the nominal value of this share and the company's share capital*". He also refers to the fact that Article 3.2 of the Articles states that the shares shall be allotted to the Member as follows

> *"[Sibneft] has 50% of shares of the Company's charter capital. Nominal value of equity is 5,000 roubles*
>
> *[Yugraneft] 50% of the registered capital with a nominal value of 5,000 roubles*
>
> *On the date of the registration of the Company 100% of the charter capital was paid by shareholders' money."*

The references cited by Professor Sergeev were made in order to show that a participation interest was not simply a chose in action for 5,000 roubles. It carried with it a right to participate in the company proportionate to the size of the share as a percentage of all shares, so that an unlawful act which reduced that value, because, by the creation of additional participation interests it reduced the size of the share, was capable of amounting to harm within **Article 1064**: see paragraph 28 of the report.

361. I can see nothing in the provisions to which he refers, or in the amendments to the charter that were made in 2002 and 2003, to indicate that a participation interest is anything other than an interest of a particular nominal value in roubles, which constitutes, and is described or defined as, a percentage of the totality of interests issued. That interest will carry with it all the rights under the company's charter attaching to the holder of shares of a nominal value of (say) 5,000 roubles. The original charter capital was 10.000 roubles. Yugraneft had 5,000 roubles out of that, which was 50%. But the charter could be, and was, amended so as to increase the original capital (and, thereby alter the size of the shares i.e. the percentages) and create new

participation interests which are necessarily not the same as the original ones. That reduced the value of Yugraneft's 5,000 rouble interest. But I cannot see how that made the new interests in any way belong to Yugraneft; or deprived Yugraneft of its 5,000 rouble interest.

362. In his commentary on Article 1102 Professor Sergeev states that a claim for unjust enrichment requires that (i) the defendant received property; (ii) that he did so without legal basis; and (iii) that he received the property at the expense of another. As I stated in paragraph 87 above, he expresses the view that it does not matter if there are a number of steps between the wrongdoing in question and the enriched party as long as the trail to the defendant establishes that the latter has been enriched without legal basis. He also says that it may be the law that a claim to unjust enrichment could be made against participants of companies which have received the property which is the object of the enrichment. On that footing Mr Abramovich would be held liable if he received the benefit of the alleged fraud following the sale of that benefit to Gazprom[35]. All that is required is that he receives property without legal basis at the expense of the claimant. But that is not the same as saying that the interests which were issued to the dilution companies (and still remain with them) became in some (unexplained) manner the property of Yugraneft.

363. These considerations alone are sufficient to destroy Yugraneft's claim to follow or trace into the offshore companies.

364. Even if that obstacle could be overcome, and the new participation interests in Carroll, Shaw and Tranquillo could be regarded as belonging to Yugraneft, what Yugraneft seeks is to trace into the proceeds of the sale of Sibneft to Gazprom, on the footing that a part of the (increased) value of the shares in Sibneft represents the value of the interest in Sibneft-Yugra which Sibneft acquired prior to the sale by virtue of Richard, Gregory and Ferenco having become its subsidiaries prior to the sale.

365. It does not, however, seem to me possible to regard any increased value of Mr Abramovich's shareholding in Sibneft, or any increased amount paid for that shareholding, as in any real sense a substitute for the participation interests in Richard, Gregory and Ferenco. What happened was that the second set of offshore companies either were in, or came into, the ownership of the Sibneft group, when Mr Abramovich already owned a majority interest in Sibneft. In consequence, on Yugraneft's case, the value of Sibneft shares increased. At best there is a causal connection between the transfer and the increased value (value not itself being an asset) when what is required is a transactional link by which a new asset is exchanged for, and acquired with, the old one. The mere fact that a defendant has benefited from a breach of trust does not give rise to claims in knowing receipt or restitution. Nor, if tracing is no longer possible, can the claimant assert a lien over the trustee's assets to reflect the extent to which they might have been swollen by the contribution of the claimant's assets: **Snell** 28-41.

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35 Professor Sergeev's report does not address the question whether Mr Abramovich was enriched when the participation interests were issued, and, if so, whether in Russian law he is to be regarded as enriched again thereafter.

366. Mr Swainston sought to derive assistance from certain passages in the speeches of Lord Browne-Wilkinson and Lord Millett in ***Foskett v McKeown*** [2001] 1 AC 102, where they observed that when monies are traced into a defendant's bank account, the chose in action represented by the defendant's right against the bank to demand payment of the balance of the account remained the same but its value increased. So, in the present case the value of Mr Abramovich's shareholding in Sibneft increased by the inclusion in the Sibneft group of the second set of offshore companies, and Yugraneft was, it is submitted, entitled to trace into that increased value.

367. I do not regard the analogy as apposite. In the case postulated by Lords Browne-Wilkinson and Millett, the trust monies paid into the bank are substituted by an enhanced chose in action against the bank. To the extent that the right to claim from the bank was for an increased amount, that right was obtained by the use of the trust monies and in exchange for them. In the present case Mr Abramovich's rights as a shareholder in Sibneft were not acquired by the use of the participation interests, nor were those rights a substitute, or exchanged, for the participation interests.

368. Mr Swainston submitted that if a person who has received property paid to him by a mistake of which he is aware is to be regarded as a constructive trustee of that property how much more should that be the case if someone such as Mr Abramovich has received the benefit of a fraudulent scheme of which he was the architect. I disagree. In the circumstances postulated Mr Abramovich would be liable as a dishonest assistant. But if the proceeds of the sale to Gazprom are not trust property he cannot come under any liability in knowing receipt.

369. Nor is there any realistic possibility of piercing the corporate veil and treating Sibneft as if it was Mr Abramovich. In ***Trustor v Smallbone (No 2)*** [2001] 1 WLR 1177 the issue was whether the defendant was liable, together with the company, in knowing receipt in respect of assets received by the company which he controlled. Morritt LJ held:

> *"[14] Counsel for Trustor submitted that the circumstances were such as to warrant the court 'piercing the corporate veil' and recognising the receipt by Introcom as the receipt by Mr Smallbone. He suggested that the authorities justified such a course in three, potentially overlapping, categories, namely (1) where the company was shown to be a façade or sham with no unconnected third party involved, (2) where the company was involved in some impropriety and (3) where it is necessary to do so in the interests of justice and no unconnected third party is involved…*
>
> *[17] … The issue is whether the court is entitled to regard the receipt by Introcom as the receipt by Mr Smallbone …*
>
> *[21] … I consider that I should follow the later decisions of the Court of Appeal in* ***Adams v Cape Industries plc*** *[1990] Ch 433 and* ***Ord v Belhaven Pubs Ltd*** *[1998] BCC 607 and decline to apply so broad a proposition as that for which counsel for Trustor contends in the third principle referred to in paragraph 14 above.*

[22] The second proposition also appears to me to be too widely stated unless used in conjunction with the first. Companies are often involved in improprieties …but it would make undue roads into the principle of Salomon's case if an impropriety not linked to the use of the company's structure to avoid or conceal liability for that impropriety was enough…

[23] In my judgment the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individuals."[36]

370. Morritt LJ did, in the event, pierce the corporate veil because he found that the companies were shams created for the purpose of receiving monies diverted by the defendants in breach of their fiduciary duties. There is no realistic basis for contending that Sibneft is a façade or a sham. At all material times it was, and it remains, one of the largest oil companies in the world dealing in petroleum exploration, refining and marketing.

371. Accordingly, as I hold, Yugraneft has no realistic prospect of establishing a right to trace any asset of its own into the increased value of the Sibneft shares or the proceeds of the sale of those shares or into any assts purchased with those proceeds. Nor has it any right to trace into any dividends paid by Sibneft. These too are not a substitute for any Yugraneft asset.

Consequences

372. The effect of rejecting Yugraneft's proprietary claim for want of a proprietary base is that its personal restitutionary claims in knowing receipt must fail, because such a claim requires that the claimant establish that the defendants has received its property at some stage. As Millett J said in ***Boscawen v Bajwa*** [1996] 1 WLR 328,334:

"Tracing properly so-called, however, is neither a claim nor a remedy but a process. Moreover, it is not confined to the case where the plaintiff seeks a proprietary remedy; it is equally necessary where he seeks a ***personal*** *remedy against the* ***knowing recipient*** *or knowing assistant. It is the process by which the plaintiff traces what has happened to* ***his property,*** *identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and, if necessary, which they still retain) can properly be regarded as representing his property."*

373. Mr Swainston relied on ***A.G. for Hong Kong v Reid*** [1994] AC 1 as showing that there may be a duty to account for property to someone who was not the original owner of the property. In that case a Crown servant in Hong Kong was bribed and purchased two properties in New Zealand with the bribe. On those facts he was held to hold the properties on constructive trust for the Crown. But this was because the bribe, when received by him, although in *law* his property, was owed in equity to the Crown, to

36 This paragraph was cited with approval by Cooke J in ***Kensington International Limited v Republic of the Congo*** [2005] EWHC 2684 (Comm) at [188]. See also Cooke J's general discussion of piercing the corporate veil at [177]–[190], which was adopted in ***Raja v Hoogstraten and others (Amendment to Particulars of Claim)*** [2006] EWHC 2564 (Ch) at [30] per Pumfrey J.

which he owed a duty to account for the bribe since as a fiduciary it was unconscionable for him to retain the benefit of it. As soon as the bribe was received it was held on constructive trust for the Crown. See, also, ***Daraydan Holdings Ltd v Solland International Ltd*** [2005] Ch 119.

374. In ***El Ajou*** the defendants received what was traceable as the plaintiff's property because English law, which was held to be the *lex causae*, (there being no proof of any foreign law in any event), treated the monies as they passed through various Continental bank accounts as subject to a charge in favour of the plaintiff.

375. So, also, a person who acquires property of another with knowledge that that property has been transferred by mistake; or who steals such property, so that, in either case, his conscience is affected, is liable to account for the property of which he is a constructive trustee: ***Westdeutsche Bank v Islington LBC*** [1996] AC 669, 715B-C, 716 C-D.

376. Profits derived by a fiduciary from an opportunity, obtained as a result of acting as a fiduciary, which he is bound to use (if at all) only for the benefit of his principal, are regarded as profits for which the false fiduciary, and any company which has acquired the rights to the profits with knowledge of the circumstances, is accountable: ***Boardman v Phipps*** *[1967] 2 AC 46;* ***Cook v Deeks*** [1916] AC 554 ("*the defendants cannot retain the benefit of such contract for themselves but must be regarded as holding it on behalf of the company"*). A contract obtained by use of a "corporate opportunity", obtained as a result of being a trustee, may thus be regarded as held on trust for the entity to which the fiduciary duty is owed; and the opportunity itself might be regarded as a trust asset; but it does not follow that equity can trace from the contract into any specific asset of the fiduciary: ***Ultraframe (UK) Ltd v Fielding & Ors*** [2005] EWHC at paras 1473 and 1491.

377. Profits made by a third party who is a stranger to the trust, even if made as a result of the rendering of dishonest assistance, do not belong in equity to the beneficiary but are only subject to a personal obligation to account: **Snell** 28-45-6.

378. Yugraneft cannot and does not seek to rely on a "remedial constructive trust", i.e. the imposition of a trust as a remedy in an *ex post facto* exercise of judicial discretion. This would, by way of remedy, confer a proprietary interest in an asset to the claimant. Such a remedy is currently not recognized by English law. See ***Re Polly Peck International Plc (No.2) v Stone*** [1998] 3 All ER 812 (C.A.) at 823-827 and at 830-831.

Unjust enrichment

379. Similar considerations apply in respect of the claim in unjust enrichment. In ***Lipkin Gorman v Karpnale*** [1991] 2 AC 548 the claimant solicitors sought to recover from the gaming club at which their compulsive gambler partner used their money for gaming. He had obtained cash for gaming by getting a subordinate to cash cheques drawn on the firm's client account. In one instance he had endorsed a banker's draft drawn in favour of the firm to the club.

380. Lord Goff held that, in a case such as this:

> *"..the [claimant] has to establish a basis upon which he is entitled to the money. This (at least, as a general rule) he does by showing that the money is his legal property..If he can do so, he may be entitled to succeed in a claim against the third party for money had and received to his use, though not if the third party has received the money in good faith and for valuable consideration. The cases in which such a claim has succeeded are, I believe, very rare…This is probably because, at common law, property in money, like other fungibles, is lost as such when it is mixed with other money. Furthermore, it appears that in these cases the action for money had and received is not usually founded upon any wrong by the third party, such as conversion; nor is it said to be a case of waiver of tort. It is founded simply upon the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money – or, as we say nowadays, for the third party to retain the money would result in his* ***unjust enrichment*** *at the expense of the owner of the money.*
>
> *So, in the present case, the solicitors seek to show that the money in question was* ***their money*** *at common law. But their claim in the present case for money had and received is nevertheless a personal claim; it is not a proprietary claim, advanced on the basis that money remaining in the hands of the respondents is their property. Of course there is no doubt that, even if legal title to the money did vest in Cass immediately on receipt, nevertheless he would have held it on trust for his partners, who would accordingly have been entitled to trace it in equity into the hands of the respondents. However your Lordships are not concerned with an equitable tracing claim in the present case since no such case is advanced by the solicitors, who have been content to proceed at common law by a personal action, viz an action for money had and received…. On this aspect of the case, therefore, the only question is whether the solicitors can establish legal title to the money when received by [the partner] from the bank by drawing cheques on the client account without authority."*

381. The House of Lords held that at common law the firm was the owner of the chose in action constituted by the indebtedness of the bank to it and therefore could trace into the direct product of that property, namely the money drawn from the firm's bank account by the partner, and follow it into the hands of the casino. It is clear that the requirement that an asset of the claimant should have come into the hands of the defendant was regarded as an essential element of the cause of action.

382. I would not, however, on a summary application, be minded to regard Yugraneft as unable to claim in unjust enrichment. In ***Banque Financière de la Cité v Parc (Battersea) Ltd*** [1999] 1 AC 221, the House was concerned with a restitutionary claim in relation to a financial transaction of some complexity. The majority of the House determined the matter on the basis of equitable subrogation. But Lord Steyn, whilst agreeing that the same conclusion could be reached by the application of principles of subrogation, proceeded on the basis that there were four questions:

> *"(1) Has OOL benefited or been enriched?*
>
> *(2) Was the enrichment at the expense of BVC?*

(3) Was the enrichment unjust?

(4) Are there any defences?"

Having answered "Yes" to the first three questions and "No" to the fourth, he held that the appellants were entitled to recover.

383. Lord Clyde held that the principle of unjust enrichment, more fully expressed in the Latin formulation, *nemo debet locupletari aliena jactura,* required at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss.

384. It may be that these formulations, particularly the former, provide a route by which, on the alleged facts, Yugraneft could recover against Mr Abramovich in unjust enrichment, similarly to the way in which Professor Sergeev contends that it may recover under Article 1102. I do not, however, intend to add to a lengthy judgment by determining whether they do.

385. The result is that, if I was wrong to conclude that the knowing receipt and unjust enrichment claims are governed by the law of Russia, I would have concluded that the knowing receipt (but not necessarily the unjust enrichment) claim would fail in English law.

