JUDGMENT : MR JUSTICE CRESSWELL Commercial Court 28th July 2006

Introduction

1. There are a number of applications before the court including applications by the Rusal defendants and the Orienbank defendants for a declaration that the court has no jurisdiction/should not exercise jurisdiction to try the Part 20 claims against these defendants, an application by TadAZ for an order that the Part 20 claim against TadAZ be struck out because it is said the Part 20 Particulars of Claim make non-justiciable allegations, an application by the sixth and eighth Part 20 defendants to set aside the default judgment entered against them and an application by Ansol for permission to amend the Part 20 Claim Form and the Particulars of the Part 20 claim (an earlier application for permission to amend having been withdrawn).

2. The applications before the court followed extensive interlocutory applications between some of the parties in the Chancery Division. The hearing (set for 8 days) was delayed by and extended by the service by Ansol of draft amended pleadings on 19 June, 21 June and 23 June.

3. Challenges to the jurisdiction and related applications in the Commercial Court (and in the Chancery Division) should be conducted in accordance with the Admiralty & Commercial Courts Guide (and the Chancery Guide) and the overriding objective, with a high level of realism and co-operation. Such applications are not the occasion for a mini trial on the basis of witness statements. At the hearing I received considerable assistance (and co-operation) from all four legal teams in a number of respects. But it should be possible to conduct applications of this nature without the need for the extensive materials placed before the court.

The Main Action in outline

4. These proceedings concern a State-owned aluminium smelting plant in Tajikistan ("TadAZ") and, in particular, the trading operations conducted by TadAZ over the period 1996 to 2004. The director of TadAZ with responsibility for the management of the plant over that period was Mr Abdukadir Ermatov, the first defendant.

5. TadAZ alleges that Mr Ermatov had a corrupt relationship with Mr Avaz Nazarov, the third defendant. It is said that by reason of that corrupt relationship, and in breach of duties of loyalty owed to TadAZ, Mr Ermatov concluded contractual arrangements between TadAZ and companies associated with Mr Nazarov (including the second defendant Ansol Ltd ("Ansol")) on terms which were manifestly disadvantageous to TadAZ. The profits earned by the second defendant by virtue of its dealings with TadAZ between July 1996 and 31 December 2004 are alleged to have been about US$485 million.

6. The fourth to sixth defendants are said to have participated in the fraud. The seventh defendant (Mr Ermatov's son) is alleged to have been privy to the fraud, and to have received various corrupt benefits from Mr Nazarov, including a flat in London. The eighth and ninth defendants (companies owned and/or controlled by Mr Nazarov) are said to have traded with TadAZ and to have received proceeds of the fraud perpetrated on TadAZ. I will refer to the second to sixth and eighth and ninth defendants as "the Ansol defendants".

7. Each of the defendants denies having committed or participated in any wrongdoing. In essence it is denied that any corrupt relationship existed between Mr Ermatov and Mr Nazarov and it is said that all trading between TadAZ and companies owned or controlled by Mr Nazarov took place at arm's length and on commercial terms. The defendants say that TadAZ's production increased significantly and it became profitable for the first time over the period in question.

The Part 20 Proceedings in outline

8. Ansol, the second defendant, issued a Part 20 claim against TadAZ and eight other parties. On 21 June 2005 Master Price granted Ansol permission to make a counterclaim against TadAZ prior to filing its defence, to add the second to ninth Part 20 defendants to the Part 20 claim/counterclaim and permission to serve the Part 20 claim/counterclaim out of the jurisdiction against the second to ninth Part 20 defendants.

   The second to fifth Part 20 defendants consist of OJSC Russian Aluminium ("Rusal") and related parties, including senior management (collectively, the "Rusal defendants"). The term "OJSC" refers to "Open Joint Stock Company". According to Rusal: - Rusal is incorporated under the laws of Russia, is privately owned, and owns a number of affiliated companies ("the Rusal Group"). The Rusal Group is the third largest primary aluminium producer worldwide and employs over 50,000 people in seven Russian regions and eleven foreign countries. Its annual sales exceed $5.5 billion, its assets exceed US$4.1 billion, and its equity is over US$2 billion. In 2004, the Rusal Group accounted for a total of 75% of Russia's, and 10% of the global, primary aluminium output.

   The eighth Part 20 defendant, OJSC Orienbank is a Tajik bank and the sixth Part 20 defendant, Mr Saduloev, is its Chairman.

   CDH Investments Corp, the seventh Part 20 defendant, is a company incorporated in the BVI. Orienbank, Mr Saduloev and CDH are collectively referred to as "the Orienbank defendants". According to the Orienbank defendants, the Rusal defendants and TadAZ, CDH has been ultimately owned by Orienbank through Amatola SA (USA) LLC since December 2004. The Ansol defendants dispute that CDH is owned by Orienbank. Prior to its transfer to Orienbank through Amatola it was an affiliate of Rusal since its incorporation in mid-2003. Ansol contends that CDH was and remains owned or controlled by Rusal (or another Rusal entity).

9. Ansol alleges that in 2003 it entered into a joint venture with Rusal, following which Hamer Investing Limited ("Hamer"), the ninth Part 20 defendant, a company owned 50% by Ansol and 50% (indirectly) by Rusal, traded with TadAZ. The alleged joint venture is denied by Rusal.

10. In the Part 20 proceedings, Ansol originally alleged that the Part 20 defendants breached various alleged contractual, tortious and fiduciary duties to Ansol and others, including in particular duties in relation to the alleged joint venture. These alleged breaches were said to have arisen in connection with an unlawful conspiracy between the Part 20 defendants and members of the Government of Tajikistan (including the President) to oust Ansol from the alleged joint venture and its trading position with TadAZ and to enable Rusal to take control of TadAZ.

11. TadAZ filed a Defence to the Part 20 claim in which it denies Ansol's allegations. The Rusal defendants and the Orienbank defendants have applied under Part 11 to dispute the jurisdiction of the court and have not therefore submitted any form of substantive defence. As part of that application, these Part 20 defendants raise in particular the question whether the Part 20 claim is justiciable. They also assert that there is no claim against them which has a reasonable prospect of success. TadAZ has issued a separate application under CPR 3.4 by which it seeks to have the Part 20 claim struck out, also on the basis that the issues it raises are non-justiciable.

12. In addition, judgments in default of filing Acknowledgements of Service were (and remain) entered against Mr Saduloev, CDH and Orienbank. Mr Saduloev and Orienbank (but not CDH) have applied to set aside the judgments in default under Part 13.2. CDH has indicated that it will issue an application under Part 13.3 in the event its application under Part 11 fails. Mr Saduloev and Orienbank have indicated that they will also issue applications under Part 13.3 in the event that their applications under Part 11 and 13.2 fail. The Orienbank defendants contend (but Ansol disputes) that an application under Part 11 can be issued and determined at a time when a default judgment remains outstanding against the party issuing the Part 11 application.

13. Hamer, the ninth Part 20 defendant, is currently subject to the control of a receiver appointed by the High Court of the British Virgin Islands. It has not filed a Defence or applied to dispute the court's jurisdiction, there being an agreed modus operandi in place that preserves its right so to do.

Procedural History in outline

14. The proceedings were issued by TadAZ in the Chancery Division on 13 May 2005. On the same day, TadAZ obtained a freezing order against the defendants in the main action. On 23 May 2005 the second to fifth (and shortly afterwards, the remaining) defendants applied to set aside the freezing order. Particulars of Claim were served on 22 June 2005. The Part 20 Claim Form was issued on 1 July 2005 and the Part 20 Particulars of Claim were subsequently served. The defendants to the main claim (with the exception of the seventh defendant, who was not at that time represented) served Defences on 26 August 2005 and the claimant served its Replies to the Defences on 21 October 2005. On 21 October 2005, the freezing orders were discharged by a judgment of Blackburne J. The seventh defendant served his Defence on 24 March 2006.

15. On 23 December 2005 and 31 May 2006 the claimant provided Further Information in respect of its Particulars of Claim. On 6 March 2006, each of the defendants (with the exception of the seventh defendant, of whom no such request has yet been made) provided Further Information in respect of their Defences.

16. The proceedings were transferred to the Commercial Court by an order dated 23 March 2006.

Applications before the Court. The following applications are before the court.

17. An application under CPR 11 issued by the Rusal defendants dated 3 October 2005 for a declaration that the court has no jurisdiction to try the Part 20 claim against the Rusal defendants or should not exercise any jurisdiction it may have, and for other relief.

18. An application under CPR 11 by the Orienbank defendants dated 21 October 2005 for a declaration that the court has no jurisdiction to try the Part 20 claim against the Orienbank defendants or should not exercise any jurisdiction it may have, and for other relief.

19. An application by the sixth and eighth Part 20 defendants dated 31 October 2005 for an order under CPR 13.2 that the default judgment entered against them on 5 September 2005 be set aside because it is said the Part 20 claim had not been properly served on the sixth and/or eighth defendants in accordance with the requirements of CPR 6.

20. An application by Ansol dated 20 January 2006 for an order that the court do remedy any error that may have occurred in service of the Part 20 claim form on the sixth and/or eighth Part 20 defendants pursuant to CPR 3.10 and/or an order that service on the sixth and/or eighth Part 20 defendants be dispensed with pursuant to CPR 6.9.

21. An application by TadAZ dated 3 February 2006 for an order that the Part 20 claim be struck out pursuant to CPR Part 3.4 on the grounds that it does not disclose a cause of action or alternatively is an abuse of the process of the Court because the Part 20 Particulars of Claim make non-justiciable allegations.

22. An application by Ansol dated 7 March 2006 for an order that Ansol be permitted to amend the Part 20 Particulars of Claim pursuant to CPR 17.1(2) (b). (This application was withdrawn in the course of the hearing – see the further application below issued 23 June 2006).

23. On 19 June 2006 Ansol confirmed that it agreed that the law governing the alleged contract between Ansol and Rusal is Russian law and that the law governing the rest of the claims against the Rusal defendants and the Orienbank defendants is Tajik law. On 19 June 2006 Ansol served (1) draft amended Particulars of the Part 20

claim and (2) a draft amended Response to Request dated 9 November 2005 by the first Part 20 defendant for Further Information of the Part 20 Particulars of Claim.

24. On 21 June 2006 Ansol served a note on justiciability, draft amended Part 20 Claim Form, revised draft amended Particulars of Part 20 claim, draft amended Response to the Request dated 9 November 2005 and draft amended Reply to Defence of the first Part 20 defendant.

25. In the note dated 21 June 2006 Clyde & Co solicitors for Ansol set out Ansol's position on justiciability in relation to the Part 20 claim as follows.

"Ansol does not allege in its draft amended Part 20 claim and will not allege at the trial of its Part 20 claim:
(1) that the President of Tajikistan was party to any conspiracy against it;
(2) that the Government of Tajikistan or any Government [or State] officials were party to any conspiracy against it;
(3) that any sovereign act properly so called of the President or Government [or any State official] of Tajikistan is or was unlawful as a matter of Tajik law.

Ansol will reserve the right at trial of its Part 20 claim to:
(1) allege and prove that a particular act is not a non-justiciable sovereign act or an act of state at all (if it should be alleged that it is);
(2) challenge any contention that any alleged sovereign act took place at all, or took place on a particular date, or that, if it did take place, that it has any particular meaning or effect contended for;
(3) allege that a particular sovereign act is contrary to public policy or should otherwise not be recognised in an English Court."

The words in square brackets were subsequently added by way of clarification.

26. On 23 June 2006 Ansol served on the Part 20 defendants: -
(1) application notice dated 23 June for permission to amend the Part 20 claim and related pleadings.
(2) draft amended Part 20 Claim Form.
(3) revised draft amended Particulars of the Part 20 claim.
(4) draft amended Response to Request dated 9 November 2005 by the first Part 20 defendant for Further Information of the Part 20 Particulars of Claim.
(5) application notice dated 23 June for permission to serve out of the jurisdiction and for alternative service.
(6) Voluntary Further Particulars in respect of paragraphs 98F (e), 98G (h), 98H (f), 98K (c), 98L (d) and 98N (c) of the draft amended Particulars of Claim.
(7) The ninth witness statement of Stephen John Tricks in the Part 20 claim dated 23 June.

The background, the history of this litigation to date, the arbitration proceedings and related matters

27. On 13 June 2006 (prior to the start of the hearing) in an email to the parties I said that I would be assisted by a working document which sets out the respective contentions/cases of the parties in relation to the background, the history of this litigation to date, the arbitration proceedings etc. Ansol had provided a summary of relevant facts and legal claims in Part 2 of its skeleton argument. I directed that this document be taken as a summary of Ansol's contentions with certain deletions. I directed the other parties to respond to Ansol's summary of relevant facts and legal claims. The Part 20 defendants have helpfully done so.

28. In paragraphs 29 to 85 below reference is made to Ansol's case, TadAZ's case, the case of the Rusal defendants and the case of the Orienbank defendants in certain respects. These paragraphs do not, however, purport to contain a definitive statement of the respective positions of the various parties. They are intended to set out the background for the present applications. I have made some additions drawing on the contemporary documents. I should record the following reservations by TadAZ, the Rusal defendants and the Orienbank defendants. TadAZ, the Rusal defendants and the Orienbank defendants all emphasise that they have provided limited responses (for the purposes of the applications before the court) to Ansol's summary of facts and claims and that they should not be taken to accept any fact or matter they have not specifically responded to.

The Order of Etherton J

29. On 13 May 2005, the second defendant, Ansol, amongst other defendants, was served with an Order subjecting them to a worldwide freezing injunction, search and seizure orders, and orders compelling them to disclose their worldwide assets. That Order had been granted that morning, ex parte, on an application based on an affidavit by the claimant's/applicant's solicitor (Bushell 1), together with two expert reports by PricewaterhouseCoopers Moscow. According to Ansol at that time, and today, PricewaterhouseCoopers Moscow were and are the auditors to the third Part 20 defendant, Rusal and it was intended that the documents seized, together with all the information which the defendants were obliged to disclose, would be handed over to Rusal.

TadAZ say that they do not know the precise current relationship between PriceWaterhouseCoopers and Rusal. It was intended that the documents obtained under the Order of Etherton J would be disclosed to Rusal so far as might be necessary for the purpose of Rusal assisting in TadAZ's claim.

The Rusal defendants do not accept that the purpose of obtaining the order was that the information disclosed was to be handed to Rusal or any of the Part 20 defendants other than TadAZ.

30. The application to set aside the Order was heard over five days in July 2005 by Blackburne J. All the ex parte Orders were finally set aside as against the second to sixth, eighth and ninth defendants, the Ansol defendants,

by January 2006. By the time the matter came before Blackburne J in July 2005, Ansol had commenced the Part 20 claim against TadAZ and various other Part 20 defendants, including Rusal.

The without notice Orders were set aside as against the Ansol defendants on terms giving TadAZ protection against the destruction of or tampering with documents pending disclosure. Ansol served its Part 20 claim on TadAZ on 6 July 2006.

Tajikistan, TadAZ and Ansol

31. The dispute arises out of the supply of raw materials to and the production of aluminium by TadAZ in Tajikistan. TadAZ is a state owned entity. Tajikistan is a land-locked and undeveloped country, but close to sources of electricity which are needed to convert alumina into aluminium. According to Ansol the remoteness of the plant from sources of raw materials causes difficulties of transport and access.

TadAZ accepts that raw materials need to be transported from their sources. Those sources are in various places across the world.

32. Under the Charter of TadAZ, it is placed under the direction and control of its Director alone. He is appointed by the Government. TadAZ has no Board of Directors as known in Western countries. The Director is entrusted with the running of the plant in every aspect. The role of the Director of TadAZ is set out in the TadAZ Charter and the Director's contract of employment. The Government's powers in relation to TadAZ are as set out in the Constitutional Law on Government and in the Charter. The Director can delegate to others.

33. According to Ansol, following independence from the Soviet Union in 1991, both Tajikistan and TadAZ faced difficult times. A civil war broke out and supplying the plant became extremely difficult. TadAZ lacked the experience, qualified personnel and financial resources to go out into the international market to arrange the supply of raw materials.

TadAZ says that it was in a better position than Ansol to go into the international market to arrange the supply of raw materials.

34. According to Ansol between 1994 and 1998 various companies supplied raw materials to TadAZ, including companies in which Mr Nazarov (the third defendant and controller of Ansol) was involved. Ansol started doing business with TadAZ in 1999. Between 1999 and May 2003 Ansol entered into a series of barter agreements with TadAZ. Under these agreements Ansol would supply raw materials and spare parts to TadAZ and make payments to third parties on behalf of TadAZ. In return, TadAZ would sell to Ansol finished aluminium equivalent to the total value of the raw materials supplied by Ansol and the payments made by Ansol on behalf of TadAZ. Ansol would then sell this aluminium to third parties.

TadAZ's case is that the value of aluminium supplied by it to Ansol greatly exceeded in value the raw materials supplied by Ansol to TadAZ. In other words, Ansol supplied raw materials to TadAZ at inflated prices. It was able to do this as a result of its corrupt relationship with Mr Ermatov.

35. According to Ansol one constant problem with this operation was the need for finance. Although a barter agreement in principle allows the supplier of raw materials to take immediate delivery of finished aluminium without waiting for that particular consignment of raw materials to be converted into aluminium, in practice the operation of the barter agreements between Ansol and TadAZ was spread over time and still required significant sums of working capital in order to avoid cash-flow problems. It would not be unusual for Ansol to have to cover a period of 90 days or more between the time an initial payment was made by them for raw materials and payment by a final buyer for the metal F.O.B. Tallinn.

TadAZ admits that there was a need for working capital. According to TadAZ, under the terms of the contracts between TadAZ and Ansol, aluminium was delivered by TadAZ to Ansol within 30 days of the relevant delivery of raw materials. TadAZ does not know the period (if any) for which Ansol had to await payment. Under the arrangements with Hydro Aluminium A.S. ("Hydro"), which is a subsidiary of Norsk Hydro, a large Norwegian company, Ansol's purchases of raw materials were pre-financed by Hydro pursuant to the contract between Hydro and TadAZ. Other purchases of raw materials by Ansol were financed by means of guarantees given by TadAZ to the ultimate supplier.

36. According to Ansol, since TadAZ had to keep operating on a continuous cycle to avoid damage to the machinery, it was not feasible for Ansol to wait until payment by the final buyer before purchasing another batch of raw materials. Ansol would have to arrange frequent shipments of raw materials to TadAZ, and therefore might end up financing at least three months'worth of raw materials at any given time.

37. According to Ansol, Ansol was able to arrange finance with assistance from, amongst others, Al Rajhi Banking and Investment Corporation and also from Hydro.

According to TadAZ, from September 2003 Hydro financed all or most of the supplies of alumina to TadAZ. Hydro insisted on entering into a contract directly with TadAZ because it was not willing to take the credit risk involved with Ansol.

The alleged Ansol/TadAZ Joint Venture

38. According to Ansol, in 2003 Ansol needed further finance for its own account and wanted to attract a strategic partner. Ansol therefore entered into discussions with Rusal for a new joint venture in supplying TadAZ. At that time (2003) Mr Deripaska (the second Part 20 defendant) was CEO of Rusal and Mr Bulygin (the fifth Part 20

defendant) was CEO of Rusal Management Company, (the fourth Part 20 defendant and an affiliate of Rusal). Mr Deripaska and Mr Bulygin are now respectively the Chairman and CEO of Rusal.

39. According to Ansol, in April 2003 Ansol (represented by Mr Nazarov) and Rusal (represented by Mr Deripaska and Mr Bulygin) agreed to establish a Joint Venture between the two companies to carry out joint projects in Tajikistan and Azerbaijan, including in relation to TadAZ.

TadAZ denies that it knew of the alleged agreement or its terms and that any such agreement would have been enforceable in law.

Rusal denies that a Joint Venture as alleged or at all was agreed between Ansol and Rusal and adds that this is a matter for Russian/Tajik law.

40. According to Ansol, on 18 April 2003 a Protocol, recording their agreement, was signed by Mr Nazarov on behalf of Ansol and by Mr Deripaska and Mr Bulygin on behalf of Rusal. On 21 April 2003 a Confidentiality Agreement was signed between the same parties.