Dishonest assistance

386. Yugraneft's claim against Millhouse in dishonest assistance rests on (a) the acts of Mr Davidovich (and certain other Millhouse employees) in relation to the issue of the additional participation interest at the EGMs; and (b) Millhouse's actions in "*orchestrat[ing] the sale of Yugraneft's interest in Gazprom and the holding and reinvestment of the proceeds"*

387. Yugraneft's claim is, as I have held, governed by Russian law, either entirely, or in the sense that the matters complained of must be actionable by both Russian and English law.

388. In relation to (a) the defendants do not submit that if the dishonest claim was solely governed by English law it should be summarily struck out. But, in relation to (b), the claim is, the defendants submit, defective in English law. In order to render the defendant liable in dishonest assistance it is not necessary to show that the assistance has caused loss or damage additional to that resulting from the original breach of trust. Nor is it the case that there can be no dishonest assistance after the original breach of trust.

389. As Lord Millett observed in ***Twinsectra*** **Ltd v Yardley** [2000] 2 AC 164

(dissenting but not on this point):

> *"Liability is not restricted to the person whose breach of trust or fiduciary duty caused their original diversion. His liability is strict. Nor is it limited to those who assist him in the original breach. It extends to everyone who consciously assists in* ***the continuing diversion*** *of the money. Most of the cases have been concerned, not with assisting in the original breach, but in* ***covering it up*** *afterwards by helping to launder the money."*

390. But the assistance must have had some causative significance: see ***Brown v Bennett*** [1999] 1 BCLC, 659 ("*..if there is no causative effect and therefore no assistance given by the person, namely Oasis, on whom it is sought to establish the liability as a constructive trustee, for my part I cannot see that the requirements of conscience require any remedy at all*"). The position is accurately stated in ***Lewin*** at 40-21:

> *"In those cases where the breach of trust consists of misappropriation of assets, the breach will not end when the assets have initially been removed from the trust fund, but when they have been hidden away, beyond the reach of the beneficiaries who might seek their recovery."*

391. In the present case the alleged breach of trust by Mr Matevosov and/or Mr Davidovich happened years before the sale of Gazprom in late September 2005. The sale of the shares in Sibneft to Gazprom had no causative effect in relation to any breach of trust. That sale did not involve a continuing diversion of trust assets, the putting of trust assets out of reach, or a covering up of the original breach of trust. The Sibneft shares were never an asset into which Yugraneft could trace. Even if the new participation interests are to be regarded as trust assets, they remain to this day with the second set of offshore companies. The sale of Sibneft to Gazprom has made no difference. The fraud relied on had been widely alleged and proceedings in the BVI and Russia commenced before the sale to Gazprom. Between the first instance hearing in the BVI and the hearing in the Court of Appeal Sibir unsuccessfully sought an injunction against Sibneft and the second set of offshore companies to preserve the participation interests in the light of the impending sale.

392. In my judgment the defendants are right to say that the "orchestration" of the sale to Gazprom and of the reinvestment of the proceeds do not amount to dishonest assistance. But that does not render them irrelevant to the dishonest assistance claim. There is authority that a claim may be made against a dishonest assistant either for compensation for loss which the claimant has suffered as a result of the misapplication of trust property or other breach of trust; or for an account (as a personal not a proprietary remedy) of any profit that the dishonest assistant may make from his dishonest assistance or from the underlying breach of trust: ***Fyffes Group v Templeman*** [2000] 2 Lloyd's Rep 643; ***Ultraframe (UK) Ltd v Fielding*** [2005] EWHC 1638 (Ch). It seems to me at least arguable that any profit made by Mr Abramovich by reason of the inclusion of the participation interests in Sibneft when it was sold to Gazprom, was attributable to and resulted from the original dishonest assistance in relation to the EGMs (if there was any), even though the sale itself was not a further act of dishonest assistance, and that Mr Abramovich would be accountable (on a personal basis) therefore. If, as the defendants assert, no value was attributed to the

49% interests by either of the parties to the sale, and Mr Abramovich has, in effect, given them away, he is, nevertheless, accountable for whatever their true value was when he did so.

Issue Estoppel and Abuse of Process

393. The defendants further maintain that, even if I were to conclude that Yugraneft's claims enjoyed a real prospect of success on their face, Yugraneft is barred from maintaining them on the grounds of issue estoppel or abuse of process. They originally relied on the following contentions:

(i) Yugraneft is bound by the finding of the BVI courts that the receipt of the participation interests by the BVI offshore companies was legitimate. This precludes any argument that receipt by those companies was illegitimate (which in turn precludes any argument that receipt by those companies gives rise to any claim against Millhouse or Mr Abramovich).

(ii) Yugraneft is bound in these proceedings by the findings of the Russian courts that the issue of the participation interests to the offshore companies was lawful and legitimate. This precludes any argument that the issue of the participation interests was unlawful or illegitimate (which in turn precludes any argument that the issue of those participation interests gives rise to any claim against Millhouse or Mr Abramovich).

(iii) Yugraneft is not entitled in these proceedings to depart from the case which was advanced on its (or its privy's) behalf in the BVI proceedings and relied upon before both the first instance and appeal courts to the effect that there is no claim in Russian law against the offshore companies or Mr Abramovich.

(iv) Yugraneft is bound in these proceedings by the rulings of the Russian criminal Investigator to the effect that Mr Matevosov and Mr Davidovich committed no crime in relation to the issue of the participation interests to the offshore companies.

The proceedings in the BVI

394. I have already set out the nature of the proceedings in the BVI by Sibir against the six offshore companies, Sibneft and Mr Abramovich. The claim alleged that Sibneft had obtained the value of Yugraneft's interest in Sibneft-Yugra in breach of fiduciary duties owed under the joint venture agreement and that Mr Abramovich had dishonestly assisted in that breach. The receipt of the participation interests by the offshore companies was said to have been unlawful. The breach of duty consisted of Mr Davidovich's votes for the issue of the administration shares.

395. The BVI offshore companies successfully applied to strike out the claim against them on the grounds that the receipt based claims were subject to Russian law and that, as was then common ground, there was, under Russian law no cause of action against them.

396. In order for there to be an issue estoppel there must be (i) a final and conclusive judgment on the merits by a court of competent jurisdiction; (ii) between the same parties or their privies; and (iii) the issue decided in the former case on which the estoppel is sought to be founded must be the same as the issue in the later case and must have been necessary for the earlier decision: ***Carl Zeiss Stiftung v Rayner & Keeler*** [1967]1 AC 853; ***Desert Sun Loan v Hill*** [1996] 2 AER 847,854.

397. Issue estoppel is subject to a limited exception in:

> "*the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings*" ***Arnold v National Westminster Bank plc*** [1991] 2 AC 93.109.

398. The first condition is satisfied.

Privity of interest – Sibir and Yugraneft

399. As to the second, the question is whether Sibir and Yugraneft were privies. In ***Gleeson v J Whippell & Co Ltd*** [1977] 1 WLR 510,515 Megarry, VC, stated this test:

> *'Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him,* ***unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party****. It is in that sense that I would regard the phrase "privity of interest".'*

400. There are a number of decisions in which a shareholder has been held to be the privy of the company which he/it owned: e.g. ***Johnson v Gore Wood*** [2002] 2 AC 1, where the test enunciated by Megarry, VC in ***Gleeson*** was satisfied when the claimant in the previous proceedings was the corporate embodiment of Mr Johnson (who accepted that he and the company were privies); and ***Mamidoil v Okta*** [2003] 1 Lloyd's Rep 1, where Aikens, J, determined that there was privity of interest between Elpet and Okta, of which Elpet had become the 69.46% owner. The shareholder was bound by the decision against its subsidiary.

401. The fact that a person has given financial assistance, or even an indemnity, to a party does not, however, mean that he becomes his privy: ***Mercantile Investment v River***

Plate Trust [1894] 1 Ch 574 at 594-5, cited in ***Carl Zeiss*** at 911. In ***Gleeson*** Megarry J said that an agreement to indemnify creates no privity and that merely having some interest in the outcome is insufficient.

Yugraneft's submissions

402. Yugraneft contends that there is no privity between it and Sibir. The claim brought by Sibir in the BVI for breach of the joint venture was a claim which could *only* be brought by it. Sibir could not bring proceedings on behalf of Yugraneft because they would have been merely reflective of Yugraneft's loss. Sibir and Yugraneft are different entities under different control. Sibir is, and always has been, its own master. Yugraneft, however, at the time of the proceedings in the BVI was under bankruptcy administration, and under the control of Mr Kotov, its External Administrator. Mr Kotov was not invited to approve the BVI proceedings. The claims which Yugraneft now brings in respect of its own interest have been appraised by Mr Kotov and the English provisional liquidator.

403. Yugraneft further contends that the ***Gleeson*** formulation requires that it should be just to hold one party bound by a finding against another party, and such a result would not be just.

404. I regard that latter submission as tending to a gloss on the formulation, which relates to whether, having regard to the subject-matter of the current dispute, there is sufficient *identification* between A and B to make it just to determine that a decision against A in a previous suit is binding against B in the current one. The focus is on the nature of the relationship between A and B rather than a broad question of whether holding B bound by the decision against A would be a just result.

405. The matters relied on by Yugraneft are these. Firstly, the BVI proceedings were not conducted on the footing that Sibir was fighting Yugraneft's battle or bringing claims on behalf of Yugraneft with its authority. I do not find that a wholly accurate characterisation. Sibir did not purport to act on behalf of Yugraneft. But it did claim to recover a loss which was a reflection of Yugraneft's loss, upon the basis that Yugraneft was being impeded in making its own claim in Russia. As to that Yugraneft submits that in ***Mamidoil*** the subsidiary failed to establish that a contract to which it was a party was no longer binding. It was the appropriate disputant and it was right that its (69.46%) parent should not be able to go behind that. Here Sibir was the wrong claimant and Yugraneft, the correct claimant, should not be bound by the fact that the wrong claimant failed.

406. Secondly, the proceedings were conducted on the basis that the offshore companies were nominees of Sibneft, whereas, as it now turns out, they are likely to be Mr Abramovich's investment vehicles. This does not seem to me a compelling consideration. The offshore companies were said to be owned and controlled by Sibneft for whom they were nominees (SoC 13 and July 2005 skeleton para 21). Sibneft was also said to be controlled by Mr Abramovich, its ultimate beneficial owner (SoC para 9). What was and is effectively being said in both sets of proceedings is that the

offshore companies were, either directly or indirectly, the puppets or nominees of Mr Abramovich.

407. Thirdly**,** in the BVI proceedings the defendants proceeded on the basis, supported by Mr Rozenberg, that nothing in the BVI proceedings would obstruct any claims by Yugraneft per se[37] .That may be so. But the fact that Yugraneft can sue in Russia for whatever claim it may have does not mean that it would be unjust for it to be unable to claim here. England has a doctrine of issue estoppel. Russia does not.

408. Fourthly, Yugraneft submits that it is apparent that Professor Butler, the expert then retained, did not consider sufficiently the availability of fraud claims, when, as Professor Sergeev's evidence shows, fraud claims and related restitution claims are available. In effect Yugraneft asserts that the concession that Yugraneft had no Russian law claims was wrongly made. If, however, it is otherwise just to treat two parties as privies, the inadequacy of the expert evidence adduced in the prior proceedings cannot be a sufficient ground not to do so. The object of securing finality would be wholly defeated if parties could claim to relitigate the same issue with a different set of experts, or better counsel, or different tactics on the grounds that their original ones could have been better.

Conclusion on privity as between Yugraneft and Sibir

409. Whether or not there is a sufficient identity of interest is very much dependant on the facts of any particular case.

410. The defendants point to a number of substantial factors which may be said to make it just to hold that the decision against Sibir in the BVI in favour of the BVI offshore companies should be binding in proceedings in which Yugraneft, instead of Sibir, is the claimant. Sibir is now, indirectly, the 99.38% owner of Yugraneft. It is the promoter and funder of this action, which it encouraged the liquidator to initiate. If it is not the formal controller of the proceedings, it must have a dominant influence on their conduct. Sibir and Yugraneft share the same solicitors. In the BVI proceedings it was seeking restitution from the offshore companies to itself of Yugraneft's 49% interest in Sibneft-Yugra, or what was said to represent it, a claim which was reflective of Yugraneft's loss. That that was so was recognised in the argument in those proceedings where it was said that there were special reasons why it was entitled to claim.[38] If it had been successful in its action it could not honestly have retained the value of Yugraneft's interest without accounting for it to Yugraneft, at least so far as was necessary to satisfy its creditors.

411. There are, however, a number of countervailing considerations. At the time of the BVI judgments upon which the estoppel is sought to be founded, Sibir had a 43.6% interest in Yugraneft, those shares being pledged to Sibneft. It also had a 31.49% interest in

37 Mr Rozenberg's view was: "*Based on the above, the consideration of the Sibir Claim in BVI does not prevent per se consideration of Yugraneft's similar claim in the Russian state arbitration court based on the same merits under Articles 148 or 150 of APC because Yugraneft is not a party in the Sibir Claim."*

38 See also Yugraneft's skeleton argument in these proceedings, para 3: *"The loss claimed by Sibir was on the face of it bound to be reflective of loss suffered by Yugraneft".*

MOGC, which in turn owned 55% of Yugraneft, giving it a further indirect interest of 17.32%, making a total of 60.92%. (The history of its interest is set out in Appendix 4). This is not a case of a wholly owned subsidiary suing where its parent has failed. Yugraneft was in administration. Sibir was not making any decisions on its behalf. Only Mr Kotov could act or litigate on its behalf: see Sergeev 3, paragraph 63. He was not asked to approve the BVI proceedings, much less any actions taken in them.

412. The interests of Sibir and Yugraneft are not identical. Yugraneft had creditors other than Sibir, although not many. Sibir and related entities represent slightly over 75% of creditors' claims against Yugraneft which are eligible to vote in its liquidation. Of the remaining 25%, 22.44% of creditors claims eligible for voting purposes belong to Sibneft, now Gazpromneft. The Gazpromneft claim for voting purposes is about 261 million roubles. The total Gazpromneft claim is for 607 million roubles (about £ 12 million). The total claims in the liquidation are about £ 30 million. But these pale into insignificance by comparison to the size of Yugraneft's claim in these proceedings which Yugraneft puts at not less that $ 2 billion.

413. The claim in the BVI was brought for breach of the joint venture agreement to which Sibir, and not Yugraneft, was a party. Sibir's assertion that Yugraneft had no claim was advanced by Sibir because Sibir's claim would or might otherwise fail. That was in its interests but not necessarily in those of Yugraneft. The effect of assimilating Yugraneft and Sibir would be to foist upon Yugraneft decisions made by a company which was the ultimate beneficial owner of 60.92%, but which was not entitled to control it, in an action which it did not authorise. If a subsidiary company, having the primary claim, loses and its parent or owner is estopped from suing again, on the ground that it was behind the subsidiary, the estoppel works no prejudice on the subsidiary and its creditors. The subsidiary has already lost. But, if the parent loses and the subsidiary is estopped the subsidiary is prevented from bringing a claim it might have won. If Mr Kotov had been involved he would, in the interests of all the creditors, have to have considered Yugraneft's position very carefully before accepting that it had no claim in Russian law. Had he taken independent advice, as he would have been bound to do, there is a good chance that he would have been advised that there was a well arguable claim on the merits, as appears from the evidence of (i) Professor Sergeev, in particular in relation to Article 1102, which was not addressed in the BVI; (ii) Dr Micheler, who thought that Article 1064 covered economic damage; and (iii) Mr Rozenberg who had thought that there was a claim against Mr Matevosov and Mr Davidovich and any co-conspirators, provided there was a conviction. And the defendants would have accepted as they do now that there is, subject to the time bar point, an arguable claim.

414. I do not regard this question as free from difficulty. Deciding what it is just to hold requires consideration of a number of relevant factors and a determination of where, looking at the matter overall, justice lies. I have come to the conclusions that justice lies in treating Sibir and Yugraneft as having privity of interest. Sibir is the real party to this litigation and the person which will, overwhelmingly, benefit from its success. It is now effectively the owner of Yugraneft and was directly or indirectly the majority shareholder at the time. The most potent point against treating the two as privies is that this will prejudice the creditors of Yugraneft, other than Sibir, who will, ipso facto, be deprived of the benefit of a potential claim, and that Mr Kotov did not authorise the

BVI proceedings. But the amount of their claims is miniscule in comparison to the claims in this litigation. This action is in reality being advanced almost wholly for Sibir's benefit, and at its expense. The lack of authority from Mr Kotov, although not irrelevant, is not a bar to privity. If Sibir had succeeded in the action it would have been unjust to allow Yugraneft to ignore it, and claim a further $ 2 billion itself. It would be equally unjust to have allowed Yugraneft to advance in the BVI, almost exclusively for the benefit of Sibir, or to advance here a claim which Sibir itself had failed to establish. Given that Sibir has lost, Yugraneft ought not to be allowed to take over the running wholly unaffected by Sibir's failure.

Privity of interest: Abramovich and Millhouse

415. Millhouse was not a party to the BVI proceedings. Mr Abramovich was. In the event the judgment of the court in relation to him was that permission would not be given to serve him out of the jurisdiction. But that judgment in his favour was based on the fact that there was no claim against any of the BVI companies because the receipt by the BVI companies of the participation interests was not actionable by Sibir.

416. Millhouse claims to be nothing more than a service company which provides services to various companies. In the BVI Sibir claimed that Mr Abramovich was the ultimate beneficial owner of the majority of the capital and controller of Sibneft, that each of the second set of offshore companies were beneficially owned and/or controlled by Sibneft which was the beneficial owner of those companies' interests in Sibneft-Yugra, and that Sibneft would not act in the dilution without the prior knowledge and approval of Mr Abramovich and that Mr Davidovich of Millhouse acted at the EGMs on his instructions and/or at his behest . This was the basis of a claim in knowing assistance, not in knowing receipt. An account was sought from him of the value of the 49% interest in Sibneft-Yugra.

417. Yugraneft claims in these proceedings, as the basis of its claim in *knowing receipt*, that the proceeds of the fraud have been received by Mr Abramovich beneficially, in that they have been received into the hands of the offshore companies which "*have no independent control over the assets and hold them to the bidding of Millhouse Capital as agent for Mr Abramovich or of Mr Abramovich himself*": PoC para 102. This is in effect an averment that the offshore companies and Mr Abramovich are as one i.e. of privity of interest.

418. In those circumstances justice, as it seems to me, requires that a decision in the BVI that the receipt of Sibneft-Yugra participation interests, pursuant to the two EGMs, by two BVI companies in each set of offshore companies, does not give rise to liability for knowing receipt in Russian law (with the consequence that the remaining defendants, including the other two offshore companies and Mr Abramovich could not be served) should be binding in proceedings against Mr Abramovich and Millhouse, in which the complaint is that Mr Abramovich, through or assisted by Millhouse, has received those interests unlawfully because receipt by the offshore companies is to be regarded as receipt by him. If the claim is that the offshore companies and Mr Abramovich are, for receipt purposes, one and the same, it is just to regard them as one and the same for estoppel purposes. The question of estoppel must be addressed on the hypothesis that

the claimant's averments are established.

Identity of issues

419. The principal question for the BVI courts, once the applicability of Russian law was determined, was whether Sibir had any claim under that law against the BVI companies arising out of their receipt of the participation interests allotted to them at the September 2002/February 2003 EGMs. The four BVI offshore companies sought to strike out Sibir's claims against them on the basis that it did not. Charles J and the Court of Appeal decided that that was so: see paragraphs 92-3 and paragraph 10 of the judgment of the Court of Appeal.

420. The court decided that Sibir had no receipt based cause of action against the BVI defendants. Charles J also decided, *obiter*, that, if Sibir's claim had been maintainable, she would, nevertheless, have stayed the action on the ground that the proceedings were overwhelmingly concerned with Russia.

421. The court's decision on that question did not depend on any distinction between one offshore company and another. Nor, in the light of the expert evidence, did it depend on whether Sibir or Yugraneft was the claimant. It depended on whether an offshore company receiving a participation interest in Sibneft-Yugra pursuant to the EGMs was liable in respect of that receipt under Russian law. The agreed evidence was that it was not. The relevant paragraph of Charles J's judgment – paragraph 91 – records that:

> "*Sibir must show that its civil claim under Russian law has a real prospect of success. Its own evidence shows that it cannot. The affidavit of Professor Butler is quite clear: there is no claim against any of the defendants other than Sibneft in Russian law*".

422. Charles J's judgment does not in terms refer to any possible claim by Yugraneft and, in those circumstances I do not think she can be taken to have *decided* any more than that in Russian law Sibir would have no claim[39] . If that is too strict a view, and she must be taken to have decided that no company (whether Sibir or Yugraneft) had a claim, her decision in respect of Yugraneft was unnecessary for her decision against Sibir.

423. Sibir had put forward the present inability of itself and Yugraneft to recover from the defendants in Russia (a) as a defence to any contention that Sibir could not claim because it was suing for reflective loss; and (b) as a ground for refusing a stay, if the proceedings against the BVI defendants were not struck out. The first point became moot once it appeared that Russian law applied and Sibir had no claim under it. As to the second, the absence of a claim by Sibir or Yugraneft against any of the defendants was not a necessary part of the court's reasoning. This was, firstly because the court's decision on stay was only necessary in the event that the judge was wrong to dismiss the claims, which she was not, and secondly because, even on that footing, she decided that a stay was appropriate because of the overwhelming link with Russia. Her decision was not dependent on Yugraneft having no claim and would have been the same

39 The judgment – at paragraph 165 – refers under the heading "*Sibir's claims not actionable in Russia"* to the fact that *"none of the Defendants except Sibneft have actionable claims* [sc against them] *in Russian law"*.

whether it did or not.

424. In those circumstances it does not seem to me that the court decided any issue, or any issue necessary for its decision, which would estop Yugraneft *per rem judicatam* from maintaining any receipt based claim or any claim in knowing assistance.

Abuse of process

425. That conclusion is not determinative, since it is open to the court to dismiss proceedings as an abuse of process even though the somewhat technical conditions for an estoppel are not met.

Sibir's case in the BVI

426. In the BVI Professor Butler, instructed by Sibir, stated that there was no cause of action against the defendants except Sibneft under Russian law. Sibir argued that this fact was a prime reason why the Court should not stay proceedings in favour of Russia. Professor Butler's evidence was common ground and was accepted by Charles, J and the BVI Court of Appeal.

427. The defendants do not contend that Charles J's finding (or at least acceptance – see paragraph 165 of the judgment) that there was no cause of action against Mr Abramovich and the non-BVI offshore companies was a necessary part of her reasoning because she ultimately came to the conclusion that that fact did not prevent Russia from being the most appropriate forum: see paragraph 424-5 above. What they do contend is that, Sibir having advanced the argument in the BVI that no cause of action existed it would be an abuse of process for Yugraneft to perform a volte face and argue the opposite.

428. In this respect they refer to the statement of Lord Diplock in ***Hunter v Chief Constable of the West Midlands Police*** [1981] 3 WLR 906 :

> *"… abuse of the process of the High Court… concerns the inherent power which any court of justice must possess to prevent misuse of its procedure 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. The circumstances in which abuse of process can arise are very varied …"*

429. They also refer, by way of an analogy to a US doctrine described as "judicial estoppel" under which a party who assumes a particular position in litigation and succeeds in persuading the court to accept that position may not be permitted to take an inconsistent position in later litigation. The Court of Appeals for the Sixth Circuit explained the position in ***Edwards v Aetna Life and Casualty*** 690 F 2s 595 (1982):

> "*The policies supporting judicial estoppel are different from those that support the more common doctrines of issue preclusion, equitable and collateral estoppel. Courts apply equitable estoppel to prevent a party from contradicting*

a position taken in a prior judicial proceeding…. Equitable estoppel enables a party to avoid litigating, in the second proceeding, claims which are plainly inconsistent with those litigated in the first proceeding. Because the doctrine is intended to ensure fair dealing between the parties, the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon his opponent's prior position. See Id. at 689-90. Collateral estoppel prevents relitigation of factual matters that were fully considered and decided in a prior proceeding. Thus, collateral estoppel operates to prevent repetitive litigation. ....

The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding…. Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. .... This distinction reflects the difference in the policies served by the two rules. Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is intended to protect the integrity of the judicial process. ... Scarano v. Central R. Co., 203 F.2d 510, 512-13 (3rd Cir. 1953) ("such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the court should not tolerate.") The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. ... Collateral estoppel is essentially a finality rule, which serves to conserve judicial resources by precluding the litigation of issues previously decided. Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled. ....”

430. Sibir mounted a claim based on the contention that the receipt by the six offshore companies of the participation interests (knowingly assisted by Mr Abramovich) was unlawful. It failed in that attempt since the BVI Courts, held that the relevant law is the law of Russia, by which law Sibir has no claim. They did so as a result of Sibir's own contention that there was no claim in Russian law by Sibir (or Yugraneft). Now through Yugraneft, its privy, it seeks to bring a claim in knowing receipt against Mr Abramovich and Millhouse, on the footing that the receipt was unlawful in Russian law. Yugraneft also seeks to bring a claim in knowing assistance against Mr Abramovich when Sibir had previously claimed that the BVI court should refuse a stay on the ground that neither it not Yugraneft had any claim. That seems to me an abuse of the process of the courts. Part of the rationale for the doctrine is the protection of the Court's process and avoidance of the harassment of defendants. Sibir's changes of tack and jurisdiction, alleging, at one moment, that the claims are governed by BVI law as the place of receipt, then BVI law as the law of the forum, then English law as the place of enrichment, and that Russian law (a) does not and (b) does afford a remedy, seems to me to offend on both counts. This is not only an example of forum shopping but of issue switching which the courts should not be prepared to tolerate.

New evidence

431. Mr Swainston submits that the evidence that has come in during and after the BVI proceedings provides an exception to any estoppel that might otherwise arise. The new evidence consists of the information that the Russian individuals, in addition to Mr Matevosov and Mr Davidovich, involved in the EGMs and the transfer between the two sets of offshore companies were, for the most part, Millhouse personnel. He relies on the fact that the BVI proceedings were conducted on the basis that the offshore companies were nominees of Sibneft when it now looks, on the basis of the investigation carried out in 2007, as if they are part of a group of offshore companies which the London office of Millhouse was established to administer/manage/control and that Millhouse, directed from London, orchestrated the arrangements to dilute Yugraneft's interest, the sale of Gazprom and the reinvestment of the proceeds.

432. Since I do not regard Sibir as estopped from bringing its claim it is not necessary to decide whether the exception applies. I do not regard the matters that Yugraneft relies on to be such as to undermine my conclusion on abuse of process.

433. Accordingly, I would also strike the proceedings out against both defendants as an abuse of the process of the court.

Russian civil procædings

434. I have set out in paragraphs 89-95 above and in Appendix 1 the proceedings in Russia which have been taken by Yugraneft against the offshore companies in Sibneft in which it has alleged that the issue of the participation interest to the offshore companies was unlawful and in each of which Yugraneft ultimately failed.

435. The following decisions are of particular relevance:

(a) The Decision of the Arbitrazh Court of the **Khanty-Mansiysk Autonomous Region,** Case No. A75-4601/2005 dated *5th July 2005*, upheld through various stages of appeal. This found (amongst other things) that Mr Matevosov acted legitimately in giving a power of attorney to Mr Davidovich to represent Yugraneft at the EGMs, and that Mr Davidovich was present and voted at the EGMs as an authorized representative of Yugraneft.

(b) The judgment on appeal dated *19 July 2005* in Case No. 09AP6918/05-GK by the **Ninth Arbitrazh Appeal Court in Moscow**. This dismissed Yugraneft's claim that (amongst other things) Mr Matevosov had acted contrary to the company's interests. That judgment was upheld on further appeal by a Judgment dated 15 December 2005 of the Federal Arbitrazh Court which held that the actions of Mr Matevosov in waiving Yugraneft's right to purchase the participation interests had been legitimate.

(c) The judgment on appeal dated *23 November 2005* in Case No. F04-7976/2005(16692-A75-21) of the **West Siberian District Federal Arbitrazh Court** in which the Court concluded that "*Based on a*

complete analysis of available evidence, the lower court made the correct conclusion about the lack of violations of the rules of material law when holding the [EGMs]"

(d) The judgment dated *4 April 2007* of the Arbitrazh Court of **Khanty-Mansiysk Autonomous District** in Case No. A75-9221/2006 finding that the issue of the additional charter capital at the EGMs was valid and lawful, again upheld through various appeals up to the Federal Arbitration Court of West Siberia (leave to appeal from there to the Supreme Court of the Russian Federation being refused).

436. In combination, therefore, the Russian courts between them have decided that Mr Matevosov (i) acted legitimately and not contrary to Yugraneft's interest in giving a power of attorney to Mr Davidovich, who attended the EGMs as an authorised representative of Yugraneft – Case (a); (ii) that the holding of the EGMs did not violate Yugraneft's rights- Cases (c) and (d); (iii) that the issue of additional capital thereat was valid and lawful – Cases (c) and (d); and (iv) that Mr Matevosov did not act unlawfully in waiving Yugraneft's pre-emption rights – Case (b).

437. The defendants originally relied upon these decisions as giving rise to an estoppel or as making the continuation of these proceedings an abuse. They submitted that, if there was some valid claim under Russian law in relation to the alleged illegitimacy of the issue of the participation interests which has not been adjudicated upon, then it could and should have been put forward in at least one of the Russian actions, relying on the classic statement of Wigram, V-C in ***Henderson v Henderson*** 3 Hare 100 at p 114. The continuing validity of that doctrine was affirmed by Lord Bingham in ***Johnson v Gore Wood*** [2002] 2 AC 1. The doctrine applies to cases in which the earlier action was before the courts of another country: ***House of Spring Garden v Waite*** [1991] 1 QB 241,255; ***Desert Sun Loan Corp v Hill*** [1996] 2 AER, 847.