The Protocol (in translation) read: -

"Moscow
2003
Party 1 - company Ansol, represented by A.S. Nazarov
Party 2 - company Rusal, represented by O.V. Deripaska

The present protocol regulates the Parties' relationships on cooperation with Tajik aluminium plant (hereinafter the Plant).

1. The Parties have agreed to establish Joint Venture (JV) to cooperate with the Plant with participation of 50:50.
2. The Party 1 will sell to the Party 2 50% in JV for 25 million dollars.
3. The Party 2 will pay to the Party 1 the amount due in accordance with clause 2 hereof before 15 May 2003.
4. Date of entering into joint business by the Parties – 01 May 2003.
5. The Party 2 will carry out everyday management of JV.
6. Starting from the date of entering into joint business JV will pay for current deliveries of raw materials to the Plant. Issue of the Party 1's debts to third parties for raw materials deliveries which exist as of the date of entering into joint business, will be settled by the Party 1 by itself.
7. The Party 1 will assign the rights and obligations on supply of raw materials and finished goods (with the Gerald, Glencore, Hydro Aluminium, Fondel and etc) for all amount of obligations as well as on debt to BNP (including the Greeks) for the amount of 13 million dollars.
8. The Party 1 will assign to JV rights to use claims to the Plant due to the Party 1 (200 million dollars).
9. Starting from 01 June 2003 JV will accept obligations of the Party [1] to repay debts under Newnicom scheme.
10. Procedure of assignment of rights and obligations in accordance with clauses 8 and 9 hereof shall be determined by the Parties' lawyers additionally.
11. The Parties will jointly participate in privatisation of the Plant.
12. The Parties have agreed about joint participation in any energy projects on the territory of Tajikistan.
13. The Parties have agreed about joint participation in AzerAl (Gainja) project.

On behalf of the Party 1 On behalf of Party 2
(Signature) (Signature)
18.04.03 18.04.03."

The definitions in the Confidentiality Agreement of 21 April 2003 included the following: - *"'Joint Venture' shall mean the joint venture of the Ansol Group and the Rusal Group, which the Parties plan to put into effect in accordance with the Protocol of 18 April 2003 and any other Protocols and/or agreements, which will be concluded in the future in this connection."*

41. TadAZ denies that it was aware of the Protocol or of its terms. The purpose and effect of the Confidentiality Agreement was to prevent third parties, including TadAZ, from learning of the Protocol and its terms. TadAZ denies that any such agreement would have been enforceable in law.

Rusal denies that the Protocol recorded or evidenced any legally binding agreement between Ansol and Rusal. Rusal further denies that it was intended to or indeed did create a contract or binding legal relationship between Ansol and Rusal and says that this is a matter for Russian/Tajik law.

42. As to clause 5 of the Protocol (Rusal "will carry out everyday management of JV"), according to Ansol the joint venture company came to be Hamer, (the ninth Part 20 defendant), which was provided by Rusal. Ansol says this clause explains why Mr Petukhov, an employee of Rusal, was appointed the only director of Hamer and why he remained in day to day control of Hamer during the period from May 2003 to December 2004 when Hamer, not Ansol, had direct contracts with TadAZ.

TadAZ admits that Hamer was a vehicle for a joint venture of some description between Ansol and Rusal. TadAZ says that Mr Nazarov, by reason of his corrupt relationship with Mr Ermatov, was in a position to dictate to TadAZ the counterparties with which it did business, and procured that TadAZ switch from contracting with Ansol to contracting with Hamer. According to TadAZ, from May 2003 Ansol had no contract with TadAZ.

43. A Framework Agreement dated 29 April 2003 between Ansol and Elleray Management Ltd ("Elleray"), a Rusal affiliate, was "concluded within the framework … achieved by the Parties arrangements stated in the Protocol of 18 April 2003" (clause 2.2). Clause 3.1 provided that Elleray Management Ltd "shall … ensure transfer to [Ansol Ltd] of 50% nominal shares in Hamer on the conditions set out in Appendix 5 … ".

44. According to Ansol, from May 2003 Hamer was inserted into the structure of agreements whereby Ansol had previously dealt with TadAZ. From that date, it was Hamer, under the control of Rusal, which sold alumina to TadAZ. Ansol and Rusal (through an affiliate, Rusal Trade Limited) supplied Hamer with the alumina and other raw materials which were passed on to TadAZ and used for the production of the aluminium. This joint venture between Rusal and Ansol continued successfully until December 2004.

    TadAZ admits the first sentence set out above but denies that Hamer was under the exclusive control of Rusal. TadAZ admits the third sentence. TadAZ further admits that the joint venture was successful as far as the joint venturers were concerned.

    According to Rusal, there was no joint venture as alleged or at all between Ansol and Rusal. This is a matter for Russian/Tajik law. Rusal says that the only joint venture that existed was that between Elleray and Ansol.

45. According to Ansol, in September 2003 a new set of agreements involving Hydro was entered into following detailed negotiations between Ansol, TadAZ, Hydro and Rusal, because Hydro decided to increase its share of the financing from US$33 million to US$100 million. Hydro's lawyers discussed these matters with in house lawyers from TadAZ. As a result of those negotiations, the 2003 Barter Agreement dated 25 September 2003 between Hydro and TadAZ, and the 2003 Aluminium Agreement of the same date between Ansol and TadAZ came into existence.

46. The Barter Agreement of 25 September 2003 contained provisions as to the basic agreement (clause 1.1 Barter) and appointment of Ansol as TadAZ's agent (clause 1.2), raw materials (clause 2) aluminium (clause 3), and other provisions. TadAZ represented and warranted that it had appointed Ansol "to act as its agent with respect to certain of its rights and obligations: … in particular, Ansol has been authorised to accept delivery of raw materials on behalf of TadAZ, and to accept quantity and quality of same, and Hydro is entitled to rely on written and verbal statements from Ansol in these respects … Hydro is aware of the fact that Ansol solely acts as TadAZ's agent … should TadAZ for any reason whatsoever, wish to revoke Ansol's appointment and name a new party as its agent … then such revocation or cessation shall be effective subject to written notice having been given by TadAZ or by Ansol to Hydro at least one month prior to such revocation or cessation becoming effective vis-à-vis Hydro" (clause 1.2).

    Clause 5.1 provided that the Barter Agreement should continue in effect through 31 December 2006.

    The Aluminium Agreement between Hydro and Ansol Ltd contained provisions as to financing arrangements, Barter Tonnage and Balance Tonnage.

    The new arrangements with Hydro in September 2003 are admitted by TadAZ. TadAZ denies that it or its in house lawyers were involved in the negotiations. According to TadAZ, Mr Ermatov executed the new contract between Hydro and TadAZ on Mr Nazarov's instructions.

47. According to Ansol, not only was Rusal heavily involved in the negotiation of the 2003 Barter Agreement, but its CEO – Mr Bulygin – and other representatives attended the signing ceremony.

48. According to Ansol, production at TadAZ steadily increased over the years as the plant was modernised and supplies of raw materials increased and became more reliable. From being close to collapse in 1996-97, TadAZ had more than doubled its annual production to 360,000 MTs in 2004. Ansol says this success would have been impossible without the efforts of Ansol and providers of finance such as Hydro.

    TadAZ disputes the production figures and the description of TadAZ as being "close to collapse" in 1996-97. It is admitted that production increased. TadAZ says that as a result of the fraud committed against TadAZ by Ansol, Mr Nazarov and others, any benefits of increased production at TadAZ were overwhelmingly enjoyed by Ansol and Mr Nazarov and Rusal.

President Putin's visit on 16 and 17 October 2004

49. According to the witness statement of Oksana Antonenko (on behalf of the Rusal defendants) a new relationship between Russia and Tajikstan was formalised during President Putin's visit on 16 and 17 October 2004 when a total of 14 agreements were executed. These included agreements on the establishment of the Russian military base, on the transfer of responsibilities over guarding the Tajik-Afghan border, and Russia's use of the Nurek Centre. The two sides also signed several economic agreements, including those for the construction of the Sanguta Hydroelectric Station and the write off of Tajikstan's debt. A principal such agreement was on long-term Co-operation between the Government of Tajikstan and Rusal. All of the agreements executed in October 2004 were constituent elements of a new strategic bargain between Tajikstan and Russia.

The alleged Contractual Structure as at 30.11.04

50. I refer to the chart prepared by Ansol showing the alleged Contractual Structure as at 30 November 2004.

The events of December 2004 - January 2005

51. On 2 December 2004, Contract TADHamer 1/2004 dated 12 November 2003 between Hamer and TadAZ was extended for one year to 31 December 2005.

52. According to Ansol, on 6 December 2004 Mr Ermatov, who had been the Director of TadAZ since 1994, was removed from his position as Director and appointed by the President of Tajikistan to the post of Deputy Minister of Trade in the government. The deputy director in charge of production, Mr Sharipov, was promoted to the post of Director of TadAZ.

TadAZ says that the removal of Mr Ermatov as Director of TadAZ and his appointment as Deputy Minister of Trade was effected by Decree 486. The appointment of Mr Sharipov as Director of TadAZ was effected by Decree 487.

The Orienbank defendants accept that these changes took place on 6 December 2004. They, however, refer to Ansol's pleaded case in paragraphs 1 to 22 of Annex A to the original Part 20 Particulars of Claim as follows. Those paragraphs, and in particular paragraphs 1 to 7, show that the context of Mr Ermatov's removal on 6 December 2004 is said by Ansol to be an agreement (in Ansol's terminology, a conspiracy) concluded primarily between Mr Deripaska and the President/Tajik authorities (but also allegedly involving others) whereby Rusal was to take over the function previously fulfilled by Ansol. It is in the context of that alleged agreement (conspiracy) with the President/Tajik authorities, that Mr Ermatov was removed. Further, Mr Ermatov was removed and Mr Sharipov was appointed in his place by the President and/or the Government of Tajikistan (see paragraph 72 of the original Part 20 Particulars of Claim and Annex A paragraphs 24 and 25).

53. According to Ansol, shortly after 6 December 2004 TadAZ suddenly stopped supplies of aluminium to Hamer and Hydro under the existing arrangements. On 13 December 2004 Mr Sharipov wrote to Hamer to say that the annual renewal of the contract between Hamer and TadAZ which had taken place on 2 December 2004 was set aside because Mr Ermatov had breached the terms and conditions of his employment with respect to consent to execute agreements for the supply of raw materials. Coming after a 10 year period of his Directorship in which he had signed all contracts for TadAZ without any objection, this was somewhat surprising.

TadAZ admits that it suddenly stopped supplies of aluminium to Hamer and Hydro. TadAZ says that Mr Ermatov did breach his contract of employment made 30 December 2003 by entering into the agreement with Hamer in December 2004 without the consent of the Government. This was a breach of clauses 3.2 and 3.3 of his contract of employment.

54. According to Ansol, on 16 December 2004, unknown to Ansol and Hydro, TadAZ suddenly entered into a 'tolling agreement' with CDH ("the CDH Contract"). A tolling agreement differs from a barter agreement in that the aluminium smelter is paid a fee for processing alumina and the supplier retains ownership of the materials and resulting aluminium. It is Ansol's case that:

a) CDH is a front for Rusal, and the CDH Contract was the means of transferring the business formerly done by Ansol as a participant in Hamer, to Rusal and other Part 20 defendants;
b) There was no negotiation of the CDH Contract but it was drafted by a Rusal employee and imposed on TadAZ;
c) TadAZ will necessarily operate at a loss under the CDH Contract. The only benefit from the new arrangements will be derived by CDH and those who control it.

TadAZ accepts that Ansol and Hydro were not aware of the CDH Contract before it was made. TadAZ denies that CDH is a front for Rusal. According to TadAZ, the CDH Contract was the subject of negotiation and was not imposed on TadAZ. TadAZ says that it is in fact operating at a profit.

According to Rusal, CDH is not owned or controlled by any of the Rusal defendants, and is not a "front" for Rusal or for any of the Rusal defendants. Rusal refers to Ansol's allegation in its original Part 20 Claim that the President of Tajikistan conspired with the Part 20 defendants, and participated in the events leading to the contract between CDH and TadAZ. Further Rusal refers to Ansol's original pleaded allegations that the tolling contract with CDH was part of the "conspiracy" involving the President and other members of the Tajik Government.

55. On 17 December 2004, Mr Sharipov wrote to Hydro inviting them to the plant to hold "negotiations about further mutual co-operation". On 23 December 2004, he wrote again inviting Hydro to a meeting "for discussion of business in the next year". Ansol says this was not known to the defendants during the application before Blackburne J, but only became known to them later when, during a second application for a freezing order, Blackburne J ordered TadAZ to supply the defendants with certain material from the arbitration between TadAZ and Hydro.

56. Ansol draws attention to the fact that nothing said or done by Mr Sharipov in his letters written in December 2004 suggested that TadAZ had been informed of a customs ban on exports of aluminium to Hydro or Hamer or a notice from the Public Prosecutor instructing TadAZ not to do so. The supplies just ceased.

TadAZ says that Mr Sharipov did not refer to the customs ban and notice from the Procurator General because he understood that they had to be kept confidential.

Rusal says that the customs ban and notice from the Public Prosecutor were official acts of the Tajik Government.

57. Ansol says that by the end of December 2004 it had become clear to Ansol and Hydro that there were going to be no further deliveries of aluminium. Meetings took place in Tajikistan with government officials, including the President, to discuss the suspension of deliveries. At the President's suggestion, all the parties, including Hydro and Ansol met TadAZ representatives in Dubai on 13 – 15 January 2004 to try to settle the matter. Rusal was also

called on to attend because TadAZ could not make any decision without them. It later became obvious why that was so.

TadAZ agree that there were going to be no further deliveries, that there were discussions in Dushanbe to discuss the suspension of deliveries and that there was a meeting in Dubai. The meeting was (at least in part) without prejudice. TadAZ deny the last two sentences set out above.

The Rusal defendants deny that they controlled TadAZ in December 2004 or at any time. The cessation of deliveries of aluminium was, as Ansol asserts, the result of the actions of the Tajik Government and its organs. These were official acts and the involvement of the Tajik President in these discussions was in his official capacity as head of state.

58. According to Ansol, at the meeting in Dubai it appeared that a temporary settlement had been reached whereby TadAZ would resume shipment of aluminium to Hydro, at least sufficient to enable Hydro to hold off their threat to declare a default under the 2003 Barter Agreement. There is a transcript of the discussions that took place and no-one mentioned the 'fact' that aluminium could not be exported to Hydro at all because of the existence of an export ban put in place at the request of the Prosecutor General on 8 December 2004. The fact that the parties, including representatives from TadAZ, Orienbank and the President's brother in law, Mr Saduloev, agreed to resume shipment of aluminium to Hydro (says Ansol) belies its existence. The transcript also records a private discussion between Mr Bulygin of Rusal and representatives from Orienbank and TadAZ in which Mr Bulygin told them not to agree to the settlement because that would "expose CDH" and constitute an admission that there were no grounds for the stoppage of supplies. To the extent that at that stage there were no grounds for the stoppage, Mr Bulygin was (according to Ansol) correct.

TadAZ says the following. There was discussion at the meeting to the effect that Hydro would hold off declaring a default if a relatively small amount of finished aluminium that had already been produced and was lying at Regar station (at the TadAZ plant) was released to Hydro. There is a transcript of some of the meeting. Deliveries could not have been made without appropriate consent from the Prosecutor General. There was no agreement to resume shipments. Mr Bulygin (unsurprisingly) expressed concern that making any deliveries might constitute an admission of liability to Hydro. His concern is reflected in Rusal's letter to Hydro of 16 January 2005. As for that part of the transcript of conversations that were private and taped without the knowledge of the participants (a) Mr Bulygin has made clear that in referring to "exposing CDH" he was referring to the risk of exposing CDH to difficulties, rather than the risk of exposing CDH's existence and (b) the references to TadAZ (genuinely) having a "force majeure" argument are consistent with the customs prohibition already having been put in place.

Ansol's interpretation of comments by Mr. Bulygin is not accepted by Rusal. There was no admission by Rusal as alleged. Further, the cessation of deliveries of aluminium was, Ansol asserts, the result of the actions of the Tajik Government and its organs. These were official acts and the involvement of the Tajik President in these discussions was in his official capacity as head of state.

59. Ansol says that Hydro left the meeting thinking that a settlement had been reached, but in fact it was not honoured by TadAZ and no aluminium was released. Hydro recorded in a letter to Rusal shortly after the meeting that they had gained the impression from Rusal's conduct in Dubai that Rusal had gained control of TadAZ.

TadAZ says that Hydro did not think (and could not have thought) that a binding agreement had been reached. TadAZ accepts that Hydro's letter states that Hydro had formed the impression that "Rusal currently holds a very strong influence on the metal output from TadAZ."

60. Ansol says that when no deliveries were made following the Dubai meeting, Hydro wrote to TadAZ on 19 January 2005 declaring a default under their Barter Agreement 2003 with TadAZ, and claiming US$125 million alleged to be owed. On 24 January 2005 a power of attorney in English came into being (or at least it is dated that day), whereby Mr Sharipov allegedly agreed (he speaks no English) to appoint Rusal as TadAZ's "representative" in respect of the 2003 Barter Agreement, to authorise Rusal to start or defend proceedings anywhere in the world, to conduct those proceedings, and to settle them in its complete discretion.

61. On 28 January 2005 TadAZ by letter informed Hydro for the first time that an export ban had been placed on it on 20 January 2005, allegedly giving rise to a force majeure and thus preventing it from performing the Barter Agreement of 2003. Ansol says the position had changed from Dubai where Mr Bulygin made clear that there were no grounds for the stoppage and that, given the existence of the power of attorney, there is little doubt that the letter was written on Rusal's instructions.

TadAZ says that there is no inconsistency with anything said by Mr Bulygin in Dubai.

Rusal says the letter was not written on the instructions of the Rusal defendants or any of them. Any export ban was an official act of organs of the Tajik State.

62. The 2003 Barter Agreement was subject to an arbitration clause providing for arbitration in London, and Hydro commenced the Hydro Arbitration against TadAZ in February 2005. Ansol says that Rusal was part of the 'circle of confidentiality' and conducted the arbitration defence on behalf of TadAZ.

TadAZ says that following representations made by Hydro at an early stage, the "circle of confidentiality" was limited to three Rusal attorneys. The arbitration defence was conducted by Herbert Smith on the instructions of

TadAZ. The three Rusal attorneys were assisting TadAZ. Hydro's solicitors wrote to Clyde & Co. on 28 April 2006 stating that Hydro could not consent to the disclosure of confidential arbitration material, including the award.

The Rusal defendants deny that they were part of the circle of confidentiality and that they conducted the arbitration defence on behalf of TadAZ. Three named lawyers from Rusal (not any of the Part 20 defendants) acting in their individual capacity were at various times part of that circle. They each gave an undertaking to the arbitral tribunal regarding non disclosure of the contents of the arbitration to Rusal.

63. On 30 January 2005, Mr Kabirov, who was until then a Director of Orienbank (the eighth Part 20 defendant), was appointed the Deputy Director of TadAZ. Ansol says that he had no known expertise or experience in aluminium or trading generally and that his appointment was apparently backdated to 10 January 2005.

TadAZ says that Mr Kabirov was appointed to improve the organisational structure and management of the plant and to oversee economic, financial and commercial issues, including TadAZ's proposed switch to international accounting standards. Mr Kabirov commenced acting on 10 January 2005 and his formal appointment was backdated to that date in order to reflect the true position. Prior to 10 January 2005, Mr Kabirov did not represent TadAZ in any capacity.

The Orienbank defendants say that the appointment of Mr Kabirov was not backdated. 10 January 2005 was the date on which his appointment took effect.

64. Ansol says that in January and February 2005, in response to the allegations then being made that it and Hydro had been party to a fraud on TadAZ, Ansol offered on three occasions to subject itself (together with all the other parties) to a full audit of its books and records and business by a mutually agreed international auditor.

TadAZ says that Ansol made conditional offers to undergo an audit in conjunction with other parties, that it did not trust Ansol to participate honestly in any voluntary process and that its fears were justified during the course of the application to discharge the Order of Etherton J. TadAZ alleges that Ansol was forced to admit that the instructions it had given to Robson Rhodes were false and that Ansol refused to give any disclosure of its transaction records for the purposes of the discharge application.

The alleged Contractual Structure as at January 2005.