438. The defendants did not, however, in the end seek to maintain their contention, and, in my judgment rightly so. The Russian courts, as is common ground, will not entertain a claim based upon the allegations that there has been criminal conduct in the absence of a criminal finding. In those circumstances all of the decisions of the Russian Court are, at best, decisions that, leaving aside any question of criminal conduct, the actions impugned are lawful. They cannot be taken to have determined the position in Russian law if, as is alleged in this action, Mr Matevosov and Mr Davidovich committed a number of criminally fraudulent acts at the behest of Mr Abramovich: see Sergeev 3 para 43-45. Nor would there appear to be any issue estoppel under Russian law against Mr Abramovich, without which there can be none in English law: **Nouvion v Freeman** [1890] 15 App.Cas1;**Zeiss**.

439. In those circumstances Yugraneft cannot be estopped from raising claims which are founded, as all of Yugraneft's claims are, on the arguable contention that what those individuals did was criminal and gives rise to civil liability under the Russian Civil code in consequence. Nor is it an abuse of process for Yugraneft to seek to do so.

Mr Abramovich's domicile

440. The claim form was issued on 14th November 2007. Mr Abramovich was served in London on the same day, when the claim form was delivered at Flat 2, 39 Lowndes Square. Whether he was properly served depends on whether he was then domiciled in London.

441. If Mr Abramovich was domiciled in England when served, Yugraneft would be able to avail itself of the rule set out in the judgment of the ECJ in ***Owusu v. Jackson*** **[2005] QB 801, the effect of which is that if a defendant is domiciled in a Member State of the EU[40] the court has no power to stay proceedings brought against him on the grounds that there is an alternative more appropriate forum for the trial of the action.**

442. **Article 2 of the *Judgments Regulation 44/2001*, ("the Regulation") provides:**

> *"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*

443. **By Article 59 of the Regulation, the domicile of a defendant is to be established by reference to the internal law of each Member State. In England, section 41 of the *Civil Jurisdiction and Judgments Act 1982* provides:**

> *"41 (3) Subject to subsection (5), an individual is domiciled in a particular part of the United Kingdom if and only if—*
>
> *(a) he is resident in that part; and*
>
> *(b) the nature and circumstances of his residence*
> *Indicate that he has a substantial connection with that part.*
>
> ……
>
> *(6) In the case of an individual who—*
>
> *(a) is resident in the United Kingdom, or in a particular part of the United Kingdom; and*
>
> *(b) has been so resident for the last three months or more,*
>
> *the requirements of subsection (2)(b) or, as the case may be, subsection (3)(b) shall be presumed to be fulfilled unless the contrary is proved."*

444. Three matters may be noted at the outset. The first is that the Act contemplates that a person may be resident but the circumstances of his residence may not indicate that he has a substantial connection with England, as will be the case if section 41 (3) (a) is satisfied but not section 41 (3) (b). Conversely, a person may have a substantial connection with the UK but not be resident here. The second is that it is possible to have more than one residence. The third is that the rule that a defendant must ordinarily be sued in the place of his domicile is for the protection of the defendant. **In *Owusu* the ECJ held:**

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40 Other than Denmark

> ***"42*** *The legal protection of persons established in the Community would also be undermined* [if a stay was possible]. *First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he could be sued."*

It would be inconsistent with that purpose if a defendant were to be treated as domiciled if he had only a tenuous connection with this country, with the result that the defendant could be sued there in any case however remote its connection to the place in question and however inappropriate it might be to do so.

445. The question for the court is as to whether Yugraneft can show a good arguable case that Mr Abramovich was resident within the jurisdiction at the date at which the claim form was issued (***Canada Trust v Stolzenberg (No 2)*** [2002] 1 AC 1). In that case the meaning of "*good arguable case*" was considered in ***Canada Trust*** by Waller LJ in a passage with which Lord Steyn, the only member of the House of Lords to consider the point, expressed agreement, in which he concluded that:

> *"Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.'*

a formulation endorsed by Lord Rodger in ***Bols Distilleries BV v Superior Yacht Services Ltd*** [2007] 1 WLR 12.

446. In ***Dubai Bank Ltd v Abbas*** [1997] ILPr 308, the issue was whether Mr Abbas, who was said to be the beneficial owner of a substantial London property, was domiciled in England so that he could be served with proceedings under what was then Order 11 rule 1(1)(a). The test to be applied was summarised in the judgment of Saville LJ (with whom Simon Brown and Aldous LJJ agreed) as follows:

> *"Although there was some discussion before us on what is meant by the word resident in s 41 of the Civil Jurisdiction and Judgments Act 1982, it seemed to me that the parties were really little apart on this aspect of the case. The leading case is* ***Levene v Commissioners of Inland Revenue*** *[1928] AC 217. Although this was a tax case, it is clear that the meaning given to the word in that case was its ordinary meaning, uncoloured by the fact that it was used in a revenue context: see the case itself and* ***Shah v Barnet London Borough Council*** *[1983] 2 AC 309, [1983] 1 All ER 226 at 341 of the former report. Mr Pickering QC for Mr Abbas suggested that although the present case is not a Convention case, since s 41 was applicable to Convention cases, it would be correct to have regard to European sources in ascertaining the meaning of the word in this section. I would not necessarily dissent from this, but since there appears to be nothing in these sources to suggest that the ordinary English meaning of the word should be displaced or modified, the suggestion carries the matter no further. On the basis of Levene it seems to me that a person is res*ident for the purposes of s 41 (3) *in a particular part of the United Kingdom if that part is for him* ***a settled or usual place of abode.***

> ***A settled or usual place of abode of course connotes some degree of permanence or continuity***. *In his judgment Potter J said that s 41(6) suggested that the threshold for residence under the 1982 Act was low. With respect, I do not find any such suggestion in this sub-section. It is true that the sub-section provides a rebuttable presumption of substantial connection if the residence has lasted for the last three months or more, but it provides no guidance on the question whether or not the person has become resident. Depending on the circumstances of the particular case time may or may not play an important part in determining residence. For example, a person who comes to this country to retire and who buys a house for that purpose and moves into it, selling all his foreign possessions and cutting all his foreign ties, would to my mind be likely to be held to have become immediately resident here. In other cases it may be necessary to look at how long the person concerned has been here and to balance that factor with his connections abroad. Since the answer to the question depends on the circumstances of each case, I did not find the other authorities cited to us of any real assistance."*

447. The test has been applied in two recent cases concerning the residence of Mr Oleg Deripaska, a high-profile Russian "oligarch". In ***High Tech International v Deripaska*** [2006] EWHC 3276 (QB) Eady J held that Mr Deripaska was not domiciled in England. He noted that it is possible to have more than one 'domicile' for the purposes of the Regulation (paragraph 7) and then recorded some important considerations in the case before him (paragraphs 10 and 11):

> *"[10] Mr Deripaska… owns two valuable homes in this jurisdiction, one in Weybridge and the other in Belgrave Square. He acquired the Weybridge property in September 2001 and Belgrave Square in April 2003. I am told that currently they are together worth approximately £40m. Although they are owned through a corporate structure, largely for reasons concerned with inheritance tax, there is no dispute that Mr Deripaska is beneficially entitled and responsible for the outgoings.*
>
> *[11] It is an important part of the evidence that Mr Deripaska is extremely wealthy, his financial worth being measured in hundreds of millions of pounds. He is one of the world's most wealthy individuals and has substantial interests in a number of businesses, most particularly Rusal. Moreover, it is also an important part of the background that he has homes in other parts of the world. There are houses under construction in Beijing and Kiev and land acquired with a view to building in Montenegro. There are several homes in Russia itself. There are two houses in France and a further one under construction. There is another in Sardinia and a house under lease in New Delhi. I am told that there are, either completed or under construction, a total of over 20 houses in various parts of the world. It is thus clear that the background circumstances against which my conclusions have to be reached are unusual."*

448. The judge recorded the submission that the Belgrave Square property was Mr Deripaska's home when he was in England but observed that the requirement for a degree of permanence or continuity applied even in the contract of a second or third home. He considered the evidence as to Mr Deripaska's movements, which showed that

he spent "*up to 90 days*" a year in England,[41] though only between 37 and 47 were spent (or partly spent) in 2005 – the year preceding issue of the claim form. As to nights he spent a minimum of 20 and a maximum of 27. The Judge noted that (at paragraph [24]):

> "*[24] Mr Hunter accepted that the matter of residence is not to be judged according to 'a numbers game', and that it is appropriate to address the quality and nature of the visits in question. Mr Deripaska is, if I may say so, very much a modern phenomenon. It makes it very difficult to draw useful comparisons with precedents from a different era. He is truly an international businessman and jets about the world for frequent and brief business meetings. Miss Page may have hit the nail on the head when she considered the ordinary meaning of 'residence'. While it may make sense to speak of Mr Cadwallader being resident in Scotland for the months of August and September, or of Mr Theron being resident during his monthly visits, it hardly rings true to say of Mr Deripaska that he was resident for (say) last Tuesday afternoon or next Thursday morning. It would be a misuse of language."*

449. The judge concluded that there was no good arguable case that Mr Deripaska was resident in England.

450. In *Cherney v Deripaska* [2007] EWHC 965 (Comm), Langley J considered all of the factors said to give rise to residence in England (paragraph 39) including ownership of expensive properties here, and family and business connections. He accepted that Mr Deripaska had "*significant business interests in England*" which appear to have included an English-based service company and several English business advisers.[42] That notwithstanding, Langley J reached the conclusion that Mr Deripaska was not resident in England for the purposes of the Regulation (paragraph 45):

> ***"[45] In agreement with Eady J, I do not accept this submission. It is not a numbers game, although the numbers hardly support Mr Cherney's case. The 'quality' of the use of the house is, I think, equally important. In many ways its use by Mr Deripaska resembles that of a private hotel. It is infrequent, intermittent, and generally fleeting. The house has the character of continuity and permanence; its use does not. It cannot, I think, in any normal sense of those words, be described as a 'settled or usual place of abode' of Mr Deripaska. In my judgment, as at 26 November 2006, Mr Cherney has failed to show a good arguable case that Mr Deripaska was resident at 5, Belgrave Square and so domiciled there for the purposes of the Jurisdiction Regulation and Judgment Order. It is therefore unnecessary to consider the second limb of para 9(2) of the Judgment Order (para 13) but it requires the nature and circumstances of the 'residence' to indicate a substantial connection with this country and so on my findings cannot be fulfilled. The same applies to para 9(6)."***

451. Mr Swainston draws attention to the fact that in *Dubai Aluminium* the court referred to residence as meaning the "*settled or usual place of abode*". I do not,

41 According to counsel's submission, recorded at paragraph 33 of the judgment.
42 See Eady J's judgment at paragraphs 31 and 32

however, read the decision of the court as using those adjectives antithetically, but rather as differently nuanced ways of saying much the same thing. This appears particularly so given that the court regarded the phrase as connoting some degree of permanence or continuity.

452. Mr Swainston also draws attention to the Scottish case of *Daniel v Forster* 1989 SLT 90.

453. In that case the issue was whether the defendant was resident in Scotland. The defendant operated a rest home in Cove in Dunbartonshire which he had purchased from the pursuers in the spring of 1987 and which he operated in partnership with the matron. His family home was in St Leonard's on Sea, which was his residence for tax purposes. He had a business there and another business, a rest home, in the West Country. He also had a half interest in a cottage in Elgin. Between 27th June, when he moved into the home to get it operating, and October 1987, which I infer was the date of raising of the action, he had resided at the rest home for periods of between 2 and 10 days with a fortnight between each visit. Since 27th June he had made between 20 and 40 visits to the home and on most, if not all, occasions resided there for a period of days at a time.

454. The Sheriff, having observed that he had not been addressed on the concept of residence in any depth, and that the parties' solicitors appeared wrongly to think that it was impossible to have more than one residence, pointed out that the Act makes no mention of "principal" or "main" residence. He referred to a number of authorities including *Shah v Barnet London Borough Council* [1983] 1 AER 226 in which Lord Scarman had quoted from two 1928 tax cases:

> ***"In each the House saw itself as seeking the natural and ordinary meaning of the words. In Levene v Inland Revenue [1928] AC 217, 255, Viscount Cave, LC said: "I think that [ordinary residence] connotes residence in a place with some degree of continuity and apart from accidental or temporary absences". In Inland Revenue v Lysaght [1928] AC 234, 243 Viscount Sumner said : "I think the converse to "ordinarily" is "extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinarily", In Levene's case …Lord Warrington said: "I do not attempt to give any definition of the word "resident". In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way a man's life is usually ordered".***

455. The House of Lords held in *Shah* that according to the natural and ordinary meaning of the phrase a person was "*ordinarily resident*" in the United Kingdom if he habitually and normally resided lawfully in the United Kingdom from choice and for a settled purpose throughout the prescribed period except for temporary

or occasional absences. Furthermore a specific and limited purpose, such as education could be a settled purpose, It was irrelevant that the applicant's permanent residence or "*real home*" might be outside the United Kingdom or that his future intention or expectation might be to live outside the United Kingdom.

456. The Sheriff also cited a number of Scottish cases including *Reid v Inland Revenue* 1926 SLT 368 in which Lord President Clyde said that "*from the point of view of time, "ordinarily" would stand in contrast to "casually*" and that he was not sure "*that there is anything impossible in a person "ordinarily residing "in two places, although no doubt he cannot be physically present in more than one place at the same time. Would it be clearly wrong to say of His Gracious Majesty that he ordinarily resides at Windsor Castle and at Buckingham Palace?"* (or for that matter Holyrood House and Balmoral Castle).

457. Lastly the Sheriff referred to Lord Scarman in *Shah*:

> ***"And there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the propositus intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment health, family or merely love of the place spring to mind as common reasons for a chose of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled".***

458. On the facts the Sheriff held that the pattern of the defendant's stay at the nursing home was that he stayed there between 2-3 days and 7-10 days, with a fortnight gap in between, under a voluntary arrangement for a settled purpose as part of the regular order of his life for the time being, the occupation being neither casual nor occasional nor the accommodation temporary. Accordingly he held the defendant to have been domiciled in the Sheriffdom of Dumbarton for three months prior to the raising of the action.

The facts

459. I set out in the following paragraphs the evidence given by or on behalf of Mr Abramovich bearing on his residence. I have no reason to doubt its accuracy.

460. Mr Abramovich is a Russian citizen. He was born in what is now Russia and brought up and educated in Russia. He speaks Russian and is not fluent in English. At the time that the claim form was purportedly served he was the governor of Chukotka province[43]. He spends more time in Russia than anywhere else and his business and personal interests are focused on Russia. His current business interests consist in particular of major investments in the Evraz group, the largest steel producer in Russia, and in Highland Gold, both of which are

43 That may not necessarily mean that he stayed much in its windswept and inhospitable landscape. He has an apartment in Anadyr.

centered in Russia and run from there by Russians. Virtually all of the business associates with whom he is said to have dealt in these proceedings are Russian. Prior to 2004 he spent virtually no time in England. In 2007, he spent only 57 full days here, virtually all in connection with football matches. Mr Abramovich is the Chairman of the Federation of Jewish Communities of Russia and involved in a number of sports and charitable projects there.

461. Mr Abramovich is a Russian taxpayer. When he enters the United Kingdom he does so on a business visa (the business being his ownership of Chelsea FC), having no leave to remain. He is not treated as resident in the UK for tax purposes. His non resident status has never been challenged by the Inland Revenue. It is submitted on his behalf that this must be an important factor, not least because the courts have sought to give the word the same '*ordinary*' meaning in both tax cases (such as *Levene*) and jurisdiction cases (such as *Abbas*). It makes sense to do so. Resident for jurisdiction purposes but not resident for tax purposes is a distinction to be avoided if possible.

462. The current Inland Revenue practice is always to regard a person as resident in the United Kingdom if he is here for 183 days or more in any tax year. The normal rule, up to April 2008, was that days of arrival in and departure from the UK were ignored in counting the days spent in the UK. If a person is here for less than 183 days a further set of practice rules apply as follows:

> ***"Coming to the UK permanently or indefinitely***
>
> 3.1. ***You are treated as resident and ordinarily resident from the date you arrive if you home has been abroad and you intend***
>
> (i) ***To come to the UK to live here permanently***
>
> (ii) ***To come and remain here for three years or more***
>
> ***You 'remain' in the UK if you are here on a continuing basis and any departures are for holidays and business trips***
>
> ***Short term visitors***
>
> ***Residence***
>
> 3.3. ***You will be treated as resident for a tax year if:***
>
> - ***You are in the UK for 183 days or more in the tax year…***
> - ***You visit the UK regularly and after four tax years your visits during those years average 91 days or more***

a tax year….You are treated as resident from the fifth year.

463. The Inland Revenue practice cannot be determinative, but it is apparent from that practice (a) that coming to England for more than 91 days (as determined by IR practice) does not automatically mean that you are to be regarded as resident in the UK; and (b) that, in its terms, Mr Abramovich would not be regarded as resident.

464. Mr Abramovich is a billionaire. His overall wealth is said to be such that the £30 million that he has spent on the only property he now owns in England, Lowndes Square, represents less than 0.5% of his estimated net worth. He has spent considerably larger sums on yachts and properties outside England. His houses, yachts etc are in no sense his principal assets.

465. Mr Abramovich was divorced in March 2007. His ex-wife, who is Russian, received all his previously owned English properties (except for Lowndes Square) as part of the divorce settlement. These included an estate in Sussex and two houses in Chester Square. Both before and after the divorce she had come to spend a considerable amount of time in England, where their children were and are being educated. In *High Tech* (para 30), Eady J noted that the independent actions of an individual's family should not be taken to affect the assessment as to whether that individual is resident in England. That must particularly be so, it is submitted, in the case of someone who, at the date at which residence is to be determined, was a former wife.

466. Mr Mark Howard, QC, for the defendants, helpfully summarised the further evidence bearing on Mr Abramovich's connection with England under five headings: **(a) the number of days he spent in England; (b) his ownership of property in England; (c) his ownership of Chelsea Football Club; (d) the significance of Millhouse and (e) the significance of his children being educated in England.**

Number of days spent in England

467. The underlying data[44] is set out as an exhibit to Mr Abramovich's second witness statement and can be summarised as follows:

Year	Full days & Part days	Full days in England	Average length of stay (in full days)	Longest stay (in full days)

44 There is an issue as to the approach to be taken if Mr Abramovich leaves the UK at 1900 and arrives in Moscow at 2330 English time, but 0200 Moscow time. Do you date his arrival as being on the same day as he left (which in English time it is) or on the next day (which in Russian time it is)? The defendants take the former approach, which increases the number of full days in Russia. Yugraneft takes the latter, which decreases it. I do not propose to resolve this question. There is very little difference in the resulting figures,

2000	**22**	**10**	**1.43**	**5**
2001	**7**	**3**	**1.50**	**3**
2002	**3**	**1**	**1.00**	**1**
2003	**72**	**25**	**0.89**	**10**
2004	**153**	**67**	**1.40**	**6**
2005	**162**	**83**	**1.98**	**10**
2006	**189**	**110**	**2.68**	**20**
2007	**130**	**56**	**1.47**	**11**

It is right to note that in 2006 Mr Deripaska had up to the issue of proceedings on 13th November spent 19 nights in England and 179 in Moscow.

468. The most relevant year is 2007, the year in which the claim form was issued. In that year, Mr Abramovich spent 56 full days in England with an average length of stay of 1.47 and a longest stay of 11 full days (during which he attended 4 football matches). Mr Howard submits that it would be a perversion of language to suggest that one can infer from those figures that England was Mr Abramovich's "*usual or settled*" place of abode.

469. These figures show that Mr Abramovich spent virtually no time at all in England prior to 2003, and only 25 full days in England in 2003 itself. Mr Abramovich's statement contains, in an exhibit, a detailed breakdown of those days. Almost all of the days in 2003 came after September 2003 (by which time he owned Chelsea FC). One cannot infer from these figures that Mr Abramovich orchestrated the dilution of Yugraneft's interest in Sibneft-Yugra from England in September 2002 – February 2003.

470. In 2005 and in 2006 Mr Abramovich spent more time in England than before. But the average length of his stays remained very short (at 1.98 and 2.68 full days respectively). Some of the visits were very short indeed. The figures reveal no pattern similar to that of a person who regularly spends substantial stretches of time in a hunting lodge, holiday home, or constituency. A very large percentage of visits are connected with football – between 71% and 92%, 79% in 2007. Some of the longer visits were when Chelsea was playing more than one match. It is right to note, however, that, on Mr Abramovich's evidence his principal reason for spending time in England in the early days of his acquisition of Chelsea (which he acquired in 2003) was the fact that his children were at school here.

471. The only pattern revealed is that his visits increase with the start of the football season and decrease with its closure. In 2007 he came to England considerably less than before. His visits were almost exclusively related to his attendance at football matches. Such visits are not the sort of visit that necessarily suggest an intention to make England one's home or usual or settled place of abode.

472. It cannot be suggested that Mr Abramovich altered his behaviour in 2007 in order to avoid the court's jurisdiction. The first notice that he had of these proceedings came after the claim form was issued and purportedly served. In its application to

the Companies Court in mid-November 2007, Yugraneft's justification for the appointment of a provisional liquidator in England was the supposed need for secrecy in order to ensure that Mr Abramovich did not alter his behaviour in anticipation of the receipt of proceedings. The actual reason for the reduction of Mr Abramovich's time spent in England in 2007 was his divorce in March of that year

473. Yugraneft draws attention to the comparison between the days Mr Abramovich spent in England and those he spent in Russia. Thus in 2006 he spent 110 full days in England and 48 full days in Russia. From 1st January to 14th November 2007 he spent 54 full days in England and 61 full days in Russia. While these comparisons are relevant they have to be approached with some caution. It is perfectly possible for a man, who is resident in Russia, as Mr Abramovich plainly is, but who jets all over the world in his private aeroplane or sails the seas in one or other of his yachts, to spend full days in Russia which do not greatly exceed those he spends in England, without thereby becoming an English resident. According to his evidence he boards an aeroplane between 10 and 15 times a month.

Ownership of property in England

474. Mr Abramovich owns (and at the time of issue of the claim form owned) one property in England – a collection of 7 or 8 flats in 39 Lowndes Square in London. He has spent about £30 million acquiring them and has applied for planning permission to knock them together into a single dwelling, which will no doubt involve expenditure on a grand scale. Mr Abramovich uses the flats at Lowndes Square as his base in England during his brief visits to England which are generally connected with watching football matches. These interests are less extensive than Mr Deripaska's ownership of a luxurious London residence and a further residence in Weybridge, which were held to be insufficient to establish residence on his part by both Eady J and Langley J.

475. Mr Abramovich owns similarly, or more, expensive properties in several jurisdiction such as two ski-chalets in Colorado, a villa in St Barts, a house in Sardinia and a chateau in France on which he has spent € 230 million. He also charters several yachts on which he spends a considerable amount of time. These are in addition to his 3 residential properties in Russia, which he regards as his home. He rents a grand historic house from the Russian Government. He owns Mr Brezhnev's former house in Moscow which he is currently renovating. Mr Abramovich is sufficiently wealthy to maintain expensive properties wherever it suits him to do so. He leases aircraft for use when he is in England.

476. As a citizen of the Russian Federation, Mr Abramovich is required to have a registered address. His registered address is (or at any rate was when he made his witness statements) in Chukotka. I do not attach much importance to this. The registered address is a formality which may bear very little relationship to a person's real residence.

Chelsea Football club

477. **Mr Abramovich is famous in England largely because he has been since July 2003 the owner of Chelsea Football Club and has spent extremely large sums hiring expensive footballers and managers. He has, however, no executive function in the Club. As the team became more established and successful, he began to spend less time on football matters and in England.**

478. **Mr Howard submits that this prompts no inference of English residence but is an example of a modern phenomenon – the purchase by wealthy foreign individuals of English football clubs. Examples are the purchase of Manchester United by the American businessman Malcolm Glazer; of Liverpool by the American businessmen Tom Hicks and George Gillett; of Manchester City by the former Thai Prime Minister Thaksin Shinawatra; and of Heart of Midlothian by the Lithuanian businessman Vladimir Romanov.**

479. **Mr Abramovich purchased Chelsea as a hobby and a leisure interest. It is not a business investment: and the sums that Mr Abramovich has given to the club (circa £ 500 million) far exceed any return that could possibly be expected.**

480. **One of the reasons why Mr Abramovich chose to purchase Chelsea (rather than a club in somewhere such as Italy or Spain) was that it was easier for a foreigner to obtain a club in England where many of the clubs are publicly owned, compared with other countries such as Italy or Spain where there are legal and regulatory regimes that make it impossible.**

481. **Mr Abramovich is also the founder and sponsor of the Russian National Academy of Football, and other Russian sports federations, the main investor in a new arena for a top Russian hockey team, which he been supporting financially for longer than Chelsea, and the supporter of an Israeli charitable football tournament.**

482. **Mr Abramovich has no substantial business interest in England other than Chelsea FC.**

Millhouse

483. **Millhouse, a company registered in England and Wales, is said to be a company that provides consultancy services in respect of Mr Abramovich's properties and investments outside Russia, including Chelsea Football Club. It was, as I have already noted, set up in England because its managing director, Mr Tenenbaum, wanted to live in England. Mr Abramovich has no role at Millhouse. It is a company whose services he employs for a fee set at market consultancy rates. Mr Abramovich has also employed the services of many companies in Cyprus and the BVI. It is submitted that the location of the company that provides management services in relation to Mr Abramovich's assets located outside Russia says nothing about where Mr Abramovich makes his home or his usual or settled place of abode. Whilst everything must depend on the circumstances, I agree that in this case that is so.**

484. The real focus of Millhouse's operation is in Russia. As Mr Tenenbaum and Mr Heagren explain (see paragraphs 231-2 above), the Millhouse Representative Office in Moscow has always been a much larger and more substantial operation, with more employees and advising in respect of more valuable transactions, than the Millhouse office in England. Since 3rd April 2006, i.e. prior to the issue of the claim form, Millhouse LLC, a separate legal entity, has, in effect, taken over the role played by the Moscow Representative Office of Millhouse and remains significantly larger than Millhouse Capital (UK) Ltd in England.

485. The accounts of Millhouse for 31st December 2006 reveal an operating profit before tax of just over £ 320,000 and total net assets of £ 603,000 of which £ 125,000 constituted tangible fixed assets (plant and fixtures and fittings).

Children educated in England

486. Mr Abramovich has five children. His first child started going to school in England in 2004 and the second in 2005. For a while his then wife lived with him and their three younger children at the estate at which they then lived in or near Moscow and commuted to and from England while the two eldest children were at school. She tired of this commuting and in September 2005, by which time the next two children had started school, she began to live in England during the term time, initially at the estate in Sussex. He flew in and out of England to visit them. The estate proved to be too far away from the school of the eldest son and, for a while his wife and children, when in London, (and he when he was there) stayed in the main ground floor apartment at Lowndes Square. That proved too cramped and in March 2006 one of the houses in Chester Square, which he had acquired in 2005, became the London base for his wife and children. Mr Abramovich continued to use Lowndes Square for himself, even after his family's London base was in Chester Square. He then bought the house next door. The two properties are used as a single property by his ex-wife. Since the divorce (in Russia) in March 2007 he does not visit his wife, and chiefly sees his children outside term time in Russia or on holidays outside England e.g. on his yacht. The centre of his relationship with his children is not in England.

Conclusion

487. I am not persuaded that Yugraneft has much the better of the argument on whether at the date of the issue of the claim form Mr Abramovich was resident in England and Wales. On the contrary it appears to me that, despite his ownership of Chelsea and his property in Lowndes Square, he was resident in Russia and not in England. **Purchases of expensive property in England which, in the case of a man of ordinary wealth, would suggest settlement here, may have no such significance to someone for whom money is no object**. Mr Abramovich's use of the Lowndes Square property (intended to become a single property) does not indicate that in November 2007 it was his usual or settled place of abode. It was not then the place in which, even for limited periods, he habitually and normally resided for a settled purpose. It was a place to which he came when visiting London largely in order to indulge his extravagant hobby of owning a football club and watching it play football. Those visits were in 2007 limited in number and short in length. I do not ignore the position in 2005 and 2006 when the number of full days spent in England was higher (between 67 – 110), as was

the average number of full days (1.40 – 2.68). But even then the stays were intermittent and, on average, short lived. Further the "numbers game", which disputants in this area decry and then play or find themselves forced to play, does not take into account the changing circumstances of Mr Abramovich's life and of his visits which, certainly by November 2007 were far from indicating sufficient permanence, continuity, or settlement to constitute residence.

Permission to serve out

488. In those circumstances, Yugraneft would require permission to serve out, in order to bring Mr Abramovich within the reach of the court's jurisdiction. Since I have already decided that the claim against Millhouse (and Mr Abramovich) is unmaintainable, there is no claim to which Mr Abramovich is a necessary or proper party.

489. But even if I am wrong on that, and the claim against Millhouse and Mr Abramovich is sustainable, England is not the most appropriate forum, which is Russia, largely for the reasons set out in the judgments of the BVI courts. English law is not the relevant law. The critical events occurred in Russia. The critical issue is whether or not there has been a great fraud, as allegedly admitted to the Mayor of Moscow (in Russian), or an agreement (made in Russia between Russians) that Yugraneft's Sibneft-Yugra interest would, in effect, be mortgaged for a debt that has not been repaid. The claim is about the conduct of Russians in Russia under Russian law.

490. ***Owusu*** mandates that any claim, if valid, against Millhouse must be determined here. But that is not a ground for bringing in a defendant if England is an inappropriate forum. It is obvious to me that the primary reason for suing Millhouse, with minimal net assets, is to provide the anchor on which to tether a claim against Mr Abramovich. Had it been relevant I would have loosed the chain.

491. Yugraneft contends that the failure to initiate a prosecution results from incompetence or corruption or both; and that, on that account, England should be regarded as the forum conveniens. I reject this.