65. I refer to the chart prepared by Ansol showing the alleged Contractual Structure as at January 2005.

The Order of Etherton J

66. Four months passed. During that time arbitration proceedings were commenced by Elleray (a Rusal affiliate) against Ansol in Switzerland and by Albaco (a Rusal affiliate) against Ansol in Sweden.

67. TadAZ's defence in the Hydro Arbitration was due on 12 May 2005.

68. On 13 May 2005 TadAZ obtained from Etherton J a world wide freezing and search and seizure order which was executed that afternoon. During the search of Ashton's offices, every document in the office (about 2000 files) was seized, together with all computers. The homes of some of the defendants were searched, and documents seized there.

69. Following an application by the defendants, all the documents were held at the offices of the Supervising Solicitors pending the application to set aside the orders. TadAZ applied at a hearing before Laddie J to compel the release of the documents and to compel the defendants to disclose their worldwide assets, prior to their application to set aside the order, but Laddie J refused the application. The documents therefore continued to be held at the Supervising Solicitors' offices without TadAZ or Rusal having any access thereto.

70. Ansol maintains that the purpose of the application was threefold:
i) To seize Ansol and Ashton's documents for Rusal for use in its arbitrations against Ansol;
ii) To provide a spurious air of authenticity for TadAZ's defence in the Hydro Arbitration, where it was alleging that it had been the victim of a fraud by Ansol relating to the 2003 Barter Agreement, which it claimed was a sham and fictitious. TadAZ's defence was due on 12 May 2005, and bringing the application on that day enabled TadAZ to convey that it took the allegations of fraud against Ansol so seriously that it had even started proceedings against Ansol. The reference to the commencement of proceedings against Ansol duly appeared in the Arbitration Defence served a few days later;
iii) To try and knock out Ansol by freezing all its assets, by obtaining information for Rusal as to the whereabouts of Ansol's and Mr Nazarov's assets and thereby enabling Rusal to seek other freezing orders wherever those assets could be found.

TadAZ says that Blackburne J accepted in his judgment that there was a risk of asset dissipation and document suppression.

In so far as these allegations are made against the Rusal defendants they are denied.

71. Ansol says that although the application on 13 May 2005 was made in the name of TadAZ, on that date Mr Sharipov, the Director of TadAZ, and the only person who could have authorized the commencement of proceedings in its name, knew nothing about the application or the action which had been commenced in the company's name. He had been deliberately kept in the dark about it. The only person who was said to know about it within TadAZ was Mr Kabirov, the Deputy Director who, despite having been appointed to that post in

January 2005, remained on the Advisory Board of Orienbank, the alleged "owner" of CDH, TadAZ's only customer.

TadAZ admits that Mr Sharipov was unaware of the commencement of the proceedings. TadAZ says that the purpose of Mr Sharipov remaining uninformed was so as not to place him in a difficult position vis-à-vis his erstwhile long time colleague Mr Ermatov, and that Mr Kabirov had authority to instruct Herbert Smith to commence proceedings pursuant to his power of attorney dated 5 May 2005.

The Orienbank defendants say that Mr Kabirov's appointment as Deputy Director of TadAZ took effect on 10 January 2005 and it was in that capacity that Mr Kabirov subsequently acted.

72. Ansol says that the court was told that CDH was owned by Orienbank, and by a collection of private individuals who are shareholders in Orienbank. Ansol's case is as follows. None of these parties are in the alumina business or would be in a position to supply TadAZ with anything, let alone alumina. None of them had any previous connection with the aluminium business, nor is there any reason why TadAZ should commit its entire production of aluminium indefinitely to them or CDH. The basis of the claim made against Ansol is that for 8 years it prevented TadAZ, by corrupting its Director, from going out into the world market and buying alumina at market prices, and then selling its resulting aluminium on the world market for the best market prices. Yet freed at last from the yoke of the Ansol regime, TadAZ far from entering the open market, committed its entire production, on far less favourable terms, to Rusal, through the front of CDH.

TadAZ refers to Mr Bushell's first witness statement which said at paragraph 260: -

"Ultimately I am instructed, CDH is owned by a Tajik company, OJSC Orienbank. Mr Kabirov was (until recently) an executive and is now a member of the supervisory board of Orienbank, maintaining this position whilst also fulfilling his more recently acquired duties as First Deputy Director of TadAZ. I am instructed by Mr Kabirov that Orienbank is mainly privately owned by a wide number of shareholders, but that there is some small element of state ownership. A list of these shareholders, provided to me by Mr Kabirov is at page 1151."

TadAZ's case is as follows. As far as TadAZ is aware, what was said in Mr Bushell's witness statement as to ownership of CDH was and remains the case. CDH (like Ansol before it) does not have its own alumina supplies. CDH purchases its alumina in the market. The terms on which TadAZ trades with CDH are not "far less favourable" than the terms on which it traded with Ansol. The CDH Contract gave TadAZ financial stability and protection from downside risk. During the first six months of its operation, TadAZ received US$62m from CDH. TadAZ's receipts from CDH have enabled TadAZ to increase salaries by 25% and to commence reconstruction of the plant. Between the date of the CDH Contract and the date of TadAZ's Defence to the Part 20 Claim, TadAZ's production volume rose by 4.8%. TadAZ is planning to go out to international tender for its raw material purchases and its aluminium sales.

The Rusal defendants say that they do not own or control CDH. It is denied that CDH is a front for Rusal.

73. Ansol say that in order to explain who authorized the application to Etherton J and the issue of the claim form, Herbert Smith exhibited a "power of attorney" which had been signed on 5 May 2005 by the Director of TadAZ, Mr Sharipov. However, he was deliberately kept in the dark about the application which was then about to be launched (one week later). Mr Sharipov also later claimed to have authorized Mr Kabirov on 10 January 2005, some four months before the application was made. Blackburne J commented on this: *"…there appears to me to be something distinctly contrived about the manner in which authority to bring the proceedings is said to have been conferred. This impression is heightened by the fact that it was as a result of a letter of complaint by Mr Sharipov (said to have been sent by him to the TadAZ prosecuting authorities on 7 December 2004) that led to the launching of criminal proceedings against him. It is also to be noted that Mr Sharipov's appointment of Mr Kabirov as his deputy is dated 31 January 2005 (three weeks after Mr Kabirov first instructed Herbert Smith) although, by its terms, the appointment is stated to take effect from 10 January, the very day Mr Kabirov says that Herbert Smith were first instructed. For his part, Mr Bushell states that Herbert Smith were instructed "in earnest" on about 17 January 2005. That was very nearly four months before TadAZ without notice application to Etherton J".*

TadAZ's contentions are as follows. On 10 January 2005, Mr Sharipov authorised Mr Kabirov to investigate the matters that became the subject matter of the main claim. Mr Kabirov was not authorised to act for TadAZ before 10 January 2005. On 5 May, Mr Kabirov received authority to commence legal proceedings in TadAZ's name. There is no inconsistency. There is a difference between Mr Kabirov having authority to instruct Herbert Smith (which authority was given in January) and authority to commence proceedings (which authority was given in May).

74. Ansol alleges and TadAZ accepts that in the lengthy preparation for the freezing application, in which Herbert Smith had "left no stone unturned" and in which PwC Moscow had spent more than 1000 man-hours, and in commencing the action, Herbert Smith received their day-to-day instructions from Rusal Management Company. Ansol say that Herbert Smith's fees were also paid by Rusal, but this was not disclosed to the Court which granted the ex parte order.

TadAZ says that Herbert Smith's fees were paid by Rual Trade Limited by way of a loan to TadAZ. This is no longer the case.

75. In his judgment Blackburne J summarised TadAZ's evidence and referred to the without notice application: -

"TadAZ's evidence

27. As presented to the court on 13 May 2005, largely in the affidavit of Mr Bushell, TadAZ's evidence was to the following effect.

28. Mr Nazarov has been associated with Mr Ermatov and TadAZ since 1995 or thereabouts. Between mid-1996 and the end of April 2003, TadAZ's alumina requirements were supplied directly by Ansol (and, prior to Ansol's incorporation in September 1998, by other entities in which Mr Nazarov was interested). All of its alumina supplies between May 2003 and December 2004 came from Hamer (the joint venture company) but had been procured by Ansol. The supply of alumina during this period was at prices (to TadAZ) which were double the average market price. The aluminium produced from alumina so supplied was (during the period May 2003 to December 2004) delivered to Hamer and then sold on by Hamer to Ansol resulting in Ansol having the ability to control its ultimate destination. The position was similar (but without Hamer being a link in the supply chain) in the period prior to May 2003.

29. Regulating these dealings were "parallel sets of contracts". One set comprised barter arrangements between TadAZ and Hydro for the exchange of alumina for an equivalent value of aluminium after production. These arrangements were originally contained in an agreement between TadAZ and Hydro entered into on 21 July 2000 and were followed by a replacement agreement … (the 2003 Barter Agreement) purportedly entered into on 25 September 2003. Alongside these agreements were other barter and supply contracts between TadAZ and Ansol and, separately, between Ansol and Hydro. They provided for the supply to TadAZ by Ansol of alumina and other raw materials (and finance) in exchange for finished aluminium, and under the separate arrangements between Ansol and Hydro, for the ultimate supply to Hydro of the aluminium produced by TadAZ. In paragraph 71 of his affidavit Mr Bushell said that the fraud alleged by TadAZ was:

"based on the contention that [the] agreements with Hydro were implemented in a manner which enabled Ansol Limited to manipulate TadAZ affairs in a way which was to Ansol Limited's considerable benefit and to TadAZ's considerable detriment."

In paragraph 75 of his affidavit he stated that:

"TadAZ believes that both barter arrangements between TadAZ and Hydro were, in practice, subordinated and were therefore never properly implemented or performed by either party."

30. Delivery confirmations by TadAZ signed by Mr Ermatov, showing the receipt by TadAZ of alumina from Hydro, were fabricated. According to TadAZ's records, there never was any genuine receipt from Hydro. The delivery confirmations were sent to Hydro by Ansol and never by TadAZ directly.

31. The result was that TadAZ was deprived of a quantity of the aluminium produced from the alumina and therefore of the significant profits that such aluminium would have yielded.

32. The arrangements which had this result were orchestrated by Mr Nazarov and acquiesced in by Mr Ermatov. Mr Ermatov did so because of bribes paid to him by Mr Nazarov and his confederates, in particular the payment of a £300,000 gift to enable him to acquire the Charter Court flat (now registered in the name of his son, the seventh defendant) and, it was believed, the payment of the costs of the seventh defendant's degree studies in London (the costs of which greatly exceeded Mr Ermatov's annual income as director of TadAZ). As a result of Ansol's ability to control the ultimate destination of all of TadAZ's produced aluminium, Ansol (and thus Mr Nazarov) was able to satisfy TadAZ's apparent obligation to deliver aluminium to Hydro under the 2003 Barter Agreement and, by allowing the 2003 Barter Agreement to be "subordinated", Hydro gave Ansol the opportunity to control and retain profits which would otherwise have been made by TadAZ. Ashton, through Mr Shushko, and Ms Osadchaya managed the arrangements on Ansol's behalf and all three are therefore implicated in the fraud. There was (or was once) a connection between Mr Ermatov and Ashton in that between February 1997 and June 1998 Cherzod Ermatov had been a director of Ashton. At the time of his appointment Cherzod Ermatov was only 17.

33. Until a copy was produced in November 2004, over a year after it had been purportedly entered into, no-one at TadAZ, not even Mr Sharipov, at any rate no-one apart from Mr Ermatov and possibly a Mr Kucharov, was aware of the existence of the 2003 Barter Agreement. Up to that time, the fraud on TadAZ, resulting from the corrupt dealings between Mr Ermatov and Mr Nazarov, went unknown to anyone outside those two and their immediate confederates.

34. These corrupt dealings are believed to go back to 1996 when Mr Nazarov first became involved in the supply of alumina to TadAZ under barter arrangements, although the detailed records presently available to TadAZ only cover the period since 2003. Such earlier records as are available to TadAZ do not enable it to demonstrate, in the way that the post-April 2003 records do, that the corrupt dealings extend back prior to May 2003 to the start of Mr Nazarov's involvement in the supply of alumina. Instead, reliance is placed on a judgment delivered on 20 November 2001 by the Lieutenant Bailiff (Catherine Newman QC) in proceedings brought in Guernsey by a Mr Vardinoyannis against, among others, Ansol, Mr Nazarov, other entities controlled by Mr Nazarov, Ashton and, by amendment, TadAZ. The judgment was given on various interim applications made in those proceedings in which Mr Vardinoyannis was alleging that he was the victim of a conspiracy between Mr Nazarov and various of his companies (including Ansol) to act in breach of a joint venture agreement between him and Ansol entered into in 1996 relating to the supply of alumina to TadAZ under barter arrangements similar (if not identical) to those

which later came into existence between TadAZ and Ansol/Hamer. The judgment is relied upon as indicating – although prior to any kind of trial of the issues on their merits – that Mr Nazarov controlled the terms upon which TadAZ did business, that TadAZ incurred very substantial debts and liabilities to companies controlled by Mr Nazarov, that it made no or no significant profits (whereas the companies controlled by Mr Nazarov made substantial profits through trading with TadAZ), and that, through Ashton, Mr Shushko managed the affairs of the companies controlled by Mr Nazarov and, in particular, their dealings with TadAZ.

35. A "near irresistible" inference of all of this is that, in the period between 1996 to the end of 2000, there was a fraudulent scheme similar to the scheme between TadAZ and Ansol after that time. More generally, Mr Nazarov appears to have followed a mode of operating the trading relationship with TadAZ similar to how he controlled matters from 2000 onwards.

36. In particular, Mr Ermatov has admitted, during informal questioning by personnel from the Tajik Prosecutor's Office on 25 March 2005, that he had received the London flat as a gift from Mr Nazarov. In addition, Mr Cherzod Ermatov was studying in London and it was unlikely that his father would have funded the fees (the inference being that Mr Nazarov had funded them).

37. Even apart from those two matters Mr Ermatov had, as a result of the contracts he had caused TadAZ to enter into, created significant liabilities to Hydro and possibly others, without good commercial reason and it was therefore difficult to resist the inference that he would only have done so if it was in his personal interest to do so. A similar inference was to be drawn to the extent that Mr Ermatov's conduct had allowed Ansol/Hamer the opportunity to make profits at TadAZ's expense. Ansol was central to the fraud as it had acted as TadAZ's agent and committed serious breaches of duties owed to it as its agent by participating in the "transfer of value" from its principal, TadAZ. As the person who controlled Ansol and its main beneficial owner, Mr Nazarov was liable as "the architect and the principal controller of the fraudulent scheme and the person who (TadAZ believed) had bribed Mr Ermatov for his co-operation". Ashton was primarily responsible for managing Ansol's trading relationship with TadAZ and thus for carrying out the fraud which it did from its London office throughout the relevant period. Mr Shushko, as Ashton's sole director, had managed the negotiations, execution and performance of the 2003 Barter Agreement and related agreements. Ms Osadchaya was involved in the administration of Ansol and of its associated companies and, in particular, had signed numerous documents on Ansol's behalf in relation to its dealings with TadAZ.

The without notice application

38. The various claims against the defendants other than the seventh to ninth defendants, were summarised (in Mr Rosen's skeleton argument before Etherton J) as:

"… based on (a) breaches of contractual and fiduciary duties by Mr Ermatov and/or Ansol (b) wrongful inducement/knowing assistance in respect thereof by the other of the First to Sixth defendants (c) knowing receipt by the defendants of monies (or their traceable proceeds) belonging in equity to TadAZ (d) deceit by the First to Sixth defendants for the false documents which perpetrated the scheme (e) conspiracy between the First to Sixth defendants to injure TadAZ by such unlawful means."

39. Reference was made in the skeleton argument to various well known English decisions illustrating those causes of action. Whether and to what extent Tajik law recognises similar causes of action, in the case of claims where Tajik law is likely to be the relevant law, were matters touched on in the evidence and in the skeleton argument. It was contended that, in so far as Tajik law was the relevant law, it recognised these or similar causes of action and, in so far as it was not the relevant law, English law was.

40. The seventh defendant was sued as the registered proprietor of the flat which Mr Nazarov had given to him as a bribe for his father's assistance in the fraud. The claims against the eighth and ninth defendants, respectively Ansol Resources Ltd and Ansol Capital Limited, were on the footing that they were companies in the Ansol Group controlled by Mr Nazarov and that they are companies which may have received the proceeds of the frauds from Ansol or Mr Nazarov. Since Ansol's main business activity was its trading relationship with TadAZ, it was submitted that any payments made by it to other entities were likely to have derived from profits of the alleged fraud. …

41. Before the court was a brief report dated 10 May 2005 by ZAO PricewaterhouseCoopers Audit who are based in Moscow … "PwC". The report, which stated that its authors did not have access to any Ansol records and that their analysis was based on, inter alia, verbal information provided by Al Service Management and was not reconciled to primary documentation, was concerned principally with the period 1 May 2003 to 31 December 2004. Al Service, it appears, was a Russian joint venture company set up in Moscow to provide administrative support to Hamer.

42. The report found that during the period 1 May 2003 to 31 December 2004 99% of all alumina purchased by TadAZ was acquired from Hamer and that Hamer itself had acquired 66% of the alumina from Ansol and 31% from "Rual". By Rual was meant "Rual Trade Ltd, a company within the Rusal Group" … The report found that 71% of aluminium produced by TadAZ during that 20 month period was supplied to Hamer, 23% supplied to Ansol and companies associated with Ansol and the remainder to small, mostly Tajik, customers. It stated that Hamer in turn sold all of the aluminium acquired from TadAZ to Ansol. It found that TadAZ sold aluminium at

approximately 96.5% of the London Metal Exchange spot price. … PwC were saying that, ignoring the effect of transport costs, TadAZ was paying twice the model market price for the supply of alumina to it by Hamer.

43. In a supplemental report, also dated 10 May 2005, PwC attempted to estimate the potential losses incurred by TadAZ as a result of the higher than market prices for alumina paid by TadAZ as described in the main report. It did so for two periods: (1) from 1 January 1999 to 30 April 2003 (during which TadAZ was said to be acquiring most of its alumina from Ansol) and (2) from 1 May 2003 to 31 December 2004 during which, as already mentioned, TadAZ acquired most of its alumina from Hamer two thirds of which Hamer in turn had acquired from Ansol. The alleged loss for the first period was calculated at $146 million and for the second period at $75 million (a figure made up as to $34 million in respect of the margin Ansol was believed to have made on supplies by it to Hamer and as to $43 million as Ansol's 50% of the overall profit margin enjoyed by Hamer from its dealings with TadAZ).

44. The aggregate losses arising as a result of TadAZ's trading, directly or indirectly, with Ansol over the six year period were therefore estimated by PwC at $223 million or $180 million if Ansol's 50% share in Hamer's profits was disregarded.

45. The case for the making of freezing orders was advanced on the basis that … it was a proper inference – indeed a strong inference – that the first to sixth defendants might have sought, and might in future seek, to remove assets so as to put them beyond TadAZ's reach. It was said that the existence of the fraudulent scheme alleged in the evidence itself supported the existence of a substantial risk of dissipation so that if given notice of TadAZ's application to the court the defendants would be likely to try and remove their assets.

46. As regards the grant of a search and seize order, it was stated … to be self-evident that if an order were not granted there would be a significant risk of destruction or removal beyond TadAZ's reach (of documentation), that in the absence of a search order documentation would be destroyed in an attempt to cover any further trail of wrongdoing, and that Mr Ermatov was likely to be in a position to procure the destruction or removal of documents which might be located at 15 Charter Court under the immediate control of his son.