492. Firstly, this case is in no way comparable to ***Cherney v Deripaska***, [2008] EWHC 1530 (Comm), in which the claimant, a Russian exile and *persona non grata* in Russia was given permission to serve out in circumstances where the agreement sued on, as a result of which he claimed a 20% interest in the largest aluminium company in the world, was made in England. The evidence gave grounds for believing that if the proceedings took place in Russia (a) he faced a greater risk of assassination (there having been a previous Russian originated attempt on his life); (b) there was a real risk that he might be arrested on trumped up charges; (c) and, because of the very close links between Mr Deripaska and the Russian state, he might very well not receive a fair trial.

493. Here Yugraneft a Russian company, one of whose shareholders is the City of Moscow, is a seasoned litigator in Russia. It has not been without success. In the bankruptcy proceedings it has enjoyed complete success, as appears from the course of proceedings summarised in Appendix 5. It is open to it to appeal the investigator's refusal but it has

decided not to do so. Mr Kotov says that he did not initiate an appeal because he considered it likely that it would be dismissed for reasons unconnected with the merits of the complaint. This view appears to be based on a conversation reported to him by an officer at the Ministry of Internal affairs involved in pre-investigative research into the complaint which that officer had had with Mr Davidovich in which the latter had said that the investigation "*has no prospects*", "*does not mean anything*" and "*will be closed anyway so there is no point in you talking to me*"[45].

494. Professor Eksarkhopulo's evidence indicates that there can be real problems in securing the prosecution of important people for economic crimes, and that a thriving practice has grown up known as *"raiding"* whereby property is unlawfully seized in the belief that no criminal case will come of it as a result of the investigators' incompetence or corruption. Yugraneft claims that there are well recognised problems of corruption in the Russian Courts. Presidents Putin and Medvedev have acknowledged as much, as has Valery Zorkin, the President of the Constitutional Court. In October 2004 he told Izvestiya that

> "*the courts are very vulnerable to attack from business in the form of corruption. Bribe-taking in the courts has become one of the strongest corruption markets in Russia. Judicial corruption is built into various corruption networks operating at different levels of power: for example, networks for causing criminal cases to collapse and for taking over businesses*".

In May 2008 President Medvedev expressed the "*particular concern of the state*" in relation to the "*corruption in the law enforcement bodies and the judiciary*".

495. Reliance is placed on the evidence of Mr Vladimir Soloviev, a Russian broadcaster with a colourful background, who claims to be, inter alia, an investigative journalist. He refers to a failure by the Chairwoman of the Federal Arbitazh Court of Moscow Circuit to procure a prosecution against him for pointing out that she had obtained in dubious circumstances four apartments in Moscow, one of them at an undervalue from a party in a case before her at a cost of 50 times her judicial salary. He also refers to a defamation action brought by Mr V. Boyev, an adviser in the Presidential Department for personnel issues and State awards, who took exception to reports he made about the latter's exercise of improper influence over judges. The action was withdrawn when he obtained the evidence of a judge that Mr Boyev had requested that she change her ruling and told her that if she did not her reappointment as Deputy Chairwoman was in jeopardy.

496. I have no doubt that Russia has had, and has, corruption problems with some of its judges; and that there is a widespread public perception of judicial corruption and political interference in the judicial process: see "*Striving for Judicial Independence*", IBA Human Rights Institute Report, June 2005. Professor Eskarkhopulo gives evidence of specific examples of judicial corruption in his second report. I am equally clear that there are many judges who are not corrupt. The evidence is insufficient to persuade me that, if there was an appeal from the investigator's refusal to initiate a prosecution, it

45 He also gives evidence of a threatening conversation from a man who claimed to be representative of the security service of a particular bank, acting on behalf of unidentified clients who advised him not to take any "*inappropriate action*" (undefined) in that regard.

would be likely to be determined contrary to its merits because Yugraneft was the complainant or because Mr Davidovich, Mr Matevosov or Mr Abramovich were the respondents. The litigation in which Yugraneft has so far engaged does not bear tell tale indicia of impropriety such as repeated determinations of different cases by the same judge without good reason, departure from normal curial practice, irrational conclusions or the like. Since Yugraneft has not attempted to appeal the Investigator's refusals it is not possible to know what a Russian judge would make of the submissions cogently advanced before me in reliance on Professor Eskarkhopulo's material, or to say that, in the event of a favourable judicial ruling, a subsequent prosecution would, for improper reasons, be doomed never to take place.

497. Lastly, if and insofar as reliance is placed upon the unsatisfactory nature of a system in which claims based on commercial fraud must await the outcome of a criminal prosecution which may never be brought, that is a characteristic of Russian law under which Sibir and Yugraneft, (behind which there lies, amongst others, the City of Moscow) and Mr Abramovich have chosen to do business. It was at one time part of English law so far as felonies were concerned.

Conclusion

498. I summarise below what I have decided:

(a) the claims against Millhouse and Mr Abramovich in *dishonest assistance* need to be actionable under Russian law. They are not actionable under Russian law because of the operation of the time bar in Article 200 of the Civil Code;

(b) the *receipt based claims* against Mr Abramovich are governed by Russian law. They, also, are not actionable under that law on account of the same time bar;

(c) even if the claim against Mr Abramovich in *knowing receipt* was subject to English law it would fail because Yugraneft's 5,000 rouble interest in Sibneft-Yugra was never received by anyone else and Mr Abramovich has not received any property which belongs to Yugraneft;

(d) if and insofar the claims in *knowing assistance* are governed by English law, the arrangements made for the sale of shares in Sibneft to Gazprom, and the reinvestment thereof do not constitute knowing assistance, although those events may be relevant to any claim to an account of profits;

(d) the *proprietary* claim fails because it is not possible to trace any asset of Yugraneft into either set of offshore companies or into any property in the hands of Mr Abramovich or his agent or nominee;

(e) the claims are an abuse of process.

Accordingly the claims against Millhouse and Mr Abramovich should be dismissed on those grounds.

499. Next I have decided the following matters, some of which, in the light of my previous conclusions, are, in fact moot :

(f) that Yugraneft does not have a good arguable case that Mr Abramovich was resident in England & Wales on 14th November 2007;

(g) that, in the light of my conclusion that there is no tenable case against Millhouse, there is no ground on which permission should be granted to serve Mr Abramovich out of the jurisdiction;

(h) that, even if there was, England would not be the appropriate forum for the determination of the dispute, firstly because there is no tenable claim against Mr Abramovich and secondly because, if there was, the appropriate forum is Russia

500. I shall, therefore, set aside the service of the proceedings on Mr Abramovich. I decline to give permission to serve him outside the jurisdiction

501. I cannot leave this case without expressing my appreciation of the diligence of counsel, who have obviously devoted many hours of industry to the compilation of very full, helpful and well annotated submissions, have made full oral submissions, and have produced substantial written material during the course of the hearing; and to their solicitors who have prepared and expertly assembled a very large amount of evidential and other material. My appreciation would have been even greater if the deficiencies to which I refer in Appendix 6 had been absent.

APPENDIX 1

RUSSIAN PROCEEDINGS

Khanty-Mansiysk

1. In about May 2004 Yugraneft brought separate actions in the Arbitrazh Court of the Khanty-Mansiysk Autonomous District against Sibneft-Yugra and against each of Carroll, Shaw and Tranquillo. The six offshore companies were later joined as third parties in the claim against Sibneft-Yugra. Sibneft-Yugra was later joined as a third party to the claim against Carroll, Shaw and Tranquillo. The claim against Carroll, Shaw and Tranquillo were stayed pending resolution of the claim against Sibneft-Yugra.

2. Yugraneft's claim against Sibneft-Yugra sought the invalidation of the resolutions adopted at the EGMs on the grounds that they were not attended by an authorized representative of Yugraneft (and alleging that Yugraneft only learned of the increase in charter capital on 12 March 2004). In support of its argument, Yugraneft filed the alleged minutes of the board of directors of Yugraneft dated 10 September 2002. The claim led to a series of judgments:

(1) By a judgment dated 19 and 23 August 2004 in Case No.A75-2368-G/04, the **first instance Arbitrazh Court of Khanty Mansiysk** rejected Yugraneft's claim. It noted that the resolution of 10 September 2002 to remove Mr Matevosov in place of Mr Tolley was not supported by any other supporting documents (including subsequent minutes of the meeting of the board of directors, orders of accession, documents issued by state authorities or banking documents) whilst the fact that Mr Matevosov continued *de facto* to act as managing director was supported by a number of documents (powers of attorney, tax documents, banking document etc). The Court found that Mr Davidovich "*was present at and voted for resolutions on the agenda of extraordinary general meetings of members of Sibneft-Yugra as an authorized representative of Yugraneft*". The Court rejected Yugraneft's claim that the meetings were not called in accordance with the proper procedure under Russian company law.

(2) The judgment was upheld by the **appellate court of Khanty Mansiysk** on 27 October 2004.

(3) By a judgment dated 24 March 2005, the **Federal Arbitrazh Court of the West Siberian Circuit** in Case F04-617/2005 (8534-A75-30) overturned the judgments below and remitted the matter for a new trial. The Court accepted that the procedure for calling the meeting was valid. It also accepted that Mr Matevosov continued to act as *de facto* director. However, it found that the

court below had failed to assess the allegation that, after Mr Matevosov's removal, he avoided transferring the corporate documentation and seal of the company to Mr Tolley thereby disabling him from performing his functions.

(4) On 23 June 2005, Mr Mark Tolley made a notarized statement in which he said that he had never served as Yugraneft's General Director, received any compensation, managed the activities of Yugraneft, issued any orders dismissing Mr Matevosov, or notified him of dismissal and did not take any action to obtain from Mr Matevosov any documents or seals of Yugraneft.

(5) On 5 July 2005, the **first instance Arbitrazh Court of Khanty Mansiysk** in Case No. A-75-4601/2005 received the notarized statement of Mr Tolley in evidence. Yugraneft challenged the authenticity of Mr Tolley's notarized statement. The court then heard evidence from Mr Tolley himself. Mr Tolley's evidence to the Court was that he had never concluded any contract to act as, nor carried out, nor been compensated for carrying out, the duties of chief officer of Yugraneft, nor taken any action to dismiss Mr Matevosov from office as a director of Yugraneft. He explained by reference to his personal diary that he was not approached in relation to the General Director role until a year later, in September 2003. In light of Mr Tolley's testimony and statement and the documents, the court concluded that any resolution that may have been taken by the Board of Directors on 10 September 2002 was not implemented and that, accordingly, Mr Matevosov continued to be General Director. The Court further concluded that Mr Davidovich was an authorized representative of Yugraneft at the EGMs.

(6) By a judgment dated 12 July 2005 in Case No. A-75-4601/2005, the **appellate Arbitrazh Court of Khanty Mansiysk** amended the order of the court below to clarify that, as the extract from the order of 10 September 2002 was not complete, Yugraneft had also failed to prove that Mr Tolley was ever appointed as General Director to begin with.

(7) On appeal to the **Arbitrazh Court of the Khanti Mansiysk Autonomous Region**, in written submissions filed on 12 August 2005, Yugraneft argued that Mr Davidovich could not have acted within his power of attorney because, by reducing its proportionate interest in Sibneft-Yugra, he was not acting in the interests of Yugraneft. Mr Davidovich (and Matevosov)'s conduct was said to have violated s 53(3) of the RF Civil Code. This is one of the two civil law provisions that Yugraneft relies on to found its allegation of breach of fiduciary duty in the present case.

(8) By a judgment dated 18 August 2005 in Case No. A-75-4601/2005, the Court upheld the first instance court's rulings on essentially the same grounds as the court below and held, inter alia, that Mr Davidovich was authorized to act at the meetings.

(9) By a judgment dated 23 November 2005 in Case No. F04-7976/2005(16692-A75-21) the **West Siberian District Federal Arbitrazh Court** recorded that Yugraneft "*cites the substantial violations of sub-clause 2, clause 2, Article 33 and paragraph 1, clause 8, Article 37 of the Federal Law "On Limited*

Companies" since questionable decisions have been made in the absence of proper representation of the company as a partner with a 50 percent interest in the authorized capital". The Court concluded that there were "*no grounds to find in favour of the complainant's cassation appeal*" and that "*Based on a complete analysis of available evidence, the lower court made the correct conclusion about the lack of violations of the rules of material law when holding the company partners meetings*".

Moscow

Gregory and Tranquillo

3. An action was brought in 2004 by Yugraneft in the Moscow Arbitrazh Court against Gregory and Tranquillo. Sibneft-Yugra appeared as a third party. Yugraneft alleged that the sale of the participation interests by Gregory to Tranquillo violated its pre-emption rights or rights of first refusal:

(1) By a judgment dated 30 December 2004, the **City of Moscow Arbitrazh Court** in Case No. 40-30097/04-24-355 held that Yugraneft's pre-emption rights had not been violated by the issue of the charter capital of Sibneft-Yugra. The Court rejected the proposition that Mr Matevosov did not act as general director in signing the notices issued on 28th and 29th October 2003 and waiving Yugraneft's rights of first refusal.

(2) On appeal, by a judgment dated 7 April 2005, the **City of Moscow Ninth Arbitrazh Appellate Court** (in Case No. 09AP-1412/05-GK) upheld the judgment. It rejected the argument that Mr Matevosov was dismissed from the position of general director on 10 September 2002 (in place of Mr Mark Tolley). The court found, in summary, that the documents before the court confirmed Mr Matevosov continued to function as general director through to 4 March 2004, that the state register did not record any change of general director until 9 March 2004 and that no evidence was produced that Mr Matevosov was dismissed under the provisions of the Russian Labour Code.

(3) On further appeal to the **Federal Arbitration Court for the Moscow District, Yugraneft** alleged in its written submissions to that court that Mr Matevosov in 2002 transferred property from Sibneft-Yugra at reduced prices to Sibneft subsidiaries and that, because his actions were harming the company, the directors resolved to dismiss him. Yugraneft suggested that Mr Matevosov refused to comply with this decision, continued to act for Yugraneft and "*performing actions aimed at further transfer from the company* [*of*] *the property owned by it"*. The submissions also noted that Mr Davidovich voted on the resolutions under a power of attorney, noting "*From 2001 he has been the Managing Director in the Moscow office of Millhouse Capital Limited UK which owns 57% of shares in Sibneft Plc*".

(4) In its judgment dated 29 July 2005 (in Case No. 40-30097/04-24-355), however, the Federal Arbitrazh Court upheld the judgment of the Appellate Court, and rejected the appeal noting, in particular, that there was "*no evidence that A.R. Matevosov evaded transferring the powers of director general to Mark*

[Tolley]".

Ferenco and Shaw

4. In its next action, Yugraneft brought a claim in the Moscow Arbitrazh Court against Ferenco and Shaw alleging that the sale by Shaw to Ferenco of its participation interests was a breach of Yugraneft's pre-emption rights because (a) Mr Matevosov had been dismissed and (b) in any event, Mr Matevosov's acts were not in accordance with the interests of Yugraneft. In relation to the latter, in its written submissions to the Court Yugraneft alleged that Mr Matevosov's acts "*resulted in fact in denial of actual benefits which the Claimant would have received as a shareholder of "Sibneft-Yugra" open joint-stock company and contradict the principles of reasonable business practice and good faith in execution of the duties of an executive body of a company (art 53 of the Civil Code of the RF, Art 71 of the Federal Law "On Limited Companies)*". (These are the same provisions that are alleged to have been violated by Mr Matevosov in the present case: see PoC at paragraph 92).