47. Mr Bushell's affidavit made a number of disclosures. Among these were that he had had instructions from lawyers employed by Rusal Management whom TadAZ had authorised to give assistance and that, according to Mr Kabirov (Mr Sharipov's deputy), this was because TadAZ had no previous experience of proceedings such as these, whereas Rusal Management "have a very well resourced Legal Department and are experienced in the field of international litigation and arbitration". He disclosed that "Rusal" (as he referred to it) had given Herbert Smith instructions on a day to day basis and (in a later passage in the affidavit) that "Rusal's participation" in this process "stems from its strong strategic alliance with TadAZ and the Government of Tajikistan". He went on to explain that Rusal had recently announced that it was planning to invest $625 million in constructing a power station in Tajikistan and that the project represented "a further significant step in co-operation between Rusal and the Tajik Government". He added that Rusal was interested in participating in any future privatisation of TadAZ and that "for this reason, Rusal has legitimate commercial reasons for supporting TadAZ in connection with the difficulties it is currently experiencing …"

48. Mr Bushell also disclosed that on 16 December 2004, "a week or so after TadAZ was notified of the prohibition imposed [by the Tajik authorities] in respect of the export of aluminium [to Hamer or Ansol], under the Barter Agreement and other contracts" TadAZ had entered into a new agreement with CDH … and that this was "a reaction to and not the cause of the cessation of deliveries of aluminium under the previous arrangements". He explained that the need to maintain continuous processing at the aluminium plant (to avoid solidification of the units used during the process) coupled with the employment and other consequences of a cessation of activity at the plant explained why TadAZ had to move quickly to enter into replacement arrangements. He also explained that the new arrangement with CDH was "tolling" in nature, meaning that the alumina supplied to TadAZ and the aluminium which resulted from TadAZ's smelting processes remained throughout in the ownership of CDH as so-called toller and therefore that TadAZ received its profit by way of a processing fee. He referred to the advantages of this new arrangement and explained that CDH was "ultimately owned by private investors based in Tajikistan" and that the Tajik Government expected that CDH and its investors might participate in the ultimate privatisation of TadAZ. He later referred to his belief that an affiliate of Rusal called Rual Trade Ltd was supplying alumina to CDH at spot market prices and that another affiliate was providing it with market analysis and pricing services.

49. He explained that the need to act quickly after the events of 6 December (when Mr Ermatov was removed as director) meant that there was no time for any formal tender process before entering into the agreement with CDH, and that CDH was owned by a Tajik company called OJSC Orienbank which was mainly privately owned by a number of shareholders but with a small element of state ownership. He disclosed that Mr Kabirov (Mr Sharipov's deputy at TadAZ) was until recently an executive of Orienbank but had become a member of its supervisory board.

50. Mr Bushell also referred to the fact that there were arbitration proceedings on foot in Geneva between Elleray and Ansol concerned with their joint venture conducted through Hamer. He also referred to the existence of arbitration proceedings in London (started on 3 February 2005) brought by Hydro against TadAZ. He referred also to assistance Herbert Smith had received from employees of Al Service, mentioned earlier.

51. He referred … to the realisation that Hamer itself was exposed to possible claims by TadAZ, that this was recognised by Rusal (which, through Elleray, was effectively Ansol's 50% co-venturer in Hamer) but that TadAZ had not yet determined whether to assert those claims adding that in the meantime "TadAZ is content to delay any decision in this respect on the basis of the continued support and co-operation received from Rusal". He also added that he was aware "from those instructing me at Rusal" and from interviews with employees of Al Service who were involved in Hamer's day to day operations that Hamer would contend that its involvement was the result of manipulation by Ansol and that it never made any real profit.

52. Finally, Mr Bushell raised whether there could be a political motivation for the proceedings TadAZ was bringing. He referred to various reasons why it might be suggested that there might be but concluded, on the basis of his instructions from Mr Kabirov, that he did not consider that the proceedings were so motivated.

53…. it was essentially on that evidence (there was a short supporting affidavit from Mr Kabirov) that Etherton J made his order on 13 May. He was not willing to grant worldwide freezing orders unlimited in amount (as had been sought) but stated that the losses (as estimated by PwC) should be discounted by one fifth since he was not satisfied that the evidence justified extending the period of claim back to include 1999. It resulted in the freezing orders being limited to US $178 million. He was also concerned about the involvement of Rusal, both as a participant in Hamer and as an adviser to TadAZ, which was a position which he characterised as "rather curious". He was concerned at what he referred to as "the potentiality for an abuse" arising out of the use of information contained in documents which might be disclosed as a result of the search and seize order or of information given pursuant to the information disclosure orders, TadAZ's intention being that the information in question should be posted on to the persons within Rusal Management who were advising it. This concern resulted in the inclusion in the Etherton Order of … the Rusal undertaking.

54. The sufficiency and appropriateness of that undertaking have been the subject of considerable criticism, not least when the matter was before Laddie J on 27 May 2005. It resulted in TadAZ, through Mr Rosen, accepting that none of the documents or other information disclosed by the defendants in compliance with the Etherton Order should be made available to Rusal or its employees."

76. Six weeks after first obtaining the freezing and search orders, TadAZ served its Particulars of Claim. Ansol says that by that stage it had become untenable to maintain, in the face of the evidence Ansol had been able to lead, that the 2003 Barter Agreement had been fictitious and had only been discovered at the end of November 2004. That story was abandoned.

TadAZ says that the essence of its case has remained consistent throughout.

77. TadAZ served its Particulars of Claim on 22 June 2005. Ansol served its Part 20 Counterclaim against TadAZ and the other Part 20 defendants in July.

78. After a five day hearing in late July 2005, on 21 October Blackburne J set aside the orders made on 13 May 2005 against all the Ansol defendants on terms giving TadAZ protection against the destruction of or tampering with documents pending disclosure.

The Hydro - TadAZ Arbitration

79. Hydro brought arbitration proceedings against TadAZ pursuant to the 2003 Barter Agreement in respect of TadAZ's failure to make shipments of aluminium pursuant to that agreement. The sum claimed was US$128,443,503.66, being liquidated damages payable under the agreement representing the value of the aluminium due.

80. In late August 2005 TadAZ served witness summonses on Messrs Ermatov, Nazarov, Shushko, as well as Ashton (the first, third, fifth and fourth defendants respectively) to compel them to attend the Hydro Arbitration which was to take place in September 2005, to give evidence and produce very extensive documentation. Ansol says that effectively meant that every document being held by the Supervising Solicitors (about 2000 bundles) would have to be brought to the first day of the arbitration and handed over to TadAZ and Rusal (who was part of the circle of confidentiality). The witnesses applied to set aside the witness summonses, and Mann J set aside the witness summonses in so far as they related to production of documents.

The summonses included a schedule of classes of documents of which production was sought. TadAZ says that the schedule had been drafted by the arbitrators and that the documents would not have been made available to Rusal, but only to the three Rusal lawyers who were within the "circle of confidentiality". Rusal was not part of the circle of confidentiality.

81. TadAZ appealed the decision, but the Court of Appeal dismissed the appeal. Ansol says that on that occasion Herbert Smith included in the Court Bundle two documents containing their typed transcript of the judgment of the Court below. Both documents indicated at that top that their client was "TadAZ/ Rual Trading". In giving judgment, the Court of Appeal commented on the fact that TadAZ was apparently proposing that about 2000 bundles of documents were to be produced on the first day of the oral proceedings of the arbitration, which made it unlikely that they would be of much use in that arbitration.

TadAZ says that the reference to Rual Trading was a reference for convenience only and did not mean that Rual Trading was Herbert Smith's client. Rual Trading introduced TadAZ to Herbert Smith and therefore the file initially referred to Rual Trading.

82. According to Ansol, the Hydro arbitration took place in September 2005. Many of the same allegations as form the subject of the present action were tried: "force majeure" based on the alleged export ban of 8 December 2004, that Ansol was guilty of overcharging and corruption, that Hydro was aware of this and facilitated it by their involvement in the 2003 Barter Agreement, that Ansol played no role whatsoever in the trade with TadAZ and just corruptly inserted itself to skim off the profits. Many witnesses from TadAZ and from Hydro gave evidence and were subject to hostile questioning akin to cross-examination. TadAZ called Messrs Nazarov and Ermatov and then proceeded to cross-examine their own witnesses.

According to TadAZ, although some of the issues in the arbitration were the same as issues in this litigation, there were some important differences. For example, the questions of force majeure involved issues of contractual construction that are irrelevant to any questions that the court has to consider. It was not suggested in the arbitration that "Ansol played no role whatsoever in the trade with TadAZ". Messrs Nazarov and Ermatov gave evidence. It is not entirely accurate to say that they were cross-examined, though the arbitrators gave more latitude than might have been given by a High Court judge. Evidence that has come to light since the arbitration shows that Mr Nazarov and Mr Ermatov lied to the tribunal concerning the extent of financial benefits made available to Mr Ermatov and his family by Mr Nazarov and Ansol.

83. According to Ansol the award was delivered in November 2005. It is now public knowledge that Hydro won and that TadAZ was ordered to pay Hydro more than US$125 million. TadAZ and Rusal (which was party to the circle of confidentiality, and Ansol says was running and paying for the arbitration) have steadfastly refused to make available a copy of the award. Its relevance to the present proceedings is obvious. Previously Blackburne J had ordered TadAZ to produce parts of the evidence. There are very many discrepancies between what TadAZ's employees told the arbitrators and what TadAZ had told the court in the freezing order application.

TadAZ says that the result of the arbitration is confidential. Rusal was not "running and paying for the arbitration". The suggestion that, "there are many discrepancies between what TadAZ's employees told the arbitrators and what TadAZ had told the court" is disputed. According to TadAZ, the Rusal attorneys did not receive a copy of the Arbitration Award. The involvement of the three Rusal attorneys terminated before the Arbitration Award was handed down by the Tribunal.

The Defence of the Ansol defendants

84. The Defence of the Ansol defendants was served after the Part 20 claim. It incorporates and adopts the original Annex A to the Part 20 claim. Ansol says that the two are inextricably bound up with each other. The alleged corruption is denied. The overcharging is denied. It is alleged that Ansol is itself the victim of a conspiracy in which these false accusations have been invented to provide a pretext and excuse for ousting Ansol from its role in the trade with TadAZ and from benefiting from the fruits of its joint venture with Rusal.

TadAZ does not accept that the Defence and the Part 20 claim are "inextricably bound up with each other". TadAZ says that the Defence concerns Ansol's denial of corruption and overcharging. The Part 20 claim concerns Ansol's allegation that it is the victim of a later and quite separate conspiracy. The facts relevant to the Part 20 claim are not pleaded as an affirmative defence to the main claim. Even if true, they would not constitute a defence.

The Orienbank defendants do not accept that Ansol's Part 20 claim, which operates only as a counterclaim and not a defence, is inextricably linked to issues in the main action. According to these defendants the issue in the main action is whether Ansol is accountable for profits earned in the period 1996 to 2004 because it bribed Mr Ermatov to cause TadAZ to enter into uncommercial agreements with Ansol (and other Ansol associated companies). The issue in the Part 20 claim is whether the Part 20 defendants acted wrongfully regarding the circumstances in which those agreements were terminated in December 2004. The two issues are separate and discrete.

85. It is contended by Ansol that the bringing of the application for a worldwide freezing order was part of the conspiracy pleaded in the original Part 20 claim and that the application was brought for ulterior motives.

TadAZ says that given the evidence of the corrupt relationship between Mr Nazarov and Mr Ermatov, it is difficult to understand why it should be suggested that TadAZ had any "ulterior motives" in bringing the claim.

The Orienbank defendants say that there is no proper basis for any suggestion that they were party to a conspiracy which included as one of its objects the bringing of the main action against Ansol.

The Judgments to date in this case and related cases

86. In his judgment dated 24 October 2005 in relation to TadAZ's application for permission to appeal against the two orders made by Mann J. on 13 September setting aside witness summonses requiring the second, third, fourth and fifth respondents to attend the hearing of the arbitration due to begin on Monday 19 September, and to produce the documents described in the schedules to those summonses Moore-Bick LJ said:- *"A dispute has arisen between TadAZ and Hydro under the 2003 barter agreement which has been referred to arbitration in London under the rules of the London Court of International Arbitration. In that arbitration Hydro as claimant is seeking to enforce the agreement against TadAZ. TadAZ is resisting the claim on the grounds that the agreement formed part of a fraudulent scheme on the part of the witnesses and others, of which Hydro was aware, to divert the profits of its business into their own hands."*

87. Moore-Bick LJ continued at paragraphs 29 and 30: -

"29. In the present case the documents are described in the schedule to each of the witness summonses in broad terms of the kind that would be appropriate to an application for disclosure but which fail to identify the documents with sufficient certainty to enable the witness to know what is required of him. I am satisfied, therefore, that the judge was right to set aside the witness summonses on this ground and that it is unnecessary to consider the other matters on which the witnesses relied in support of their applications. Many of them are matters which would be relevant to an application for disclosure by a third party and which may also be relevant to an application to set aside a witness summons to produce documents. They include the burden of complying with the order, the importance of the documents for the just resolution of the dispute and the protection of confidentiality. One such matter does deserve further mention, however, and that is the order made by Laddie J., to which TadAZ consented, restricting its access to the very same documents pending the outcome of the witnesses' challenge to the search and seizure order. Mr. Doctor Q.C. submitted that these witness summonses were little more than an attempt by TadAZ to circumvent that order to obtain immediate access to the documents for purposes unconnected with the arbitration. Miss Reffin submitted that TadAZ would be entitled to have access to them sooner or later in any event when the time came to give disclosure in the High Court proceedings and that the effect of obtaining production under the witness summonses would merely accelerate that process. However, since Laddie J.'s order was designed to ensure that the process of disclosure was not accelerated, at least until the dispute surrounding the search and seizure order had been resolved, I did not find that a very satisfactory answer. It was difficult to see how TadAZ could realistically hope to make much use of such a large body of material in the arbitration if it was only presented with the documents at the opening of the hearing, which leads one to suspect that it may have had an ulterior motive for issuing the witness summonses.

30. This is just one of the matters that we should have had to consider in greater detail if we had been satisfied that the witnesses summonses contained an adequate description of the documents which the witnesses were required to produce. However, since in my view they do not, it is unnecessary to reach any conclusion on this question."

88. Blackburne J began his judgment dated 21 October 2005 by pointing out that the matter had no apparent connection with England, but nevertheless was brought here by TadAZ. Ashton and Mr Shushko are both domiciled in England for the purposes of the Judgments Regulation (Council Regulation (EC) 44/2001). According to Ansol, of the individual defendants, only Mr Shushko and now Mr Ermatov live in England; of the corporate defendants, only Ashton is based here.

89. Blackburne J accepted that there was a good arguable case in fraud against Mr Nazarov and Ansol and that it was reasonable to infer a risk of asset dissipation on the part of Mr Nazarov and Ansol. He said at paragraphs 163-5 of his judgment:

"163: … Ansol, whose business appears to have been very largely devoted to its relationship with TadAZ, has over the years made very considerable profits from its dealings with TadAZ. It also seems likely, although to what extent is very much in dispute, that the prices charged to TadAZ by Ansol (and later Hamer) for the alumina supplies, even when allowance is made for transportation costs and the like, exceeded what TadAZ could arguably have been expected to pay if it had been able to source its requirements on the open market. I accept, of course, that whether TadAZ was so able is very much a matter of dispute. It is also the fact that Mr Nazarov, in circumstances which he has not explained, was exceedingly generous in 1999 when making a gift to Mr Ermatov or to his son … of a £300,000 flat in London and that he has provided generously for Cherzod Ermatov's education and other living expenses while in London. As Mr Rosen observed, these matters call for an explanation.

164 It is no answer to my mind to point out that Mr Sharipov's daughter (as Mr Sharipov has admitted) has had her studies in Moscow paid for by Mr Nazarov and that the children of other TadAZ staff and of other persons in the region have been similarly favoured. Nor to my mind is it a sufficient answer for Mr Ermatov to say that what TadAZ paid for its alumina was not a secret but was set out in its yearly and quarterly accounts and that TadAZ's activities were frequently discussed by him with Tajik Government officials and others (including, if it be the case, the President) and that Ansol's role as supplier was well known.

165 Reviewing the evidence as a whole together with counsel's detailed submissions, I have come to the conclusion that on matters as they presently stand TadAZ does demonstrate a good arguable case at any rate as against Mr Ermatov, Ansol and Mr Nazarov."

90. In his judgment Blackburne J said in relation to Ansol's Part 20 Claim:-

"(2) Ansol's Part 20 claim

174. Ansol *claims that it is the victim of a conspiracy involving Rusal, CDH and TadAZ (and including Messrs Deripaska, Bulygin and Saduloev). The gist of the claim is to assert a concerted series of actions, orchestrated by Rusal (acting by Mr Deripaska and Mr Bulygin) and those who now control TadAZ, which have resulted in Mr Ermatov's sudden removal on 6 December 2004 as TadAZ's director, the repudiation of the supply arrangements between TadAZ and Hamer (which had been renewed for another year as recently as 2 December 2004), the suspension of further aluminium deliveries to Hydro, and the making on 16 December 2004 of the tolling agreement between TadAZ and CDH.*

175. *Central to the claim is the contention that the decision, allegedly taken on 8 December 2004, to institute criminal proceedings against the "functionaries" of TadAZ and Ansol based upon the "fictitious" 2003 Barter Agreement (see the letter dated 8 December 2004 from the General Prosecutor's Office to Mr Sharipov) was designed to provide a pretext for repudiating the existing supply arrangements, suspending further aluminium deliveries and hurriedly entering into the tolling agreement. It is claimed by Ansol (and by Mr Ermatov) that the institution of those proceedings was trumped up in that, as TadAZ now appears to accept, there was nothing fictitious about the 2003 Barter Agreement and, in any event, the decision to bring them was not taken on 8 December (as the documents produced by TadAZ in evidence suggest) but rather later (some time in January 2005). Ansol claims that, so far from the tolling agreement having hurriedly to be entered into on 16 December to replace the previous arrangements with Hamer in order to ensure continuity of supply to TadAZ, the new arrangement was designed to enable the benefit of TadAZ's smelting activities to pass to those who own or control CDH, namely Rusal and/or close associates and relatives of President Rakhmonov led by Mr Saduloev. Ansol claims damages and an account of profits.*

176. *In particular, Ansol alleges that Rusal has breached the joint venture agreement. One of its terms, set out in the framework agreement regulating its operation, was that neither party, whether acting directly or indirectly including through any affiliated entity, should realise without the other's involvement any projects and/or financial/economic activities in the sphere of aluminium, alumina or energy business in Tajikistan. The framework agreement also provided that, among the joint venture's purposes, was the pursuit of projects aimed at ensuring TadAZ's production activity and increasing its profitability and, should the Tajikistan Government privatise TadAZ, acquiring shares in TadAZ.*

177. *I am persuaded on the evidence that I have seen that Ansol establishes a seriously arguable case for the relief which it claims based on the allegations it makes. I do not propose to review in any detail the many matters which are pleaded by Ansol in support of its claim. It is sufficient to draw attention to certain features of the evidence.*

178. *The first is that the reasons which TadAZ has since adduced for abrogating its arrangements with Hamer and entering into the tolling agreement are difficult, and in some cases impossible, to reconcile with some at least of the documents produced by TadAZ and referred to in its evidence. To take one example, as late as 13 December 2004, TadAZ, by then under the directorship of Mr Sharipov, was writing to Hamer complaining that Hamer was in default of its obligation to make various payments on TadAZ's behalf. The letter stated that TadAZ reserved the right to stop further disposals of aluminium. Surprisingly, in view of what is now said by TadAZ, the letter makes no reference to any fictitious 2003 Barter Agreement, or to any criminal investigation, much less to Hamer charging excessive amounts for alumina supplies or to the fact that, already on 8 December, a decision had been taken (if it had) to suspend further deliveries of aluminium. Indeed the evidence suggests that TadAZ was not notified of the suspension of aluminium deliveries prior to 16 December 2004 although, according to another document on which TadAZ relies, the decision to suspend deliveries had already been made, like the decision to bring criminal proceedings arising out of the 2003 Barter Agreement, on 8 December. For its part, Hydro claims that it was not aware of any suspension until towards the end of December 2004.*

179. *To take another example, the commencement of the criminal investigation into the 2003 Barter Agreement, said to have been launched on 8 December 2004, followed, it is said, the sending by Mr Sharipov of a letter dated 7 December (i.e. the previous day) to a Mr Bobokhonov at the office of the Tajikistan Attorney-General. Mr Sharipov had only been appointed director of TadAZ the previous day. The letter which, curiously, is handwritten did no more than state that the 2003 Barter Agreement "was not recorded at the plant or in any documents". It asked for an investigation into the agreement "so that henceforth such irregular situations will not occur at the plant". There was no complaint in the letter that the Barter Agreement was fictitious much less that it disclosed or was an indication of fraudulent dealings. Nevertheless the very next day the Prosecutor General of Tajikistan purportedly issued a decree reciting that it had been "established" that Mr Ermatov had conspired with Mr Nazarov and other persons "to appropriate aluminium by way of a knowingly false supply of non-commodity alumina and to conclude transactions the purpose of which was to circumvent the requirements of legislation of the Republic of Tajikistan". It referred to the 2003 Barter Agreement as a "fictitious contract". Not the least of the curiosities of this episode is that Mr Sharipov's handwritten letter only emerged in the course of TadAZ's reply evidence notwithstanding that four months of investigation (including an interview with Mr Sharipov in the course of April 2005) had preceded the launching of these proceedings during which it might have been thought that a letter of such significance would have surfaced so as to appear in the very voluminous evidence that was before the court on 12/13 May. On any view, Mr Sharipov's appointment on 6 December, his handwritten letter the following day and the decision to prosecute (based on having "established" a conspiracy) taken on the day after that, display remarkable speed on the part of Mr Sharipov and the Prosecutor General. The defendants take an altogether more cynical view of events: they say that they have been concocted (in the case of Mr Sharipov's letter much after the supposed event) as part of the conspiracy to discredit them and are inherently implausible.*

180. *A further feature concerns the origins and ownership of CDH. It is a BVI company incorporated on 1 July 2003. Until at least 7 December 2004 it was an affiliate of Rusal in that, until that date, its shares were held by Elleray. Indeed, at one stage CDH was put forward by Rusal as one of the companies through which its joint venture with Ansol should be conducted. On 7 December 2004, the very day Mr Sharipov claims to have written*

to Mr Bobokhonov complaining that the 2003 Barter Agreement had not been registered, Elleray transferred its shares in CDH to a company called Chantell Developments Inc. Chantell is another BVI company. It has (or had) the same registered office as Elleray and was likely therefore to have been another Rusal affiliate. When CDH entered into the tolling agreement with TadAZ on 16 December 2004 its shares were still held by Chantell. At a subsequent date control of CDH passed to a company called Amatola SA (USA) Llc. Nothing is known about that company. TadAZ claims that CDH is ultimately owned by Orienbank. The evidence lends support to the view that Orienbank is controlled by close members and/or associates of President Rakhmonov's family (Mr Saduloev, the President's brother-in-law, is the bank's chairman). Mr Kabirov, currently (according to TadAZ since early January 2005) deputy director of TadAZ, was formerly an executive of Orienbank but is now a member of its supervisory board. He is, on his own evidence, a de facto director of Tajservice which acts as CDH's "service company". Tajservice's staff include former Rusal employees. Mr Kabirov signed the tolling agreement. He claims that he did so as deputy chairman of Orienbank. It is not obvious why Orienbank should have needed its deputy chairman to sign that agreement. The defendants say that Kabirov signed the agreement on behalf of CDH not least because his signature appears in the box in the agreement provided for CDH's signature. A few days later, Mr Kabirov was appointed deputy director of TadAZ. These proceedings (as I have earlier mentioned) were instituted on Mr Kabirov's authority rather than on the authority of Mr Sharipov who was apparently kept in deliberate ignorance of what was afoot even though it was his letter of 7 December that had purportedly initiated the whole course of events. It is common ground that there was no kind of tender process for the award of the contract. In these circumstances, it is difficult to view those who are said ultimately to control CDH as being independent of those who control TadAZ. On any view Rusal was closely involved in these events.

181. Under the tolling agreement, TadAZ does not acquire title to the alumina which it receives for smelting, nor to the aluminium which results from the smelting process. Instead it is paid a processing fee. It is difficult to see why TadAZ should have wished to enter into an agreement of this kind with an off-shore shelf company, as CDH was, which had no track record in alumina, aluminium or any other kind of dealings. Indeed, some of the very objections which TadAZ has since raised against Mr Ermatov and Ansol (for example, why it was necessary for TadAZ to have a middleman at all rather than simply deal with alumina suppliers on the open market and the absence of any tender or other negotiations) can be as easily raised against this new arrangement.

182. By the end of December 2004, it appears that CDH had taken delivery from TadAZ (without payment) of aluminium valued at $23 million. Prior to late December 2004 this would not have been permitted under Tajik law. That CDH was able to take delivery from TadAZ without payment of any aluminium at all was only made possible by the providential making of a Presidential decree on 23 December 2004 authorising such a course of conduct. When I asked Mr Rosen what the reason was for CDH having taken so large a quantity of aluminium without payment his answer was that it was to enable CDH to get started. Yet the very purpose of the tolling agreement was, so it is claimed by TadAZ, to ensure that TadAZ was able to continue to operate (and do so significantly more profitably than under the arrangements which it had hitherto had with Ansol/Hamer) following the sudden but necessary removal of Mr Ermatov and the repudiation of those earlier arrangements consequent upon the discovery of the 2003 Barter Agreement. I did not understand that TadAZ's willingness to enter into the new arrangement and the speed with which this occurred were in any way connected with its wish to help CDH to get started.

183. Another source of considerable puzzlement was a point forcefully made by Mr Stanley. This concerned the nature and terms of the tolling agreement. Under that agreement TadAZ is obliged to carry all of the costs of processing the alumina from the moment it is received at the railhead at Regar station to the moment the finished aluminium is delivered to that railhead. In return, the fee which it receives for each metric tonne of processed aluminium is no more than $310. Yet, according to the figures set out in the so-called Act of Revision (a document upon which, for other reasons, TadAZ relies), the cost per metric tonne to TadAZ in the first six months of 2004 of producing aluminium, that is to say those parts of the overall process which under the tolling agreement TadAZ has to carry out at its own expense, comes to $407.71. On those figures therefore - this was Mr Stanley's point - it is impossible to see how TadAZ can be operating other than at a significant loss.

184. It was suggested by Mr Rosen, but on the basis of instructions and without any supporting evidence, that by early 2005 TadAZ's energy costs of producing aluminium were much lower than what they had been in first half of 2004 (to which the figures and the Act of Revision related) and that its business expenses were also much lower. It is not clear why this should be so and, in any event, is not a matter that can be resolved on this hearing. By contrast it is clear, at any rate according to the figures in the Act of Revision, that TadAZ was able to enjoy a profit of around $147 per metric tonne of aluminium produced under its earlier arrangements. To be better off under the tolling agreement than it was under the earlier arrangements TadAZ has therefore to limit its production costs to less than $163 per metric tonne. It is very far from clear that this is happening or, more relevantly, was expected to happen."

91. TadAZ says that Blackburne J was wrong to find that Ansol had a good arguable case. He would not have done so had he been aware of the further financial benefits made available by Mr Nazarov and his companies to Mr Ermatov. If (as the evidence shows) the relationship between Mr Nazarov and Mr Ermatov was corrupt, then Ansol has no arguable case to recover as damages the lost profits that it says it ought to have continued to make by reason of that corrupt relationship.

The Rusal defendants say that they were not parties to the applications before Blackburne J. The judge did not hear submissions or arguments such as those now advanced by the Rusal defendants on any issue, let alone the issues raised on their Part 11 application. Whatever the Rusal defendants' involvement in these matters, they say that they do not control CDH or TadAZ.

The Orienbank defendants say that there is nothing in the passages referred to from Blackburne J's judgment that suggests that he was of the view that the Orienbank defendants were party to a conspiracy that included as one of its objects the bringing of the main action against Ansol.

92. As to Rusal's role, Blackburne J said in his judgment: -

"(3) Rusal's role

185. A particular feature of the evidence which has surprised and concerned me is the role of Rusal, the Russia Aluminium company. Rusal, it is common ground, is a major world producer of aluminium. Indeed, it is described by Mr Bushell as the world's third largest aluminium producing group. Quite how Rusal is structured is a matter of some doubt. It is, as its name implies, based in Russia and appears to be controlled by Mr Deripaska with Mr Bulygin serving as his deputy. It is common ground that Rusal has a number of affiliates, including Rusal Management and Elleray. Others are referred to in the evidence. …

186. Rusal, acting by Elleray, was a 50% participant in Hamer. It is noteworthy that, although through Hamer it must have been aware of what TadAZ was being charged for the alumina supplied to TadAZ from May 2003 and must have been aware of the mark-up (it was itself the supplier to Hamer of almost a third of the alumina supplied in turn by Hamer to TadAZ, apparently at prices in excess of the theoretical "market" price, and Rusal personnel were involved in Hamer's operation), Rusal never once complained of the prices charged. Instead, it appears to have gone along with the dealings and, for all I know, benefited as a result. Indeed, one of the terms of the agreement on joint operations made between Ansol and Elleray in connection with the operation of the joint venture stipulated that Ansol should make every effort to ensure an increase in the price of raw materials supplied by Hamer to TadAZ.

187. It is therefore odd, to say the least, that Rusal has thus far escaped any claim by TadAZ. Mr Bushell's comment that at this stage "TadAZ is content to delay any decision" on whether to proceed against Rusal is, to my mind, unsatisfactory.

188. But the matter goes further than that because, as Mr Bushell has stated, it is Rusal, through Rusal Management, that has been providing Herbert Smith with day to day instructions on behalf of TadAZ in connection with these proceedings and from whom, presumably, some at least of the impetus has come for the charge of fraud founded on the allegedly excessive prices charged to TadAZ for the alumina. Rusal's assistance has extended beyond simply the giving of instructions. TadAZ now admits that its funding for this litigation (or some of it) is being provided by Rusal. When I asked Mr Rosen about this he said that Rusal considered it in its own interests to do so "because of its strategic objectives and its proposed alliance with the Government of Tajikistan to assist". This is a reference to the fact, as Mr Ermatov pointed out at length in his evidence, that for some months going back at least to the summer of 2004 Rusal has been in negotiation with the Tajik government to provide assistance of one kind or another, in particular in connection with the running of TadAZ's smelting plant. This, it appears, resulted in the signing of the agreement in October 2004 to which Mr Ermatov referred. There is a serious question whether in so doing Rusal was acting in conformity with the terms of its joint venture with Ansol. Ansol complains - this forms a part of its Part 20 claim - that it was not.

189. It is therefore a matter of considerable concern that the search and seize provisions of the Etherton Order would have permitted the disclosure to Rusal Management of all of the documentation seized. Indeed, the clear intention was that the information disclosed by the documentation seized should be passed to that company as being the entity from which Mr Bushell was receiving his day to day instructions. This was a matter which gave rise to concern in Etherton J as well. It resulted in the giving of what I have earlier referred to as the Rusal undertaking. The purpose of that undertaking was to ensure that the information or documents so obtained would be used only for the purpose of these or related proceedings. It is an undertaking which, as I think is now accepted by TadAZ, it would have been wholly impossible to police since, so far as is known, Rusal Management has no presence within the jurisdiction. There would have been no means of preventing the disclosed documents finding their way to Rusal itself and no means even of knowing whether this had occurred. Given Rusal's pervasive presence in the events which have culminated in the commencement and subsequent prosecution of these proceedings, disclosure to Rusal and use by it of the information for its own purposes would have been a very distinct possibility. This would plainly have been highly undesirable and exceedingly unfair to Ansol. The fact that TadAZ now accepts that no documents (or information contained in them) should be permitted to find their way to Rusal does not detract from the fact that it was precisely because of Rusal's close involvement in these proceedings that the assumption was made that Rusal Management personnel should have access to whatever disclosures were made by the defendants or documents revealed by the making of the freezing and search and seize orders.

190. A further matter which strikes me as odd and unsatisfactory is that, although Rusal is happy to assist TadAZ in the prosecution of TadAZ's claims in this jurisdiction against Ansol and others, it has indicated, when confronted by Ansol's Part 20 claim, that it intends to contest the jurisdiction of this court to try that claim. That is not at all an attractive posture. It is true that it is not one for which TadAZ is responsible.

191. Pulling these various strands together, the strong overall impression which I have gained is that, notwithstanding the joint venture, Rusal has decided to further its own interests through the exploitation of TadAZ's aluminium production capacity, intends to do so shorn of any participation by Ansol through the joint venture, and, to that end and acting in conjunction with those who now control TadAZ, is backing these proceedings both by providing Herbert Smith with day to day instructions and by underwriting some or all of the cost to TadAZ of bringing them. In short, from once being Ansol's partner, through Hamer, in their joint dealings with TadAZ, Rusal has now become Ansol's rival and, as part of the pursuit of its commercial interest, is promoting this litigation. It does so while denying this court's jurisdiction to try Ansol's related cross-claims against it. This may turn out on closer examination at the trial to be a wrong conclusion but that is how it presently appears to me.

93. The Rusal defendants say that they are not, and were not, parties to a joint venture with Ansol. The relevant relationship is that between Ansol and Elleray as set out in the Framework Agreement and the Agreement on Joint Operations. That relationship is the subject of an arbitration in Switzerland.

94. Blackburne J said in relation to exercise of discretion: -

"Exercise of discretion

192. The firm view that I reached by the end of the five day oral hearing - and it is a view confirmed by my rereading of all of the papers in the course of preparing this judgment - is that, having regard to the relative strengths of TadAZ's claim and Ansol's cross-claim, between which there is little to choose, and having regard in particular to the role of Rusal, not least as the source of the day to day instructions for the conduct of TadAZ's claim and also as the entity meeting some or all of TadAZ's legal costs (and likely therefore to have a significant influence on the course and direction of the claim and an interest in its outcome), it would be wrong for the first to fifth defendants to be subject to continuing freezing and search and seize order relief. It is to my mind very likely - if not inevitable - that documentation and information made available by Ansol and the other defendants in complying with the search and seize order and with the asset disclosure provisions of the freezing order would find their way to Rusal, whatever safeguards the court may seek to build into its order to prevent this from happening. I do not see how it is possible to avoid such an occurrence if, through Rusal Management, Rusal is the source of Herbert Smith's day to day instructions on TadAZ's behalf. Given the circumstances of this litigation, I consider that this is a result which the court should strive to avoid. This concern argues for the discharge not simply of the search and seize order but also of the freezing order which will be of little effect in the absence of the fullest disclosure of the assets held worldwide by the affected defendants. Over and above those considerations, I have a strong sense that this litigation is but part of a wider contest over the right to deal with TadAZ and thus to profit from its very considerable aluminium smelting capacity and that the obtaining by TadAZ of the freezing order and other relief is but a step in this contest. I do not consider that by granting this exceptional pre-trial relief, the court should appear to be lending its assistance to this wider contest.

193. I propose therefore to discharge the freezing and search and seize order."

95. In November 2005, TadAZ made another application for a worldwide freezing order against the defendants. On this occasion, Lawrence Collins J held (30 November 2005): *"in my judgment, this application does confirm what Blackburne J. said in the final sentence of paragraph 192 that this is simply another skirmish in a much wider dispute where the benefits to be gained by the claimant in terms of remedy are not sufficient to justify the type of application which is made".*

96. In January 2006 TadAZ notified the defendants that it would be withdrawing its renewed application for worldwide freezing relief. Blackburne J ordered TadAZ to pay indemnity costs.

TadAZ says that the basis of the renewed application was new evidence about corruption which had previously been withheld.

97. Ansol says the following. Blackburne J was unaware (because he was not informed) about the power of attorney allegedly signed by Mr Sharipov in English (a language Mr Sharipov does not understand) on 24 January 2005 giving Rusal authority to bring any proceedings anywhere in the world in the name of TadAZ. Blackburne J was only told about a power of attorney dated 5 May 2005 (i.e. 7 days before the proceedings began on 12 May) in which Mr Sharipov allegedly authorized Mr Kabirov to launch proceedings anywhere in the world, despite having claimed in his subsequent witness statement that Mr Kabirov had "de facto authority to bind TadAZ from the date of his appointment" (i.e. 31 January 2005 backdated to 10 January 2005). The evidence put forward by TadAZ was that Mr Kabirov first instructed Herbert Smith on 10 January 2005 i.e. some 21 days before he was in fact appointed: see Blackburne J's judgment, para. 26. Whoever Mr Kabirov was acting for on that day, it was not TadAZ.

TadAZ says that the fact that Mr Kabirov was only authorised to launch proceedings on 5 May 2005 does not mean that he was not authorised to instruct Herbert Smith to investigate matters from 10 January 2005.

The Orienbank defendants say that Mr Kabirov's appointment as Deputy Director of TadAZ was effective from 10 January 2005. It was in this capacity that he acted as regards instructions to Herbert Smith.

The Main Action

98. TadAZ makes the following claims in the main action.

1. Breach of implied terms in Mr Ermatov's contract of employment and breach of fiduciary duties owed to TadAZ.

2. Breach by Mr Nazarov and Ansol of fiduciary duties said to be owed to TadAZ by virtue of the "control" exercised over it.
3. Liability of Mr Ermatov, Mr Nazarov and Ansol in "fraud" to TadAZ in relation to the corrupt payments.
4. Equitable compensation/proprietary claims in respect of property and assets of TadAZ received by Mr Nazarov and Ansol.
5. Knowing assistance/conspiracy/unlawful interference in business by Mr Ermatov, Mr Nazarov, Ansol, Ashton, Mr Shushko and Ms Osadchaya.

The Part 20 Claim

99. Ansol's claims in the original Part 20 claim are set out below.

1. Rusal – liable to compensate Ansol in equity for its breaches of trust and/or fiduciary duty.
2. Rusal – liable to account to Ansol for the secret profits accrued by it, alternatively it holds such profits on trust for Ansol.
3. Rusal – liable to Ansol in damages for breach of a joint venture agreement.
4. The Part 20 defendants – each jointly and severally liable to Ansol in damages for procuring and/or inducing breaches of trust and/or fiduciary duty and breaches of contract.
5. The Part 20 defendants – each jointly and severally liable to Ansol in damages for unlawful interference.
6. The Part 20 defendants – each jointly and severally liable to Ansol in damages for conspiring to cause damage to Ansol by unlawful means.
7. The Part 20 defendants (except Rusal) – each jointly and severally liable to Ansol in damages to account to Ansol as constructive trustees for their dishonest assistance in Rusal's breach of trust and/or fiduciary duty to Ansol.
8. The Part 20 defendants hold all sums received by them in fraud of Ansol as resulting or constructive trustees for Ansol.
9. The Part 20 defendants – liable to reconstitute those assets which they hold on trust for Ansol.
10. The Part 20 defendants – jointly and severally liable to indemnify Ansol in respect of such liabilities as it may have in law to third parties which arise directly or indirectly from the acts of the Part 20 defendants.
11. The Part 20 defendants – each jointly and severally liable to pay exemplary damages to Ansol.

By application notice dated 23 June 2006 (issued in the course of the hearing) Ansol applied for permission to amend its claims in the Part 20 claim as follows.

1. Deleted
2. Deleted
3. (As before) Rusal – liable to Ansol in damages for breach of a joint venture agreement.
4. TadAZ and Hamer (only) – each jointly and severally liable to Ansol in damages for procuring and/or inducing breaches of contract (only).
5. TadAZ and Hamer (only) – jointly and severally liable to Ansol in damages for unlawful interference.
5A. The Rusal and Orienbank defendants – jointly and severally liable to Ansol for abuse of rights contrary to Article 10 of the Tajik Civil Code.
6. Deleted.
7. Deleted.
8. Deleted.
9. Deleted.
10. As before.
11. As before.

The existing pleadings and governing law

100. TadAZ's Particulars of Claim in the main action are pleaded in English law. They relate to the profits earned by Ansol and others pursuant to contracts made with TadAZ. Those agreements were made subject to English law (in the case of the agreements between Ansol and TadAZ) and Swiss law (in the case of the agreements between Hamer and TadAZ). So far as the claim relates to the agreements between Hydro and TadAZ, those agreements were governed by English law.

101. TadAZ's case is that if the claim that Mr Nazarov's and Mr Ermatov's conduct constituted equitable fraud is not governed by English law, then their case in Tajik law will be made in reliance on Chapter 55 of the Civil Code and Article 10 of the Civil Code - abuse of rights (TadAZ Further Information dated 26 August 2005, Response 10).

102. TadAZ allege that Mr Ermatov owed duties to TadAZ in Tajik law under Resolution 111, the Labour Code of Tajikistan, Chapter 55 of the Civil Code and Article 10 of the Civil Code - abuse of rights (Reply to Defence of Ansol defendants, paragraph 4).