5. The claim resulted in a series of rulings:

(1) At first instance, Yugraneft was successful. By a judgment dated 16 May 2005 in Case No. A40-30094/04-61-366, the judge of **first instance** accepted the claims of Yugraneft that Mr Matevosov had been dismissed as General Director on 10 September 2002, that Mr Matevosov had impeded Mr Tolley from taking over as general director and, accordingly, that the pre-emption rights of Yugraneft had been violated. It ordered reinstatement of the interest.

(2) However, by a judgment dated 19 July 2005 in Case No. 09AP6918/05-GK, the **Ninth Arbitrazh Appeal Court**, overturned the lower court's judgment. The Appeal Court noted, in particular, that it had been

> "*presented with a declaration by Mark Tolley with a notary-certified signature endorsing it. In the said declaration M.Tolley stated that he had never performed the obligations of ANK Yugraneft plc's Managing Director, had not signed any contracts or other agreements with ANK Yugraneft plc or its shareholders for the performance of the function of Managing Director of the company, had never issued any declarations or acceptance of position of Managing Director, and had not signed as Managing Director any documents on behalf of ANK Yugraneft plc*".

The court accepted that Mr Matevosov was not replaced as General Manager by Mr Tolley and that the pre-emption rights of Yugraneft were not violated.

(3) By a judgment dated 15 December 2005, the **Federal Arbitrazh Court** dismissed the further appeal by Yugraneft. The Court recorded Yugraneft's argument that the court below "*failed to take into consideration the fact that A.R. Matevosov was performing his duties of general director of OAO ANK*

Yugraneft illegitimately and that such actions cannot cause legality of the company's waiver to buy the disputed share". The Federal Arbitrazh Court concluded, in summary, that all of the evidence showed that Mr Matevosov continued in his role as General Manager and noted that "*the legitimacy of actions of A.R Matevosov in his general director capacity at the time of signature of the waver to acquire the disputed share has been established by legally effective resolutions of Moscow Arbitration court in case No. 40-30097/04-24-355* {i.e. the first instance judgment in respect of Gregory and Tranquillo} *[and] of Arbitration court for Khanty-Mansiysk autonomous district in case No. A75-4601/2005*" {i.e. the first instance judgment in respect of Sibneft-Yugra}.

(4) By a judgment dated 6 April 2006 in Case No.3341/06, the **Supreme Arbitrazh Court** of the Russian Federation rejected Yugraneft's application for leave to appeal to the Praesidium of the Supreme Arbitrazh Court.

Richard

6. Yugraneft brought a further claim against Richard in the Moscow City Arbitrazh Court. Sibneft-Yugra and Carroll were third parties. Yugraneft alleged that its pre-emption right to purchase was violated by the disposition by Carroll of its stake in the authorized capital of Sibneft-Yugra to Richard. The claim failed:

(1) By a judgment of the *Moscow City Arbitrazh Court* dated 26 September 2005 in Case No. A40-30099/04-22-311 the Moscow Arbitrazh Court rejected the claim on the basis that Yugraneft had failed to provide the original Minutes of the meeting of 10th September202 at which it was alleged that Mr Matevosov was dismissed as general director of Yugraneft and the documents before it showed that Mr Matevosov continued to act in that capacity.

(2) On appeal, the **Ninth Arbitrazh Court of Appeal** upheld the decision by a judgment dated 10 and 13 January 2006 in Case No.09AP-13759/05-GK.

Sibneft-Yugra

7. A further action was commenced in the Moscow City Arbitrazh Court in or around 2005-6 against Sibneft-Yugra, Sibneft and the first set of offshore companies. The second set of offshore companies was joined as third parties (as was the tax inspectorate). Yugraneft alleged that the increase in the authorized share capital of Sibneft-Yugra at the EGMs did not take place. It appears to have been alleged that the additional contributions of charter capital based on the EGMs were never provided.

8. On 26 October 2006, the claim was transferred to the Khanty-Mansiysk Arbitration Court. On 1 March 2007, Sibneft was replaced by Gazpromneft, its legal successor, as defendant. A series of judgments found against Yugraneft:

(1) By a judgment dated 4 April 2007 the **Arbitrazh Court of Khanty-Mansiysk**

Autonomous District in Case No. A75-9221/2006 found that the issue of the additional charter capital at the EGMs was valid and lawful. It found that the additional contributions by the offshore companies and by Sibneft were duly paid and evidenced by payment orders and bank statements and had been registered with the tax authorities.

(2) By a judgment dated 14 June 2007 the **Arbitrazh Court of Appeal of Khanty-Mansiysk** upheld the decision of the court below

(3) The **Federal Arbitration Court of West Siberia** dated 31 August 2007 upheld the decision.

(4) On 24 December 2007 the **Supreme Arbitration Court of the Russian Federation** refused leave to appeal.

APPENDIX 2

1. The EGMs, at which the dilutions complained of, and from which any obligation to make restitution or compensation arose, took place in Russia.

2. The dishonest assistance was, on the claimant's case, primarily provided by Mr Davidovich, a Russian citizen resident in Russia, exercising a Russian power of attorney, issued by Mr Matevosov, the Russian General Director of Yugraneft, a Russian company, to issue the additional participation interests in Sibneft-Yugra, another Russian company. Mr Matevosov was an employee of Sibneft, also a Russian company.

3. It is suggested that neither of those two would have acted without reference to Mr Tenenbaum, Mr Schvidler or Mr Abramovich. Even if Mr Tenenbaum was involved, the latter two were resident in Russia.

4. In the light of the evidence of Mr Tenenbaum, Mr Heagren and Mr Davidovich and in the absence of any cogent evidence to the contrary there does not seem to me to be a realistic prospect of establishing that the dilutions were managed by Mr Tenenbaum.

5. The two sets of offshore companies operated through Russian officers and directors (except for Ferenco, whose officers were Cypriot). All of the meetings at which the decisions affecting Sibneft-Yugra took place were held in Russia.

6. The participation interests are interests in a Russian company (Sibneft-Yugra). Those interests were issued by registration on constitutional documents administered by governmental authorities in Russia upon application by the Russian General Director of that company in Russia.

7. The other participant at the first EGM was Mr Korsik, a Russian resident and citizen, representing Sibneft (another Russian company, where he worked) at the meeting.

8. The new board approved at the first meeting (Mr Korsik, Mr Matevosov, Mr Novikov, Mr Shmyrev and Ms Lobanova, Mr Freiman, Mr Aristarkho and Ms Nikulina) consisted entirely of Russians, resident in Russia.

9. The acts of "*further disposal*" relied upon by the Claimant (at paragraphs 48 – 50 of its Particulars of Claim) and the "*transfer of Yugraneft's interest to Sibneft*" are entirely Russian events involving Russians. The second set of offshore companies to which the additional participation interests were sold operated principally through Russian officers and directors. The transfer was effected by registration

in like manner as the original issue.

10. All of the individuals who are alleged to have carried out specific acts on behalf of the Second Defendant in rendering the alleged dishonest assistance (namely, Mr Davidovich, Mr Peretiatko, Ms Pavlova, Ms Sukhanova, Mr Aristarkhov, Ms Lobanova and Mr Osipov) were Russian citizens, resident in Russia (Mr Osipov moved to Millhouse in London in March 2005) and who carried out all of their relevant acts in Russia. Mr Davidovich was exercising a Russian power of authority.

11. All of the key individuals involved in the Sibneft-Yugra project for Sibneft were resident in Russian and acted in Russia: Mr Korsik, Mr Shvidler, Ms Breeva and Ms Novikov.

12. The directors of **Carroll** were Mr Thorkov, Ms Lobanov, Ms Trouskoliavkaya and Mr Peretyatko. All were resident in Russia and carried out all their acts in relation to Sibneft-Yugra in Russia.

13. The directors of **Shaw** were Ms Andreeva and Ms Pavlova. Both were resident in Russia and carried out all their acts in relation to Sibneft-Yugra in Russia.

14. The persons authorized to act on behalf **Tranquillo**'s Panamanian Directors were Mr Efremov and Ms Sukhanova. Both were Russians, resident in Russia and carried out their acts in relation to Sibneft-Yugra in Russia.

15. The directors of **Gregory** were Mr Osipov and Ms Moreva. Both were resident in Russia and carried out all their acts in relation to Sibneft-Yugra in Russia.

16. The directors of **Richard** were Ms Evdokimova and Ms Gromova. Both were resident in Russia and carried out all their acts in relation to Sibneft-Yugra in Russia.

17. The directors of **Ferenco** were Ms Damiana, Ms Christofidu and Ms Elia. Both Ms Christofidu and Ms Elia, who carried out the acts in relation to the EGMs, were resident in Cyprus but carried out all their acts in relation to Sibneft-Yugra in Russia.

18. The joint venture on which Yugraneft relies was between a Russian company (Sibneft) and the Claimant's parent Sibir a company which, although incorporated in England and listed on the AIM, does business entirely in Russia (and is majority owned by a Russian businessman, Mr Tchigirinsky). The joint venture involved an oil exploration project entirely in Russia. The "Principles of Cooperation", outlining the initial arrangement, was a document in Russian (only) and related exclusively to Russian assets and investments. Yugraneft itself is a Russian company, as is Sibneft-Yugra (which takes its name from its two original Russian owners – Sibneft and Yugraneft).

19. The underlying fiduciary duties (the breach of which are alleged to form the basis of the First and Second Defendant's liability) were duties alleged to be owed to Yugraneft in Russian law by Russian citizens resident in Russia (namely Mr

Matevosov and Mr Davidovich) to a company incorporated in Russia (Yugraneft). Russia was the country where the alleged breaches of these fiduciary duties took place and the country with the closest connection to those duties and to the breach of those duties. It was, therefore, the country where any constructive trust or equity or obligation to restore the property first arose.

20. Russia was the country where the Claimant's alleged property was taken and, accordingly, where any loss or damage was sustained. It was in Russia that the Claimant's participation interests were allegedly diminished or "taken". Russia was also the place where the offshore companies (or, through them, Sibneft or Mr Abramovich) were enriched. If the transfer to Sibneft was to "*enhance the value of Mr Abramovich's shares in Sibneft*", those shares were equally shares in a Russian company.

21. Mr Abramovich was at the time of the relevant events unquestionably resident in Russia and not in England.

APPENDIX 3

YUGRANEFT'S CLAIMS ABOUT THE WEB OF COMPANIES CONTROLLED BY MILLHOUSE

1. Mr Friedman, in his third witness statement claims that the evidence shows:

   (i) that Millhouse is an investment manager whose activities are guided by Mr Abramovich, Mr Tenenbaum and Mr Shvidler;

   (ii) that it has undertaken transactions which transfer a large amount of Mr Abramovich's wealth outside Russia;

   (iii) that its strategic role is focused on London; and

   (iv) that it controls Mr Abramovich's assets through a web of offshore holdings which are administered by a combination of Millhouse representatives and offshore local service providers. The favoured jurisdictions are Cyprus and the BVI and the favoured providers are linked to or connected with Deloittes namely Meritservus Ltd[46], Caribbean Corporate Services Ltd ("CCS"), and others.

2. As to (i), he refers to a Sibneft Press Release of 24th October 2001 which stated:

   "A group of core shareholders in Sibneft will entrust management of an extensive portfolio of assets spanning key sectors of the Russian economy to a newly created asset management group, Millhouse Capital. The assets will include an 88% stake in Sibneft ....The company will also manage a series of other investments held by Sibneft's core shareholders, including investments in the airline, electricity, automobile, pulp and paper processing, insurance and banking industries. Millhouse Capital will manage assets, but will not own significant assets itself ..."

3. He cites press coverage at the time which referred to Sibneft shareholders revealing that they had consolidated their oil, metal, aviation and other assets into Millhouse Capital which would manage assets with a total value of $ 3-4 billion including shares in a range of companies, such as Sibneft, RusAl, Aeroflot etc. The central role of Millhouse Capital (which was set up by Deloitte in October 2001) in Mr Abramovich's affairs was consistently commented on in the press thereafter. Millhouse was said, inter alia, to have controlled over 70% of the shares in Sibneft and to be

46 Meritservus Ltd is described as a service provider company of Deloitte & Touch in an SEC filing.

centrally involved in the sale of Sibneft shares to Gazprom. Many reports actually described Millhouse as on the other side of the deal.

4. Thus Millhouse and Gazprom made a joint press announcement that the deal had been done. The deal was, on the defendants' evidence, negotiated by Mr Davidovich and Mr Shvidler. They were Millhouse people. Gazprom itself thought that it was dealing with Millhouse. According to Gazprom's annual report for 2005:[47]

> "*In October 2005, Gazprom acquired a 72.66% shareholding in the oil company OAO "Sibneft" **from Millhouse** for US$13.079 billion bringing its shareholding in OAO "Sibneft" up to 75.68%.*

Dresdner Bank acted for Gazprom in the transaction. It too thought that it was dealing with Millhouse according to its Annual Report for 2005[48]:

> "*In 2005, Dresdner Kleinwort acted as a sole financial adviser to Gazprom on the largest Russian M&A transaction to-date. OAO Gazprom acquired 72.66% stake in OAO NK Sibneft **from Millhouse** for approximately US$13.1 billion in cash. In addition, Dresdner Kleinwort jointly led the acquisition financing for the transaction acting as Coordinating Mandated Lead Arranger, Joint Bookrunner and Facility Agent ...*"

The same statement appears in its 2006 Annual Report[49]. The press reporting was similar e.g.:

(a) Prime-Tass Business News Agency for 27th July 2005:

> *"Russia's West Siberian Depositary nominally holds 72.54% in Sibneft. Roman Abramovich, probably Russia's richest man, is widely believed to control the stake through its offshore company Millhouse. Deutsche Bank nominally holds 20% in the company. Russian oil major YUKOS is a beneficial owner of a 20% stake."*

(b) Euromoney's EuroWeek for 30th September 2005:

> *"Russia to pay $10 bn early, Gazprom secures Sibneft .... Gazprom, the state-controlled gas utility, this week bought outright control of Russia's fifth largest oil producing company, Sibneft, in a deal worth $13.1 bn – making it the biggest ever M&A deal in the country. Gazprom will acquire 72.7% of Sibneft from Millhouse – an offshore investment company controlled by Chelsea football club owner Roman Abramovich – taking its holding to 75.7% ..."*

(c) Associated Press Online for 29th September 2005:

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47 30/108/243
48 30/108/166 at 184
49 30/108/195 at 203

> *"Russia's state gas monopoly Gazprom struck a deal Wednesday to pay $13.01 billion for control of the private Sibneft oil company ...*
> *Gazprom signed the agreement Wednesday with Sibneft's owner, Millhouse – a holding company controlled by Chelsea soccer club owner, billionaire Roman Abramovich, believed to be among a handful of tycoons on good terms with the Kremlin ..."*

5. Until March 2003 Mr Abramovich held an interest in Aeroflot through **Caroll** and **Shaw.** In an interview with Vedemosti, a Russian newspaper in June 2003 Mr Shvidler explained that Millhouse had initially assembled its Aeroflot stake with a view to resale, and sold it as soon as a proper offer came along. It is to be inferred that Millhouse was managing Mr Abramovich's interest in Aeroflot via Carroll and Shaw. Carroll and Shaw appointed Mr Davidovich, Mr Osipov (head of mergers and takeovers at Millhouse and M Tuzhilin (head of corporate management at Millhouse) to the board of Aeroflot in May 2002.