103. The Ansol defendants plead that Mr Ermatov's rights and duties as Director of TadAZ were governed by Tajik law (Ansol Defence, para. 9). They also plead (Ansol Defence para. 17.2) that the concept of "equitable fraud" does not exist in Tajik law. TadAZ admits that Mr Ermatov's rights and duties as Director of TadAZ were governed by Tajik law (Reply to Ansol Defence, para. 3). TadAZ says that the law by reference to which the conduct of Mr Ermatov and Mr Nazarov constituted an equitable fraud against TadAZ is English law and, in the alternative, that their conduct was wrongful under Tajik law (Response 10, TadAZ Further Information served in Response the Request of the Ansol defendants dated 26 August 2005).

104. In TadAZ's Defence to the Part 20 claim the governing law was not put in issue by TadAZ and therefore that claim remains to be determined on the basis of English law.

Other related proceedings in the Commercial Court

105. There is other related (or possibly related) litigation in the Commercial Court as follows.
(1) TadAZ's challenge to the award made in the LCIA Arbitration brought by Hydro against TadAZ (2005 Folio no 291). No materials relating to these proceedings (such as claim form, orders or judgments) were before the court in relation to the present applications. I was told that a judgment given by Morison J is subject to a confidentiality order which he imposed. It follows that the only information before the court as to these proceedings is as set out above.
(2) Proceedings brought by Gerald Metals SA ("Gerald") against Ansol and TadAZ, in support of arbitral proceedings against Ansol (in the International Chamber of Commerce in Zurich) and TadAZ (in the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow) (2005 Folio no 598). TadAZ's involvement in these proceedings arises from its alleged role as guarantor of Ansol's liabilities to Gerald. The proceedings have been discontinued as against TadAZ.
(3) Ashton Investments Ltd (the fourth defendant in the main action) and Ansol issued proceedings against the Rusal defendants in the Chancery Division on 8 February 2006, claiming an injunction, damages and other relief by reason of the Rusal defendants having allegedly gained unauthorised access to the files on Ashton's computer system in London. Applications for an injunction and amendment to the Part 20 Particulars of Claim were also issued in the Part 20 Proceedings. The action has been transferred by consent to the Commercial Court.

The Rusal defendants deny the allegations, but gave various undertakings to the court in much narrower terms than the injunction sought by Ansol and Ashton pending the determination of the Rusal defendants' challenge to the jurisdiction under CPR Part 11. The Part 11 application is listed for hearing on 25 September 2006.

Principles upon which permission to serve outside the jurisdiction is granted.

106. It is convenient at this point to set out the principles upon which permission to serve outside the jurisdiction is granted.

An application for permission to serve a claim form out of the jurisdiction under rule 6.20 must be supported by written evidence stating –
a) the grounds on which the application is made and the paragraph or paragraphs of rule 6.20 relied on;
b) that the claimant believes that his claim has a reasonable prospect of success; and
c) the defendant's address or, if not known, in what place or country the defendant is, or is likely, to be found. (rule 6.21(1)).

107. Where the application is made in respect of a claim referred to in rule 6.20 (3), the written evidence must also state the grounds on which the witness believes that there is between the claimant and the person on whom the claim form has been, or will be served, a real issue which it is reasonable for the court to try. (rule 6.21(2)).

108. The applicant must show that each claim made by him has the attributes set out in at least one of the sub-paragraphs of rule 6.20 (in the present case rule 6.20 (3)). The burden is upon the applicant to show in respect of each claim that he has a good arguable case that it falls within the relevant sub-paragraph of rule 6.20 (in the present case rule 6.20 (3)).

109. Rule 6.20 provides that a claim form may be served out of the jurisdiction with the permission of the Court if –
"(3) a claim is made [by A] against someone [X] on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and – (a) there is between the claimant and that person [X] a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person [Y] who is a necessary or proper party to that claim".

110. Caution must always be exercised in bringing foreign defendants within this jurisdiction under rule 6.20 (3). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction (Lloyd LJ in ***The Goldean Mariner*** [1990] 2 Lloyd's Rep 215 at 222). The jurisdiction under rule 6.20 (3) is particularly exorbitant because it enables a foreigner to be impleaded when the dispute may have no connection with this country at all. Hence a need for even greater caution (Hoffmann J in ***Arab Monetary Fund v Hashim (No 4)*** [1992] 1 All E R 645 at 648).

111. Where reliance is placed on rule 6.20 (3) the following conditions must be fulfilled:
i) A, the Part 20 claimant, must satisfy the court that there is between A and X a real issue which it is reasonable for the court to try.
ii) Y, who is out of England, must be either a necessary or a proper party to the Part 20 claim. If Y is a proper party it is not also a requirement that Y be a necessary party. If adding Y is likely in practice to achieve no potential advantage for the claimant, it would not ordinarily be a proper case for service out of the jurisdiction. The question whether Y is a proper party to proceedings against X may be tested in this way: suppose both X and Y had been in England, would they both have been proper parties to the proceedings? If they would, and only one of them, X, is in this country, then Y is a proper party and permission may be given to serve him out of the jurisdiction. It is not necessary that the alleged liability of Y be joint or several with that of X.

(See Dicey & Morris, The Conflict of Laws fourth Supplement to 13th Edn, p 55 and United Film Distribution Ltd v Chhabria [2001] EWCA Civ 416).

112. The court's power to permit service out under rule 6.20(3) is not narrower than the court's wide power to add or substitute a party under rule 19.2(2). (***United Film Distribution*** supra at paragraph 38, Blackburne J). Rule 19.2(2) provides that the court may order a person to be added as a new party if (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

113. The applicant must show a reasonable prospect of success in respect of each cause of action in respect of which he asks for permission against each Part 20 defendant. The merits test under CPR 6.20 is in substance no different from the test of a real prospect of success under CPR 3.4 or 24.2. The underlying rationale is that the court should not subject a foreign litigant to proceedings which the defendant would be entitled to have summarily dismissed. The test is not a high one. A claimant has a real prospect of success if its chances of success are not fanciful. (***Carvill America Inc v Camperdown UK Ltd*** [2005] EWCA Civ 645 at [24], Longmore LJ).

114. The court will not give permission unless it is satisfied that England and Wales is the proper place in which to bring the claim (rule 6.21 (2A)).

115. The court has a general discretion to decide whether or not the case is a proper one for service out of the jurisdiction. In particular it must consider the question of forum conveniens, namely in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice.

116. As to forum conveniens, the burden is upon the applicant to persuade the court that England is clearly the appropriate forum for the trial of each Part 20 claim. The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice. The court must consider first what is the "natural forum", namely that with which the Part 20 claim has the most real and substantial connection. If the court concludes that there is another available forum which is apparently as suitable or more suitable than England, it will normally refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless be granted.

117. Where a party seeks to establish the existence of a matter that will assist him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it.

118. Although there are differences between rules 6.20 and 6.21 and the former provisions of RSC Order 11, the underlying principles to be found in the decisions of the House of Lords in ***Seaconsar Far East Limited v Bank Markazi Jomhouri Islam Iran*** [1994] 1 AC 438 and ***Spiliada Maritime Corp v Consulex Limited (The Spiliada)*** [1987] AC 460 remain the same.

119. Where a cause or causes of action are expressly mentioned in the claim form and the particulars of claim if they accompany the form, the court must decide an application for permission to serve out upon any cause of action so mentioned. The claimant will not be allowed to rely upon an alternative cause of action which he seeks to spell out of the facts pleaded, if such cause of action has not been so mentioned, unless perhaps the alternative basis has been specifically referred to in the supporting evidence (***Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc*** [1990] 1 QB 391; DSQ Property Co Ltd v Lotus Cars Ltd, The Times, June 28,1990, CA; **ABCI v Banque Franco – Tunisienne and others** [2003] 2 Lloyd's Rep 146, CA). Where the cause of action has not been mentioned a more flexible approach may be adopted, ***DVA v Voest Alpine*** [1997] 2 Lloyd's Rep 279.

120. The Admiralty & Commercial Courts Guide, Appendix 15 (service out of the jurisdiction: related practice) states that: -

"On applications for permission under rule 6.20 the written evidence must, amongst other things:
(i) identify the paragraph or paragraphs of rule 6.20 relied on as giving the court jurisdiction to order service out, together with a summary of the facts relied on as bringing the case within each such paragraph;
(ii) state the belief of the deponent that there is a good claim and state in what place or country the defendant is or probably may be found;
(iii) summarise the considerations relied upon as showing that the case is a proper one in which to subject a party outside the jurisdiction to proceedings within it;
(iv) draw attention to any features which might reasonably be thought to weigh against the making of the order sought;
(v) state the deponent's grounds of belief and sources of information;
(vi) exhibit copies of the documents referred to and any other significant documents" (paragraph 2 (a)).

121. The Chancery Guide states in relation to the duty of disclosure: -

"5.16 On all applications made in the absence of the respondent the applicant and his or her legal representatives owe a duty to the court to disclose fully all matters relevant to the application, including matters, whether of fact or law, which are, or may be, adverse to it. If there is a failure to comply with this duty and an order is made, the court may subsequently set aside the order on that ground alone. The disclosure, if made orally, must be confirmed by witness statement or affidavit. The representatives for the applicant must specifically direct the court to passages in the evidence which disclose matters adverse to the application."

Non-disclosure in connection with applications for permission to serve out of the jurisdiction

122. I was referred to the following authorities in relation to allegations of non-disclosure in connection with applications for permission to serve out of the jurisdiction: -

Macaulay (A) (Tweeds) Ltd & Ors v Independent Harris Tweed Producers Ltd (1961) RPC 184, Cross ***J. BP Exploration v Hunt [***1976] 1 Lloyd's Rep 471, Kerr J. ***Kuwait Oil v Idemitsu Tankers*** [1981] 2 Lloyd's Rep 510, CA. ***General Mediterranean Holdings SA v Patel*** 17 June 1997, Ferris J. Knauf ***UK G.m.b.H v British Gypsum Ltd and Anothe***r [2001] EWCA Civ 1570. ***MRG (Japan) Ltd v Engelhard Metals Japan Ltd*** [2003] EWHC 3418 (Comm), Toulson J.

123. In the light of these authorities in my opinion the relevant principles are as follows.

(1) The golden rule is that an applicant for relief without notice must make full and frank disclosure to the court of all material matters relevant to the decision whether to grant the application. The duty of candour and care is a heavy one.

(2) Failure to observe the golden rule may lead to the court discharging the order obtained, even though the applicant may be able to make another application.

(3) A balance must be maintained between marking the court's displeasure at the non-disclosure and doing justice between the parties.

(4) The question whether there has been a material non-disclosure is a matter of degree in the particular circumstances. Regard will be had to the nature and extent of any material non-disclosure in relation to the matters which it was necessary for the court to consider on the without notice application. An applicant for permission to serve out is not expected to anticipate all the arguments/points which might be raised against his case. A failure to refer to arguments on the merits which the defendant may seek to raise in answer to the claim at trial should not generally be characterised as a failure to make full and fair disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant permission.

(5) The degree of any culpability on the part of the applicant and of any prejudice to the defendant is relevant to the court's discretion.

(6) A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the court, and a negligent failure to state certain facts which ought to have been stated.

(7) If the court is satisfied that there was a deliberate intention to deceive the court the order is likely to be discharged.

(8) Negligent non-disclosure may be so serious as to justify the court in discharging the order, even though it is satisfied that the applicant had no intention to deceive the court.

(9) If the judge is satisfied that there was no intention to deceive and the mis-statement was not grossly negligent, it may well be inappropriate to discharge the order.

(10) In Macaulay supra Cross J said at page 194 "If the judge is satisfied that there was no intention to deceive and the mis-statement is not grossly negligent, he may think it better not to visit it with a penalty which may fall as heavily on the defendants as on the plaintiffs, since the plaintiffs can, ex hypothesi, make a fresh application which will succeed."

(11) A material question may be – if the full facts had been before the court, would the court have given permission?

(12) In exercising the court's discretion, the crucial test is – what does justice demand?

(13) In appropriate circumstances the court may impose a condition as a term of maintaining the order.

My conclusions in relation to the applications before the court

124. I would normally set out my conclusions at the end of the judgment. In the present case as a number of my conclusions are interdependent/interlinked it is convenient to set out my conclusions first before setting out the reasoning.

125. My conclusions in relation to the applications before the court are as follows.

(1) TadAZ's application dated 3 February 2006 (for an order that the Part 20 claim be struck out pursuant to CPR Part 3.4 on the grounds that it does not disclose a cause of action or alternatively is an abuse of the process of the court because the Part 20 Particulars make non-justiciable allegations) fails.

(2) The Rusal defendants' application under CPR 11 dated 3 October 2005 (for a declaration that the court has no jurisdiction to try the Part 20 claim against the Rusal defendants/should not exercise any jurisdiction it may have), fails in relation to Rusal, but succeeds in relation to the other Rusal defendants.

(3) The Orienbank defendants' application under CPR 11 dated 21 October 2005 (for a declaration that the court has no jurisdiction to try the Part 20 claim against the Orienbank defendants/should not exercise any jurisdiction it may have) fails in relation to CDH, but succeeds in relation to the other Orienbank defendants.

(4) As to the application by the sixth and eighth defendants dated 31 October 2005 for an order under CPR 13.2 that the default judgment entered against them on 5 September 2005 be set aside (because it is said that the Part 20 claim was not properly served on the sixth and/or eighth defendants in accordance with the requirements of CPR 6), the judgments will be set aside in the light of my conclusions at (3) above. In addition the judgment against CDH will be set aside as a condition of maintaining the order granting permission to serve out against CDH.

(5) As to Ansol's application dated 20 January 2006 for an order that the court do remedy any error that may have occurred in the service of the Part 20 claim on the sixth and/or eighth Part 20 defendants, this does not arise in the light of my conclusions at (3) above.

(6) Ansol's application dated 7 March 2006 for an order that Ansol be permitted to amend the Part 20 Particulars of Claim was withdrawn in the course of the hearing and is accordingly dismissed.

(7) As to Ansol's application notice dated 23 June for permission to amend the Part 20 claim and related pleadings in accordance with the drafts served on 23 June, I will grant permission to amend the claim form and related pleadings on terms that the claims for relief against all Part 20 defendants other than TadAZ, Rusal, CDH and Hemer are deleted.

(8) As to Ansol's application dated 23 June for permission to serve out of the jurisdiction and for alternative service, this does not arise in relation to Rusal and CDH and is dismissed in relation to the other Rusal and Orienbank defendants.

I give my reasons for reaching these conclusions below.

(1) TadAZ's application dated 3 February 2006 (for an order that the Part 20 claim be struck out pursuant to CPR Part 3.4 on the grounds that it does not disclose a cause of action or alternatively is an abuse of the process of the court because the Part 20 Particulars make non-justiciable allegations) fails.

126. Where reliance is placed on rule 6.20 (3) the following (first) condition must be fulfilled:

Ansol, the Part 20 claimant, must satisfy the court that there is between Ansol and TadAZ a real issue which it is reasonable for the court to try. I am satisfied that there is such an issue.

TadAZ's submissions

127. Mr Rosen QC for TadAZ submitted as follows.

128. Ansol's counterclaim as originally pleaded falls foul of the rules concerning act of state and non-justiciability.

129. Ansol has now made an application to amend its Part 20 Particulars of Claim and related Further Information. Ansol has also set out in the document dated 21 June 2006 that it will not allege at trial that the Government of Tajikistan or any government officials were party to any conspiracy against it or that any sovereign act of the President or Government of Tajikistan is or was unlawful as a matter of Tajik law.

Ansol's position is unsatisfactorily vague in a number of respects.

130. TadAZ puts forward three main points of principle in opposition to Ansol's application to amend its statements of case:-

(a) The amendments do not "alter the facts". The "skilled pleader" has simply removed express references to the Government and officials of Tajikistan. The role of the Government and officials is still central to the case. Ansol is seeking to do precisely what the House of Lords said in Buttes Gas cannot be done, namely to claim damages for the consequences of official acts of the Government of a friendly sovereign state acting within its territorial jurisdiction.

The notion that such claims do not fall foul of the act of state doctrine is referred to as the "Occidental Fallacy".

(b) Ansol has committed itself in its original verified statements of case to the proposition that the conduct of which it complains could only have happened at the direction of the Government. The basis of Ansol's contention that it has a claim against TadAZ in tort for TadAZ's conduct in Tajikistan pursuant to lawful and valid directions of the Tajik Government is not understood. A fortiori given that Ansol is relying upon torts that require intention, purpose, motive and absence of justification.

(c) TadAZ has in any event a full defence to the claim in the form of the prohibition on exports dated 8 December 2004 ("the Suspension"). The Suspension prohibited exports of aluminium pursuant to the contractual structures put in place by Ansol and from which it complains it was ousted. TadAZ's primary case is that the Suspension is a complete answer to the claim. Alternatively it is an answer to the claim for any period after 20 January 2005 (the date on which Ansol alleges that the Suspension was in fact issued). Accordingly, at the very least, the fact of the Suspension massively reduces the value of the claim.

131. Ansol does not allege that TadAZ has excluded Ansol for TadAZ's own financial benefit. It is Ansol's factual case that TadAZ is the object of the conspiracy / plan, rather than a conspirator itself.

132. The allegations of serious and deliberate wrongdoing by the President and other serving high officials of the Republic of Tajikistan lie at the heart of Ansol's claim.

133. A full list of non-justiciable matters is set out in the agreed list served on Ansol on 16 May 2006.

134. What Ansol has done, in its draft amended pleadings, is simply to excise reference to the President and the Government. But the acts of the President and the Government remain central to Ansol's claim. This is a transparent and hopeless attempt to disguise the true, non-justiciable nature of the claim.

There is no basis for leaving questions of non-justiciability to trial.

135. It is impossible to understand the basis upon which Ansol suggests that the acts of TadAZ in Tajikistan at the lawful direction of the Government of Tajikistan can give Ansol a claim against TadAZ in tort.

136. English law does not recognise as tortious any act authorised (let alone procured) by a foreign sovereign where the act complained of takes place within the territorial jurisdiction of the consenting sovereign.

137. Ansol's claim cannot succeed unless it can persuade the court to ignore or to rule invalid decrees of the Republic of Tajikistan effective within the territory of that state and issued pursuant to express constitutional powers.

138. Given the fact of these decrees, TadAZ was incapable of trading pursuant to the arrangements from which Ansol says it was excluded.

139. The Suspension is dated 8 December 2004. There is no dispute as to its genuineness as a government document, save as to its date. TadAZ accepts for the purpose of the present hearing that if inquiry is permissible there is a strong case that the decrees dated 8 December 2004, including the Suspension, were not issued until the latter part of January 2005. But:-

i) Ansol is not entitled to ask the English court to inquire into the alleged backdating of the Suspension.

ii) It would in any event avail Ansol nothing to show that the Suspension was backdated. The Suspension purports to have effect from 8 December 2004. The English court must proceed on the assumption that the Suspension was valid and effective from 8 December 2004 regardless of when it was in fact issued.

140. TadAZ further submitted in the alternative that Ansol's claim to damages could not extend beyond the time at which the Suspension was admittedly issued, namely 20 January 2005, and that the Part 20 claim ought to be struck out so far as it sought damages for the period after that date.

141. As to abuse of process, Ansol's true motivation in bringing its counterclaim is to embarrass the President and the Government. Ansol has deliberately chosen to include in Annex A to its original Part 20 Particulars of Claim allegations that are sensationalist, incendiary and political.

142. The English court must refuse to be drawn into resolving issues that go to the heart of the political processes of a foreign friendly state.

The submissions of the Rusal defendants

143. Mr Beazley QC for the Rusal defendants adopted the submissions on behalf of TadAZ and submitted as follows.

Ansol has changed the case which it presented to the court when seeking permission to serve out, which is the case which the Rusal defendants challenged by their Part 11 application. The new case advanced is incoherent as to how the Part 20 defendants are supposed to have achieved their ends, and inconsistent with the case previously advanced by Ansol in pleading, with statements of truth, and in evidence. No or no proper and credible explanation is given as to the basis of that change, or how the Plan could have worked without the knowing and deliberate involvement of the Government actors as parties to the conspiracy. There is no real prospect of Ansol succeeding on the case without the allegations against the Government officials.

144. As a direct result of Ansol's unacceptable conduct, the Rusal defendants have been (or at least are at grave risk of being) very seriously prejudiced.

145. The draft amendments do not extinguish the objections to the Part 20 Particulars of Claim which arise from non-justiciability, act of state and immunity. By excising various parts of its pleadings and amending others Ansol has done no more than try to veil from the court's view facts and matters which lie beneath the surface of its pleaded claim, and which, if its claim proceeds, are bound to arise again and again. They will arise in pleadings, in disclosure and in witness statements. There can be no question of waiting for trial to decide these matters.

The superficiality of Ansol's amendments is apparent.

The submissions of the Orienbank defendants

146. Mr Popplewell QC for the Orienbank defendants adopted the submissions on behalf of TadAZ and the Rusal defendants and submitted as follows.

The factual amendment to the pleading makes no difference in substance to the issues which the Part 20 claim against the Orienbank defendants requires the court to address and decide at trial. Alternatively the amendment leaves the claim against the Orienbank defendants incoherent, incomprehensible and unsustainable.

147. Ansol's case cannot be advanced at trial without asserting what it says is the true position on the evidence. The case is objectionable on grounds of act of state, non-justiciability and immunity.

The "Plan" is incoherent without the governmental involvement.

148.

149.

150. The respective contentions of the parties as to the legal principles governing

A. Act of State
B. The principle of non-justiciability/judicial restraint
C. Case management issues as to Act of State/non-justiciability
D. Sovereign immunity under the State Immunity Act 1978
E. Immunity under the Diplomatic Privileges Act 1964
F. Article 6, ECHR

are set out below.

A. Act of State

The Broad Doctrine Agreed By All Parties

(1) The (foreign) act of state doctrine is closely related to, but separate from, the principle of judicial restraint/non-justiciability (***Buttes Gas v Hammer (No.3)*** [1982] AC 888, 931F).

(2) It has been described as giving effect to a policy of judicial restraint (***Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883, §135 per Lord Hope).

(3) The act of state doctrine is a rule of domestic (not international) law (***R v Bow Street Magistrate, ex p Pinochet (No.1)*** [2000] 1 AC 61, 106G per Lord Nicholls).

(4) It provides that English courts will not adjudicate upon or call into question legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory (***Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883, §135) or, occasionally outside its territory (***R v Bow Street Magistrate, ex p Pinochet (No.1)*** [2000] 1 AC 61, 106F per Lord Nicholls).

(5) The act of state doctrine precludes an English court from inquiring into the motives of the foreign state in carrying out an act of state (***Williams & Humbert v W&H Trade Marks (Jersey) Ltd*** [1982] AC 368, 431 per Lord Templeman).

(6) As with the principle of non-justiciability, the act of state doctrine applies irrespective of whether or not the relevant state or its organs are joined as parties to the action.

The Extent and Application of the Act of State Doctrine

The parties differ on the extent and application of the act of state doctrine.

The Part 20 claimant's formulation is:

(a) The doctrine of act of state applies only where the status of the sovereign's act lies at the heart of the dispute (***Industria Azucarera Nacional SA v Empresa Exportadora de Azucar*** (unreported, 29 Feb 1980) page 48).

(b) The rule that the validity of sovereign acts of a foreign sovereign on its own territory will not be called into question by the English Court is only a prima facie rule (***Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883 (CA) at §320 per Brooke LJ. It is not absolute: ***Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883 (HL) at [113] (Lord Steyn).

(c) The court will consider whether the alleged act of state is indeed a prima facie valid act of state (***Princess Paley Olga v. Weisz*** [1929] 1 KB 718, 723 per Scrutton LJ).

(d) The court will examine any alleged act of state to determine what its true meaning and effect is (***Princess Paley Olga v. Weisz*** [1929] 1 KB 718, 731 per Sankey LJ).

(e) The court will consider the act in question to see whether it is in truth a sovereign act or a private act (***A Bank v B Bank*** [1997] FSR 165, 175 per Morritt LJ). (see also the distinction between acta jure imperii and acta jure gestionis below).

(f) The right to rely on the act of state doctrine may be waived (i) by adducing evidence as to the matters which it is (subsequently) alleged may not be adjudicated upon by the court and/or (ii) by adducing evidence from state officials as to the said matters and/or (iii) where the relevant government (with notice) permits the matters to be heard without protest (***The Playa Larga*** [1983] 2 Lloyd's Rep 171, 193-194 per Ackner LJ).

The Part 20 defendants' formulation is:

(a) In requiring English courts to treat foreign acts of states as valid, the act of state doctrine requires them to be treated as being lawful, proper and effective (see, in relation to domestic acts of state, ***Salaman v Secretary of State for India*** [1906] 1 KB 613, 640 per Fletcher Moulton LJ). The principle applies to acts of a foreign state regardless of whether those acts take the form of a formal promulgation or decree (***Princess Paley Olga v Weisz*** [1929] 1 KB 718 per Russell LJ).

(b) The court will examine whether the foreign act of state is, indeed, an act of state.

(c) English courts will not adjudicate any claim against a private party that relies in fact or law upon showing collusive conduct (in form or in substance) by a foreign sovereign acting in its own territory. A claim to damages for the consequences of such conduct necessarily involves a challenge to the state's acts as it

questions the status, character, lawfulness and effect of the act (***Hunt v Mobil Oil Corporation*** 550 F 2d 68 (1977) at pp. 7-9 of Westlaw transcript).

(d) If a foreign state authorises or procures a person to perform acts within the territory of the sovereign, the act of state doctrine prohibits the English courts from imposing tort liability on that person for those acts. A fortiori liability for torts requiring bad faith on the part of the person sued (Halsbury's Laws Vol. 18(2) §621 and ***Carr v Fracis Times*** [1902] AC 176, 179 per Earl of Halsbury LC).

(e) Like the principle of judicial restraint/non-justiciability the act of state doctrine cannot be waived (and certainly not impliedly).

(f) As a matter of international law, and for the purposes of the English act of state doctrine, the conduct of an organ of a State (or of a person/entity empowered to exercise elements of the governmental authority) shall be an act of the State if the organ, person or entity acts or purports to act in that capacity or under colour of authority, even if it exceeds its authority or contravenes instructions (***Jones v Ministry of the Interior*** [2006] UKHL 26, §§12-13 per Lord Bingham and §78 per Lord Hoffmann).

(g) By reason of the foregoing, it is permissible for a claimant to rely upon an act of state in order to found a claim in circumstances in which it is impermissible for the defendant to plead in his defence that the act of state is unlawful or invalid; a claimant may rely upon an act of state to defeat a counterclaim or an affirmative defence, notwithstanding its submission to the jurisdiction by bringing the main claim (see generally, ***Williams v. Humbert*** [1986] AC 368). This applies subject to the limitations set out in Dicey & Morris, Rule 3.

(h) One consequence of the act of state doctrine is that English courts will not pronounce on whether a foreign State is acting contrary to the interests of its people (***Civil Air Transport v Central Air Transport*** [1953] AC 70, 92 per Viscount Simon). Other consequences are that (i) the English courts will not inquire into allegations that a foreign official has backdated a decree fraudulently or for an improper motive or purpose (see ***Buttes Gas*** generally) and (ii) English courts will refuse to receive evidence as to the motives of foreign officials in passing a decree (***Settebello*** [1985] 2 Lloyds Rep 448, 450-451 per Sir John Donaldson MR upholding the judgment of Hirst J).

Limitations on the Act of State Doctrine

The parties differ as to the limitations on the act of state doctrine.

The Part 20 claimant's formulation is:

(a) The distinction between acta jure imperii and acta jure gestionis applies to the act of state doctrine (***The Playa Larga [***1983] 2 Lloyd's Rep 171, 194 per Ackner LJ).

(b) Acts of a foreign state in the exercise of its sovereign authority (acta jure imperii) attract immunity from jurisdiction but acts carried out by the State which have a private law character (acta jure gestionis) do not (***I Congreso del Partido*** [1983] 1 AC 244, 262 per Lord Wilberforce).

(c) The court will examine whether the act of state is contrary to English public policy (and, if so, will disregard it). A law which violates human rights is one example of a law which the English Courts will not recognise but the principle is not confined to human rights violations and will extend to other situations (***Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883, §§16-17 per Lord Nicholls and §117 per Lord Steyn).

The Part 20 defendants' formulation is: The act of state doctrine may be displaced where

(a) there is a statutory rule to the contrary (***R v Bow Street Magistrate, ex p Pinochet (No.1)*** [2000] 1 AC 61, 107B-C) or

(b) a gross violation of principles of human rights/international law has been established (Kuwait Airways Corp, §§26; 113-114, 137 and 148).

151. As in relation to the principle of non-justiciability, the act of state doctrine is not displaced by allegations of conspiracy or corruption (see generally ***Buttes Gas v Hammer (No.3)*** [1982] AC 888). Nor is it displaced where some of the acts in question may be commercial (***Kuwait Airways*** [1995] 1 WLR 1147, 1165 per Lord Goff).

B. The Principle of Non-Justiciability/Judicial Restraint

The Broad Principle Agreed by All Parties

(1) The principle of judicial restraint (or non-justiciability) provides, in general terms, that courts will not adjudicate upon the transactions of foreign sovereign states. It, therefore, requires a court to reach a decision on whether it is competent to decide the issues raised and withdraw from adjudication if it is not (***Buttes Gas v Hammer (No.3)*** [1982] AC 888, 931F per Lord Wilberforce).

(2) The principle of judicial restraint/non-justiciability is a principle of private international law. It presents a substantive bar to adjudication (***R v Bow Street Magistrate, ex p Pinochet (No.1)*** [2000] 1 AC 61, 90B per Lord Lloyd).

(3) The application of both the doctrine of act of state and the principle of non-justiciability depend on the facts of each case which may involve a close examination of the specific issues said to be non-justiciable: ***Total E&P Soudan v Edmunds & Ors*** [2006] EWHC 1136 , §[25] (Tomlinson J).

(4) The principle of non-justiciability applies irrespective of whether or not the relevant state or its organs are joined as parties to the action (***Buttes Gas v Hammer (No.3)*** [1982] AC 888, 932-933 per Lord Wilberforce commenting on Duke of Brunswick v King of Hanover).

The Extent and Application of the Principle of Non-Justiciability

The parties differ in their interpretation of the extent and application of the principle of non-justiciability.

The Part 20 claimant's formulation is: Non-justiciability is a principle of judicial restraint or abstention, which the courts may exercise when called upon to adjudicate over transactions between foreign states and which arises where there is a lack of judicial standards by which to judge the issues. It is distinct from Act of State (B***uttes Gas v Hammer (No.3)*** [1982] AC 888, 931-932 and 938 per Lord Wilberforce).

The Part 20 defendants' formulation is: The application of the principle of judicial restraint/non-justiciability is triggered by facts and issues (whether purely governmental or not: ***Kuwait Airways*** [1995] 1 WLR 1147, 1165 per Lord Goff) which relate to acts of foreign sovereign states which are incapable of being judged by reference to "judicial or manageable standards" (***Buttes Gas v Hammer (No.3)*** [1982] AC 888, 938B, per Lord Wilberforce) and/or which would involve meddling in the affairs of foreign states (***Fayed v Al Tajir*** [1988] 1 QB 712, 731 per Mustill LJ). Where it applies, the principle of non-justiciability is of mandatory application and cannot be waived (***R v Bow Street Magistrate, ex p Pinochet (No.1)*** [2000] 1 AC 61, 90B per Lord Lloyd).

Limitations on the Principle of Non-Justiciability

The parties differ regarding the limitations on the principle of judicial restraint/non-justiciability.

The Part 20 claimant's formulation is:

(a) The distinction between acta jure imperii and acta jure gestionis applies to the principle of non-justiciability (***Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883 (CA), §319 per Brooke LJ).

(b) The principle of non-justiciability can be waived (***President of Equatorial Guinea and Republic of Equatorial Guinea v Logo Limited*** [2005] EWHC Civ 2034, §93.2 per Davis J).

(c) The principle of non-justiciability may be displaced where public policy requires it.

The Part 20 defendants' formulation is: Although the principle of judicial restraint/non-justiciability cannot be waived it may be displaced where

(a) there is a statutory rule to the contrary (***R v Bow Street Magistrate, ex p Pinochet (No.1)*** [2000] 1 AC 61, 107B-C per Lord Nicholls) or

(b) a gross violation of particular principles of human rights/international law has been established (***Kuwait Airways Corp,*** §§26 per Lord Nicholls; 113-114 per Lord Steyn, 137 and 148 per Lord Hope).

It is not displaced by allegations of conspiracy or corruption (see generally Buttes Gas v Hammer (No.3) [1982] AC 888). Nor is it displaced where some of the acts in question may be commercial (Kuwait Airways [1995] 1 WLR 1147, 1165 per Lord Goff.

C. Case Management Issues as to Act of State/Non-Justiciability

The Part 20 claimant's formulations

(a) Matters as to justiciability should be determined - at the earliest - only when all the issues have been defined on the pleadings, and in complex cases should be left to the trial judge (***Kuwait Airways Corp v. Iraqi Airways Co*** [1995] 1 WLR 1147 at 1167-1168 (Lord Goff); ***Total E&P Soudan v Edmunds & Ors*** [2006] EWHC 1136 at [25] (Tomlinson J)).

(b) A successful invocation of the principles of act of state and non-justiciability may give rise to case management and fair trial considerations. For example, if the claimant succeeds in striking out all or part of the defence, the court is obliged to consider whether a fair trial of the claim is still possible: ***Buttes Gas v. Hammer (No 3)*** [1982] AC 888 25, pages 938 (Lord Wilberforce); ***Skrine & Co and others v Euromoney Publications plc and others*** 144 SJ LB 274, The Times 10 November 2000, Transcript at [27] (Morland J).

The Part 20 defendants' formulation

(a) An English court will not permit cases to progress to trial where they do not have reasonable prospects of success. Where (as on the facts of the present case) it is clear that a claim cannot succeed by reasons of the principle of non-justiciability and the act of state doctrine then the claim must be dismissed (as happened in Buttes Gas).

(b) The Part 20 defendants' position is that the possibility that "if the claimant succeeds in striking out all or part of the defence, the court is obliged to consider whether a fair trial of the claim is still possible" does not arise on the facts of the present case. The applications before the court are concerned only with the Part 20 Claim, not with the defences to the main action.

D. Sovereign Immunity under the State Immunity Act 1978

The Part 20 claimant's position as regards state immunity is that it is not relevant because no state or government is sued. Furthermore, all of the references to members of the government and the President have now been

deleted. The argument of state immunity was rejected in Buttes Gas v Hammer (No.3) [1982] AC 888, 926. The Part 20 claimant accordingly does not agree or disagree with the following propositions but maintains that the 1978 Act simply does not apply.

The following propositions are advanced by the Part 20 defendants.

(a) States are immune from the jurisdiction of English courts, except as provided in the State Immunity Act 1978 (section 1(1) of the 1978 Act). "State" includes (a) the sovereign/other head of State in that public capacity; (b) the government of that State; and (c) any department of that government (section 14(1) of the 1978 Act).

(b) A State will be entitled to claim immunity not only where it is made a party to the proceedings in question but also where the proceedings relate to

(i) a claim against the state's functionary (Dickinson, State Immunity, page 342 and ***Jones v Ministry of the Interior*** [2006] UKHL 26, §10 per Lord Bingham).

(ii) property in the possession/control of the State or in which it has an interest (section 6(4) of the 1978 Act) or

(iii) the rights, interests or activities of the foreign State (UN Convention on Jurisdictional Immunities, Article 6(2) and ***Jones v Ministry of the Interior*** [2006] UKHL 26, §§8 and 10 per Lord Bingham.

(c) Whether or not a State is made party to the proceedings a court must enquire, of its own motion if necessary, whether there is any entitlement to immunity (section 1(2) of the 1978 Act).

(d) The claimant bears the burden of proving why state immunity is inapplicable (***JH Rayner (Mincing Lane) v DTi*** [1987] BCLC 667, 675-679 per Staughton J).

(e) A State is not immune in respect of proceedings relating to a commercial transaction entered into by the State (section 3(1)(a) of the 1978 Act).

(i) Section 17 defines "commercial purposes" as "purposes of such transactions or activities as are mentioned in section 3(3)".

(ii) A State will only have "entered into" a transaction where it is directly involved as a party (see, e.g. ***JH Rayner (Mincing Lane) v DTi*** [1990] 2 AC 418, 478 and 503 per Lord Oliver). There is a distinction between the commercial transactions of a state and the commercial transactions of an independent state organisation. The acts of a state, not involved in any trading relationship itself, in ordering a repudiation of contract by an independent state organisation does not amount to a commercial act by the state where the state itself never assumed a commercial obligation: see ***I Congreso*** [1983] AC 244 at 271 per Lord Wilberforce, dissenting. (The majority decided the case on the basis that the state had entered into a contract in the case of ***The Playa Larga*** and into a commercial bailment in the case of The Marble Islands).

(iii) The words "proceedings relating to" a transaction refer to claims arising out of the transaction (usually contractual claims) and not tortious claims arising independently of the transaction but in the course of its performance (***Holland v Lampen-Wolfe*** [2000] 1 WLR 1573, 1587 per Lord Millett).

(f) A State may waive its immunity by submitting to the jurisdiction (section 2 of the 1978 Act).

E. Immunity and Privileges under the Diplomatic Privileges Act 1964

(g) Section 20 of the Diplomatic Privileges Act 1964 gives a head of state the privileges and immunities set out in Schedule 1 to the Act. These may be waived but the waiver must be express (Article 32 of the Vienna Convention on Diplomatic Relations, scheduled to the 1964 Act).

(h) Article 29 of the Vienna Convention on Diplomatic Relations provides that the person of a diplomatic agent is inviolable and requires the receiving state (the UK) to (a) treat him with due respect and (b) to take all appropriate steps to prevent any attack on his person, freedom or dignity.

(i) As an emanation of the Crown, courts are bound to uphold Article 29 by, for example, confining to an absolute minimum any meddling in the affairs of a foreign sovereign and protecting him from affront (***Fayed v Al Tajir*** [1988] 1 QB 712, 725 and 731 per Mustill LJ).

F. Article 6, ECHR

(j) The principles of non-justiciability, act of state and sovereign immunity do not violate the right of access to courts in Article 6, ECHR. (In relation to sovereign immunity: Jones v Ministry of the Interior [2006] UKHL 26, §§14-28 per Lord Bingham and §64 per Lord Hoffmann). (The Part 20 Claimant agrees with this formulation insofar as it is restricted to state immunity only).

Analysis

152. I do not consider that it is appropriate or just to strike out the Part 20 claim against TadAZ (or Rusal or CDH) at this stage on the grounds of act of state and/or non-justiciability/judicial restraint and/or sovereign immunity for in particular (but without limitation) the following reasons.

(i) In its skeleton argument served prior to the hearing Ansol submitted "In order to strike out the whole Part 20 claim the court would have to be convinced that the central and essential elements of Ansol's case are non-justiciable, not simply non-essential and severable parts of it. … Ansol contends that even if every one of the

passages were excised and all references to the President were deleted, Ansol would still have a substantial case on the remainder of the facts referred to." Ansol has sought to make good this contention by serving draft amended Particulars of Part 20 claim (and related pleadings), the latest versions being those served on 23 June 2006.

(ii) In my opinion a party is entitled to amend its claim with a view to avoiding any contention that the claim is precluded by the act of state doctrine, the principle of judicial restraint/non-justiciability or sovereign immunity, if on the remaining material there is a reasonable prospect of success in respect of each cause of action against each Part 20 defendant.

(iii) The application of both the doctrine of act of state and the principle of the non-justiciability depends on the facts of each case. A close examination of the specific issues said to be non-justiciable is necessary. Where (as in the present case) the underlying facts cry out for full and careful investigation after disclosure, the just course is to leave issues as to act of state/non-justiciability/judicial restraint/sovereign immunity to be considered at trial. It is to be noted that Mr Rosen refers to a "strong case that the decrees dated 8 December 2004, including the Suspension, were not issued until the latter part of January 2005", although he says the court is not entitled to inquire into certain matters. It is also to be noted that there are two versions of the document which bears the date 8 December 2004. The true sequence of events cries out for full and careful investigation after disclosure in all the circumstances set out above. In reaching this conclusion I refer to the questions raised in the judgment of Blackburne J as to what happened in and after December 2004.