6. As to (ii) he refers to the sale of the interests of Mr Abramovich in the following companies: RusAl and Rospromotovol in 2003; two State power plants in April 2004; and Sibneft in 2005. A Russian newspaper reported that the proceeds of the latter would be transferred to "*the accounts of offshore companies controlled by Mr Abramovich's London-based subsidiary, Millhouse Capital*". That sale raised about $ 13 billion, which he presumes went to the Cypriot companies through which Mr Abramovich held his Sibneft shares, because those companies were the sellers in an earlier abortive transaction with Yukos and the shares were substantially returned to them when the transaction was reversed.

7. Of that $ 13 billion only $ 3 billion appears to have been invested in Russia viz (i) a 48% interest in Evraz Group S.A., which has expanded very substantially outside Russia; and (ii) $ 623 million in a pharmaceutical company, which interest has now been sold. The acquisition of the 48% was made through the purchase of the shares of Lanebrook Ltd a Cypriot company, the acquisition being made by one of Millhouse Capital's offshore companies. The remainder must have been initially received by the Cypriot companies or some of them.

8. As to (iii) the reports of the transactions referred to in paragraph 4 above make clear that Millhouse had a strategic role in them. That that strategic role was focused *in London* is said to arise from (a) the fact that Millhouse was established as an English company; (b) that Mr Tenenbaum is a longstanding friend and business colleague of Mr Abramovich and is described on the Chelsea FC website as one of his closest associates. Mr Shvidler, who bought an expensive house in London in 2004, is a senior figure in the activities of Millhouse. He is reported as saying in June 2003 that his work with Millhouse Capital was his "*primary work*". Mr Tenenbaum and Mr Shvidler went on the board of Evraz. After the creation of Millhouse LLC in 2006 Millhouse had 45 employees, but the wage bill increased, suggesting that those 45 were in the higher echelons. According to Mr Tenenbaum's statement in these proceedings it has, at the time of the statement 28 employees in England. His salary in 2005 and 2006 was £ 900,000, which is inconsistent with a limited role.

9. As to (iv) the results of company searches show a large web of interconnected offshore vehicles which hold or have held at various times Mr Abramovich's assets of both a business and a personal nature (e.g. properties, planes, yachts etc).

10. Mr Friedman exhibits a series of company structure charts at different dates. What they show includes the following.

11. So far as the six offshore companies are concerned, in December 2000 **Richard** and **Gregory** (two of the second set) owned Heflinham and Kindselia, both Cypriot companies. Heflinham and Kindselia owned part of Mr Abramovich's acknowledged shareholding in Sibneft. **Richard** and **Gregory** must, therefore, have been vehicles for Mr Abramovich's personal interest along with Heflinham and Kindselia.

12. In December 2000 Esios Investments, a Cypriot company, owned both Gemini and **Ferenco** (the 3rd of the second set of Dilution Companies). Gemini was one of the Cypriot companies which held Mr Abramovich's acknowledged shareholding in Sibneft. Esios, Gemini, and **Ferenco** must be vehicles for his interest.

13. By 1st January 2002 the ownership of Gemini and **Ferenco** had been transferred to *Finservus (Trustees) Ltd*, another Cypriot company. (Its shares were originally owned by Deloittes but then transferred to Demetris Ioannidis, who is a director of Meritservus Ltd and other Meritservus companies and head of the Meritservus organisation in Cyprus). The implication must be that Finservus is a vehicle for Mr Abramovich's personal interests.

14. This is corroborated by the ownership by Finservus of various other companies associated with Mr Abramovich within the Millhouse group of offshore companies: e.g. (i) Tristan Holdings Ltd; (ii) Electus Investments Ltd [50](which owned Millhouse Capital UK Ltd); (iii) between November 2002 and May 2005 Blue Ocean Yacht Management Ltd[51], which manages Mr Abramovich's yachts; and (iv) Calmera Trading & Services Ltd and (v) Aretino Holdings Ltd both of which made payments to Millhouse according to Millhouse's accounts.

15. Calmera and Aretino are mentioned by Mr Tenenbaum and Mr Heagren as possible routes by which some of the money from the sale of Mr Abramovich's interest in Sibneft may have reached Millhouse and/or Chelsea FC. This is a further basis for inferring that the offshore companies were vehicles for Mr Abramovich's personal interest.

16. That **Ferenco** is a vehicle for Mr Abramovich's personal interest is also demonstrated by the Option Agreement dated August 2003 between Sibneft Oil Trade Company Limited ("SOTC") as buyer and Farleigh as seller. Farleigh is a vehicle for Mr Abramovich's personal investment interests as appears from certain transactions concerning Pharmstandard involving shares in Augment Investments Ltd ("Augment").

17. According to the Ferenco Option Agreement, Farleigh was the owner of Ferenco. But according to Ferenco's corporate documents Farleigh was never a

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50 Elects had as directors Mr Ioannidis, Mr Tenenbaum, and Ms Panchenko, who may have been the Deputy Governor of Chukotka.

51 By 2008 Blue Ocean was owned by Corpserve (Trustees) Ltd, which was owned by Mr Ioannides.

shareholder in Ferenco. On the contrary, Ferenco was owned first by Esios and then by Finservus. According to the Cypriot Registry Finservus only transferred Ferenco's shares to SOTC on 29th January 2007: If the Ferenco Option Agreement is genuine, it could only have been concluded on the basis that Ferenco could readily have been transferred to Farleigh before Farleigh sold to SOTC. This may have been the case because Ferenco was owned first by Esios and then by Finservus both of which have owned various personal interests for Mr Abramovich at different times. Again the implication is that Finservus is a vehicle for his personal interests. The likelihood is that Finservus owned Farleigh as well as Ferenco.

18. The matters set out in the previous paragraphs provide additional support for the inference that Farleigh was a vehicle for Mr Abramovich's personal interests, as was Ferenco.

19. Accordingly the second set of offshore companies all appear to be vehicles for Mr Abramovich's personal interests which were managed by Millhouse on his behalf.

20. The Sibneft-Yugra participation interests were transferred to the second set of offshore companies by the first set (Carroll, Shaw and Tranquillo) for a nominal consideration.

21. Carroll, Shaw and Tranquillo also appear to be vehicles for Mr Abramovich's personal interests in the control of Millhouse. Firstly, the transfer was for nominal consideration. Secondly, Richard, Gregory, Carroll and Shaw, the second set of offshore companies, have the same BVI address. Thirdly, Carroll and Shaw held Mr Abramovich's acknowledged interest in Aeroflot which was one of those transferred into the management of Millhouse according to the 24th October 2001 announcement. Millhouse representatives on the board of Aeroflot included (a) Mr Davidovich; and (b) Mr Osipov (head of Takeovers and Mergers at Millhouse). Mr Osipov moved to the London office in 2005 to deal, Yugraneft suggests, with the sale (and the proceeds) of Mr Abramovich's interest in Sibneft to Gazprom. So did Ms Vilia Nikolina who had worked at the Representative Office and had been one of the Millhouse people who went on the board of Sibneft-Yugra. Yugraneft also suggests that there are various reasons why Mr Abramovich would wish to move asset offshore, such as actual or potential difficulties with the Russian authorities.

22. All of the offshore companies are thus. It is said, within the offshore group of companies *run by Mr Tenenbaum.*

23. Mr Abramovich's 92% interest in Sibneft (the remaining 8% being on the market) was held through six Cypriot companies: (i) White Pearl, (ii) Gemini, (iii) Marthacello, (iv) Kravin, (v) Heflinham, and (vi) Kindselia. These companies were themselves owned (mainly) by other Cypriot companies in the Meritservus stable. All six companies were involved in 2003 in an attempted merger with Yukos under which part of the shareholding in Sibneft was to be sold in return for a shareholding in the merged entity, but 20% was to be sold to Yukos for $ 3 billion. In fact the merger did not go through and the shares in Sibneft of five of the companies other than Kravin were transferred back (according to a judgment of the Moscow Arbitazh Court of 10th February 2005 – where Kravin is not mentioned). The 20% interest appears to have stayed with Yukos (in return for the $ 3 billion), so that Mr Abramovich's previous 92% interest in

Sibneft reduced to 72%. Mr Tenenbaum was to have been on the board of the merged entity. Mr Shvidler's evidence is that Mr Tenenbaum had, after he moved to London, some involvement in the "*proposed international aspects of the merger with Yukos*" and a proposed merger with Royal Dutch Shell.

24. There is no distinction between the structures which hold Mr Abramovich's "personal" assets – like planes, boats and houses – and the structures which hold his business interests. All are run through offshore entities controlled by Millhouse. Thus the yachts are operated through Blue Ocean, which was owned by Finservus and then (indirectly) by Mr Ioannides. Mr Abramovich's two planes, with his personal livery, are owned by Crocus Corporation AVV, a company incorporated in Aruba, whose directors are Maria Elia and Panagiotis Nikou, who are Meritservus personnel, and the other by Conibair Holdings Ltd, a BVI company administered by CCS. Maria Elia is a director of Millhouse. She was also a director of Finservus from August 2004. She was not on the board of any of the six offshore companies.

25. Some of his Lowndes Square properties were at one time held by BVI companies owned directly or indirectly by CCS. Chelsea FC is ultimately owned by Taverham Holdings Ltd, a BVI company of which Mr Abramovich is the sole beneficial owner. It in turn owns Isherwood Investments Ltd, a Cypriot company, which owns Chelsea Ltd which owns Chelsea FC plc. Maria Elia is a director of Isherwood and the company secretary is Meritservus (Secretaries) Ltd.

26. Yugraneft also relies upon the charts for what they do not reveal i.e. any involvement by Mr Davidovich or Mr Shvidler as director or shareholder with the Meritservus companies or the offshore companies. This, it is suggested, is because Mr Tenenbaum was co-ordinating their activities, and was the safe pair of hands into which Mr Abramovich entrusted his interests including the proceeds of the sale of his interests in Sibneft.

APPENDIX 4

1. Prior to June 200 Sibir held 30.8 % of Yugraneft. In June 2000 it increased its stake to 69.2%

2. By 31st December 2001 Sibir had increased its share to over 99%.

3. In or by August 2003 Sibir and the Central Fuel Company ("CFC"), a company owned by the City of Moscow agreed on the establishment of a joint venture in the form of the Moscow Oil & Gas Company ("MOGC").

4. CFC contributed to the joint venture its shareholding in the Moscow Oil Refinery and other assets in return for a 55% stake in MOGC. Sibir contributed that part of its shareholding in Yugraneft (which then held nothing other than the Sibneft-Yugra shares) which was not already pledged to Sibneft as security for Loans 1 and 2. That amounted to about 55% of the shares of Yugraneft. In return it received a 31.49% stake in MOGC. It was envisaged that Sibir would ultimately contribute the remainder of its shares (about 44%) in Yugraneft, when the pledges to Sibneft were discharged, and receive in turn share in MOGC which would ring its holding up to 45%.

5. The effect of that was that, at the time of the BVI proceedings Sibir held about 44% of the shares of Yugraneft (pledged to Sibneft). These are described as a 43.6% interest held indirectly, in the accounts of Sibir for the year ending 31st December 2004. But Sibir also owned a 31.49% interest in MOGC which, itself, owned 55% of Yugraneft. So the total interest, direct or indirect, of Sibir in Yugraneft was 43.6% + 17.32% [31.49% x 55%] = 60.92% of Yugraneft.

6. In summer 2007 the CFC transferred all of its shares in MOCG to Sibir in exchange for shares in Sibir with the result that Sibir held over 99% of Yugraneft.

APPENDIX 5

2005

1. On 6th April Sibir defeated Sibneft's objections to the registration of Sibir's claims and Sibneft's application to stay the bankruptcy proceedings.

2. On 31st May the 9th Arbitrazh Appeal Court varied the order of 6th April but did not allow Sibneft's appeal.

3. On 3rd June Sibneft lost its appeal in the bankruptcy proceedings against allowing Sibir's claim to a debt of $3 million.

4. On 27th July, Sibneft's application was passed to the President of the Supreme Arbitrazh Court.

5. On 6th September, the Federal Arbitration Court of Moscow allowed Yugraneft's appeal against the 9th Appeal Court's decision of 31st May in favour of Sibneft and sent the case to the 9th Arbitrazh Appellate Court for review.

6. On 3rd October Sibir defeated Sibneft's appeal claiming that the bankruptcy of Yugraneft violated its rights. Sibneft's application for a review of the decision of 30th December 2004 was refused.

7. On 14th June Sibneft's claim to avoid a loan agreement between Sibir and Yugraneft was dismissed by the Moscow Arbitrazh Court.

8. On 11th October Sibneft's appeal to the 9th Arbitrazh Appeal Court was dismissed.

9. On 3rd November the 9th Arbitrazh Appeal Court dismissed Sibneft's case that the Order of 6th April should be overturned.

10. On 27th December the Federal Arbitrazh Court for Moscow District rejected Sibneft's cassation complaint seeking to overturn the Order of 6th April.

APPENDIX 6

1. There were 45 volumes of documents. They contain swathes of duplication. I doubt that it was really necessary to photocopy them all.

2. In any event a core bundle should have been provided which at least included (a) the primary documents relating to the events in question in chronological order; (b) the relevant provisions of the Russian Civil and Criminal Codes; and (c) in respect of the BVI proceedings the Statement of Claim, the judgments, and Sibir's skeleton arguments for the hearings before Charles J in July 2005, at first instance and in the Court of Appeal.

3. I was told that when consideration was given to a core bundle, it was thought that it was too late. It was not. Upon my request a core bundle was compiled as the case proceeded, which was helpful, but an inadequate substitute for a proper bundle compiled in advance. The one compiled is not, in the event, complete – it does not, for instance, include all the relevant sections of the Russian Civil and Procedure Codes.

4. The authorities extend to some 14 volumes, 9 being provided by Clydes and (in the end) 5 by the defendants' counsel's Chambers. The latter started off as four but, as is not uncommon, one of them was so overstuffed as to make it unusable. There is considerable duplication between the two. Reports of huge size have been photocopied on single sheets (i.e. not on both sides of the paper) in their entirety, when only limited portions could, on any view, have been required. It was surely unnecessary for the claimants to copy 528 pages of the Insolvency Rules or the entirety of *Ultraframe* – 494 pages; and *Three Rivers* – 294 pages

5. The compilation was on occasion eccentric. *El Ajou* was included at first instance by one side and in the Court of Appeal by the other. *Grupo Torras* in the Court of Appeal had to be included by the defendants in a small set of additional authorities. The claimants' index does not always marry with the contents of the files.

6. These failings, which are neither unfamiliar, nor, in the overall scale of things, momentous, ought not to occur. They add, unnecessarily and avoidably, to the

burden of dealing expeditiously with a case of this magnitude.