(iv) As Tomlinson J pointed out in ***Total E & P Soudan v Edmunds & Others*** [2006] EWHC 1136 at para. 25 there is no hard and fast rule as to the stage of proceedings at which an issue of non-justiciability must be determined. It is not a plea which goes to the jurisdiction of the court. Disclosure of documents may be needed in order to demonstrate whether a particular issue is indeed, as asserted, of non-justiciable nature. I have no doubt that disclosure of documents is needed in the present case.

(v) There are fundamental differences between the parties as to the relevant legal principles as set out above. These differences should be resolved (to the extent that it is necessary to do so) once the full facts have been ascertained.

(vi) In particular any consideration in the present case as to whether any of the exceptions to the doctrine of act of state and the principle of the non-justiciability apply, can only sensibly take place once the true facts have been established after disclosure.

(vii) In ***Buttes Gas v Hammer (no 3)*** supra Lord Wilberforce said: -

> *"A problem might arise if Buttes were to insist upon the action proceeding: to allow it to proceed but deny Occidental the opportunity to justify would seem unjust, although Buttes suggests that there are precedents for such a situation being accepted by the court. However, in the event, Buttes has, in its summons of July 11 1980 offered to submit to a stay on the claim if the counterclaims are stayed. Buttes should be held to this offer."*

In the present case TadAZ wishes to pursue its claims in the main action against Ansol and at the same time preclude Ansol from pursuing Part 20 claims against TadAZ, Rusal and CDH which Blackburne J described (in my view correctly) as "seriously arguable" (see paragraph 177 of his judgment). The "problem [which] might arise" to borrow the words of Lord Wilberforce, requires careful examination in the particular circumstances of this case, once the true facts have been established after disclosure.

(2) The Rusal defendants' application under CPR 11 dated 3 October 2005 (for a declaration that the court has no jurisdiction to try the Part 20 claim against the Rusal defendants/should not exercise any jurisdiction it may have) fails in relation to Rusal, but succeeds in relation to the other Rusal defendants.

(3) The Orienbank defendants' application under CPR 11 dated 21 October 2005 (for a declaration that the court has no jurisdiction to try the Part 20 claim against the Orienbank defendants/should not exercise any jurisdiction it may have) fails in relation to CDH, but succeeds in relation to the other Orienbank defendants.

153. Mr Doctor QC on behalf of Ansol submitted as follows.

Ansol has causes of action against each of the Part 20 defendants. The court should not make any assumption about the substance of the corporate defendants. There is no evidence that Rusal owns anything – there is no evidence that it is even a holding company in the English sense. It describes the vehicles it uses for its purposes, not as subsidiaries but as affiliates. Rusal deals through off-the-shelf non Russian companies in locations such as the BVI and Cyprus – see for example Elleray and CDH which have no assets, personnel or offices. These companies have nominee directors who play no part in their activities. The individual defendants are proper parties. Ansol has a cause of action in abuse of rights against each of them and it is desirable to include these individuals as defendants, so that the court can resolve all the matters in dispute. Mr Deripaska and Mr Bulygin played central roles in this matter. The individuals acted in multiple capacities in the complex conspiracy. In what capacities were Mr Saduloev or Mr Bulygin acting when they attended the meeting in Dubai on 14 January 2005? Mr Bulygin said "exposing CDH is a difficulty" and Mr Saduloev replied "yes, we will not expose CDH". Mr Saduloev participated in the Plan.

154. Mr Beazley QC for the Rusal defendants submitted as follows.

There is no real prospect of the contract claim against Rusal succeeding. It is common ground that the claim cannot be based on an oral agreement under Russian law. The allegation that there was a binding written contract has no real prospect of success. The Protocol was never intended to be a binding written agreement. Even if it was so intended, it lacked essential terms, such that it is not binding in Russian law. The abuse of rights case now pleaded has no real prospect of success. Reliance is placed on the expert evidence filed on behalf of the Part 20 defendants (Sukhanov, Bolshova and Shukorov). A claim of this generalised type based on abuse of rights is speculative, with no established basis in Tajik law (or Russian law). The court should not accede to the invitation to consider making entirely new Tajik law, on a basis rejected by one of those who drafted the relevant provisions of the Russian Civil Code, a very experienced Russian judge and a very experienced Tajik practitioner. The court is being asked to recognise an entirely new and previously unknown and unsupported category of claims, which would be of critical importance in the Tajik and Russian systems. There is no viable claim against any of the Rusal defendants. There is no real prospect of a successful claim against the individual Rusal defendants who have, no doubt, been included to try to apply some sort of pressure. They are, in effect, simply the senior people in Rusal. They had some contact with the Tajik Government, but Ansol's position is now that that is irrelevant.

Further there was material non-disclosure and the order of Master Price should be set aside for this reason.

The material non-disclosure consisted of (i) the failure to draw to the court's attention the fact that the claims against the Rusal defendants were governed by Russian or Tajik law and that there were material differences between English law and Russian or Tajik law which might be relied on by way of defence and (ii) the failure to draw to the court's attention the fact that the Rusal defendants might raise defences of act of state and or non-justiciability and/or sovereign immunity.

155. Mr Popplewell QC for the Orienbank defendants submitted as follows.

Where permission to serve out of the jurisdiction is granted on the basis of a pleading containing one cause of action, the claimant cannot amend to add a new cause of action nor seek to justify the permission on a cause of action not pleaded, even if the new cause of action is based on the same facts. Ansol now concedes that its claim (if any) against the Orienbank defendants is subject to Tajik law (abandoning the stance previously adopted that English or Guernsey law governed). The only basis for actionability would therefore be under Tajik law, not the English law causes of action pleaded in the Part 20 Claim Form and the original Particulars of Claim. Hence Ansol's application to amend to rely on Article 10 (abuse of rights). Whatever the outcome of the debate on Article 10 under Tajik law, the order of Master Price must be set aside, together with all steps based upon it, including service and the default judgments. The court has power to grant permission afresh in relation to an amended pleading if otherwise satisfied that the jurisdictional and justiciability requirements are satisfied, and to make efficient case management orders for service etc. The jurisdictional and justiciability requirements are not satisfied in the present case. Osborne Clarke confirm that they will be instructed on behalf of all the Orienbank defendants, including CDH, to accept service. The order of Master Price should be set aside because there has been material non-disclosure and/or because the case for which permission was granted has been abandoned and replaced by a new case in law and fact. The Orienbank defendants made the same allegations of material non-disclosure as the Rusal defendants and in addition referred to and relied on Ansol's note on justiciability served 21 June 2006 (see paragraph 25 above).

The result is that the order, service and the default judgments against each of the Orienbank defendants should be set aside. Ansol makes an application to amend and for fresh permission to serve the amended Claim Form. The applications should fail. There is no sustainable claim against TadAZ, the anchor defendant, and so no permission should be granted against the Orienbank defendants as necessary and proper parties to that claim. The claim against the Orienbank defendants has no real prospect of success for reasons of act of state/non-justiciability/immunity, alternatively is incoherent and unsustainable. The claim against the Orienbank defendants has no real prospect of success under Tajik law (Article 10 Abuse of Rights). England is not the proper forum. There is no procedural bar to the Part 11 application succeeding (as Ansol allege) by alleged submission to the jurisdiction or the existence of the default judgments.

Analysis

156. Before analysing these respective submissions it is necessary to refer to the procedural history.

157. In the without notice application to Etherton J "reference was made in the skeleton argument to various well known English decisions illustrating [the English] causes of action. Whether and to what extent Tajik law recognises similar causes of action, in the case of claims where Tajik law is likely to be the relevant law, were matters touched on in the evidence and in the skeleton argument. It was contended that, in so far as Tajik law was the relevant law, it recognised these or similar causes of action and, in so far as it was not the relevant law, English law was." (Paragraph 39 of the judgment of Blackburne J).

158. In the Part 20 proceedings, Ansol originally alleged that the Part 20 defendants breached various alleged contractual, tortious and fiduciary duties to Ansol and others, including in particular duties in relation to the alleged joint venture. These alleged breaches were said to have arisen in connection with an unlawful conspiracy between the Part 20 defendants and members of the Government of Tajikistan (including the President) to oust Ansol from the alleged joint venture and its trading position with TadAZ and to enable Rusal to take control of TadAZ.

159. On 21 June 2005 Master Price granted Ansol permission to make a counterclaim against TadAZ prior to filing its defence, to add the second to ninth Part 20 defendants to the Part 20 claim/counterclaim and permission to serve the Part 20 claim/counterclaim out of the jurisdiction against the second to ninth Part 20 defendants.

    It is not alleged that there was any deliberate intention to mislead Master Price. But in making the without notice application to Master Price, Ansol should have disclosed all material differences between English law and Russian/Tajik law and drawn attention to the possibility that the Rusal defendants and the Orienbank defendants might (a) allege by way of defence that the Part 20 claims were governed by Russian/Tajik law (Ansol now accept this – see paragraph 23 above) and (b) raise defences of act of state and/or non-justiciability and/or sovereign immunity. I do not consider that these failures were grossly negligent in the case of the claims against Rusal and CDH. As to (a) paragraph 155 above is repeated. As to (b) this might be said to have been reasonably obvious from the material before the court.

160. In their application under CPR 11 dated 3 October 2005 the Rusal defendants alleged (among other matters) that "the applicable law for the claims which Ansol … asserted against TadAZ and/or the second to fifth Part 20 defendants … was Tajik law or Russian law, and under Tajik and/or Russian law the claims made in the Part 20 claim did not constitute claims against TadAZ, or against the second to fifth defendants or any of them, with a reasonable prospect of success." In October 2005 the first witness statement of Mr Sukhanov (Russian law) and the first witness statement of Mr Shukurov (Tajik law) were served in support of the Rusal defendants' Part 11 application.

161. In their application under CPR 11 dated 21 October 2005 the Orienbank defendants alleged (among other matters) that "the applicable law for the claims which [Ansol] asserted against [TadAZ] and/or [the Orienbank defendants] was Tajik law or Russian law, and under Tajik and/or Russian law the claims made in the Part 20 claim did not constitute claims … with a reasonable prospect of success." The second witness statement of Mr Adrian Lifely in support of the application relied on Sukhanov 1 (Russian law) and Shukurov 1 (Tajik law).

162. Professor Butler's first witness statement dated 16 January 2006 was served by Ansol in opposition to the Part 11 applications.

163. As to the legal effect of the Protocol in Russian law, Professor Butler considered that the provisions of the Protocol are valid and binding on the parties (paragraph 20) for the reasons set out in paragraphs 15 to 19.

164. As to other obligations of parties arising out of or in connection with contracts, Professor Butler said that the Russian Civil Code does not provide for the use of "implied terms" or "implied conditions". Contracts must be in compliance with imperative provisions of Russian law, and there are also provisions which assist the court in determining the obligations to the parties. The Civil Code of the Russian Federation imposes a duty upon the parties to a contract not to obstruct performance of the contract and to assist the other party in performance. He referred to Articles 309 and 401. He said that in his view "if, under the Protocol, Rusal agreed to participate on a 50 – 50 basis in the business of Ansol with TadAZ, then that is what it was obliged to do, and was not entitled to undermine the joint venture. Whether Rusal complied with the agreement or whether it undermined it, is a matter for the court to decide." In his opinion by virtue of Articles 1 and 2 of the Civil Code of the Russian Federation there is a general obligation of good faith in Russian civil law. This would mean that parties are required to perform their obligations (contractual or otherwise) in good faith.

165. Professor Butler explained that Russian civil law contains the concept of "abuse of right" (Article 10, Civil Code). The reference in Article 10 (1) to "abuse of right in other forms" would cover conduct which would "obstruct or undermine the performance of the obligations under a contract." In his view "in the field of a joint venture, if parties agree to operate within the joint venture, and then proceed to operate outside the joint venture by engaging in activities which, whilst lawful in themselves, would undermine the joint venture or are a violation of the joint venture, then such conduct would be regarded as an abuse of rights under … Article [10]."

166. As to concepts of economic torts and non-contractual obligations Professor Butler said that Russian and Tajik law recognise obligations arising out of the causing of harm. There are very general provisions found in Chapter 59 of the Russian Code (Chapter 55 of the Tajik Code) governing these concepts. There is no classification of separate torts as exists in English or American law. According to Professor Butler this is not to say that the victim of the sort of activity described in the original Part 20 claim would be without remedy. Article 10 of the Russian Code refers to a rule of law described as "abuse of rights". The Tajik Code was adopted much later than the Russian Code and reflects the continuing development of civil law in the CIS. Article 10 of the Tajik Code is more developed than its Russian equivalent. In Professor Butler's view the acts described in the original Part 20 claim would fall within the concept of abuse of rights. Just because a person is not a party to a contract does not mean that he can (without legal consequences) collude or conspire with a party to a joint venture (or other contract) to undermine or breach that contract.

167. Mr Tricks' fifth witness statement on behalf of Ansol dated 17 January 2006 extending to 215 paragraphs maintained that the applicable law in the case of the tortious/delictual claims was Guernsey (or English) law (paragraph 172) but that if all the claims were governed by Russian or Tajik law they are nevertheless good claims (or there are equivalent claims that are good) (paragraph 176).

168. By its application dated 7 March 2006 Ansol sought permission to amend the Part 20 Particulars of Claim. The draft Amended Particulars of Part 20 claim contained paragraph 98 A: -

"Further or alternatively if which is denied, the Part 20 Claimant's claims (or any of them) are governed by Russian or Tajik law then the Part 20 Claimant will contend that the acts of the Part 20 Defendants were an abuse of rights contrary to Article 10 of the Russian Civil Code and/or Article 10 of the Tajik Civil Code.

PARTICULARS OF ABUSE OF RIGHTS

98 A.1 The Part 20 Claimant will rely on the acts particularised in paragraph 72 above and Annex A hereto as amounting to an abuse of rights."

169. Further witness statements from Mr Sukhanov, Mr Shukurov and Professor Butler followed.

170. On or about 1 June Ansol served Voluntary Particulars pursuant to paragraph 16 (b) of the order dated 3 May 2006 "including full particulars of each of the rights that TadAZ has abused under Article 10 of the Russian Civil Code or Article 10 of the Tajik Civil Code and … the like particulars in respect of the … Rusal defendants … and … the Orienbank defendants".

171. On 15 June I directed that Professor Butler provide a short further witness statement (i) listing separately each of the causes of action set out in the draft amended Part 20 Particulars of Claim, (ii) listing in the case of each cause of action the parties against whom the particular cause of action is pleaded, (iii) stating in the case of each cause of action and each party against whom the cause of action is pleaded, whether or not in his opinion there is a good arguable case under Tajik law that there is such a cause of action against each relevant defendant (with a cross-reference to the relevant paragraph in his existing witness statements), (iv) providing similar answers to those under (iii) above under Russian law. Provision was made for the experts instructed by the other parties to respond.

172. On 19 June (the first day of the hearing) Mr Doctor made certain concessions as to applicable law. The hearing was adjourned to allow Ansol to revise its pleadings and for Ansol to confirm the terms of its concessions.

173. On 19 June Ansol confirmed that it agreed that the law governing the contract between Ansol and Rusal is Russian law and that the law governing the rest of the claims is Tajik law. For completeness I should record that a qualification in Clyde & Co's note of 19 June as to the dishonest assistance claims was subsequently withdrawn. On 19 June Ansol served (1) draft amended Particulars of the Part 20 claim and (2) draft amended Response to Request dated 9 November 2005 by the first Part 20 defendant for Further Information of the Part 20 Particulars of Claim.

174. The draft amended Particulars of Part 20 claim were said to indicate the essential allegations of Ansol's claims and to eliminate any claims which cannot be contended for in Tajik or Russian law following on the concessions as to governing law set out above.

175. On 20 June (the second day of the hearing) the hearing was again adjourned to allow Ansol further time properly to plead its foreign law claims and to bring Annex A into the body of the pleading. The amended pleading was to be served by 3 pm the following day. Thus the third day of the hearing was lost.

176. On 21 June Ansol served Clyde & Co's note on justiciability, a draft amended Part 20 Claim Form, revised draft amended Particulars of Part 20 claim, a draft amended Response to the Request dated 9 November 2005 and a draft amended Reply to Defence of the first Part 20 defendant.

177. The revised draft amended Particulars of Part 20 claim contained claims against Rusal (damages for breach of the JVA and an order that Rusal compensate Ansol under certain paragraphs), against TadAZ and Hamer (damages for procuring and/or inducing breach of fiduciary duty and/or breach of contract and damages for unlawful interference) and against all of the Part 20 defendants (damages for abuse of rights).

178. On 22 June Mr Doctor confirmed that Ansol would issue an application for permission to amend its claims.

179. On 23 June Ansol served on the Part 20 defendants: -
(1) application notice dated 23 June for permission to amend the Part 20 claim and related pleadings.
(2) draft amended Part 20 Claim Form.
(3) revised draft amended Particulars of the Part 20 claim.
(4) draft amended Response to Request dated 9 November 2005 by the first Part 20 defendant for Further Information of the Part 20 Particulars of Claim.
(5) application notice dated 23 June for permission to serve out of the jurisdiction and for alternative service.
(6) Voluntary Further Particulars in respect of paragraphs 98F (e), 98G (h), 98H (f), 98K (c), 98L (d) and 98N (c) of the draft amended Particulars of Claim.

The case which Ansol now seeks to advance is set out in these pleadings.

It is most regrettable that it was not until 19 June that Ansol confirmed that it agreed that the law governing the alleged contract between Ansol and Rusal is Russian law and that the law governing the rest of the claims is Tajik law. The necessary amendments to reflect the very late concession as to proper law thus came at an extremely late stage and disrupted the hearing. It is not easy for the court to hold a fair balance between the parties in such a situation.

180. I turn to consider the position in relation to each of the Part 20 defendants.

181. As to TadAZ for the reasons set out above, TadAZ's application dated 3 February 2006 is dismissed. The Part 20 claim against TadAZ will continue as formulated on 23 June 2006.

182. I apply the principles upon which permission to serve outside the jurisdiction is granted as set out above.

183. As to Rusal and CDH I respectfully agree with those parts of the analysis of Blackburne J in paragraphs 174 to 184 in his judgment which are relevant to the claims against Rusal and CDH as now formulated in the latest version of the amended Particulars of Part 20 claim. The extensive evidence filed since his judgment in my opinion only serves to confirm these conclusions. The Part 20 claims will continue against these two defendants as reformulated on 23 June 2006. I consider that the following conditions are fulfilled. Ansol has satisfied me that there is between Ansol and TadAZ a real issue which it reasonable for the court to try. In my opinion Rusal and CDH are proper parties to the Part 20 claim. I consider that Ansol has shown a reasonable prospect of success in respect of each cause of action which it seeks to advance against Rusal and CDH. I refer to the entirety of the evidence of Professor Butler. A great deal of this evidence is contradicted by the experts instructed by the Part 20 defendants. But these issues cannot be resolved at an interlocutory stage. I am satisfied that England and Wales is the proper place in which to bring the claim against Rusal and CDH in all the circumstances, including in particular the fact that the main action is being pursued here. I consider that Ansol has discharged the burden of persuading the court that England is clearly the appropriate forum for the trial of the Part 20 claims against Rusal and CDH, being the forum where the case may most suitably be tried for the interests of all the parties and the ends of justice. I consider that if the full facts had been before the court in relation to the claims against Rusal and CDH at the time of the application for permission to serve out, permission would have been granted against these two defendants. I consider that justice demands that the Part 20 claim should be allowed to continue against these defendants in all the circumstances set out above. I impose a condition as a term of maintaining the order for service out against CDH, being that the judgment against CDH is set aside. If I am wrong in maintaining the order granting permission to serve out against Rusal and CDH, I would in the alternative have granted fresh permission to serve out against these defendants.

184. As to the remaining Part 20 defendants (Mr Deripaska, Rusal Management Company, Mr Bulygin, Mr Saduloev and OJSC Orienbank) I consider that the order granting permission to serve out should be set aside for (among others) the following reasons: -

(a) Caution must always be exercised in bringing foreign defendants within the jurisdiction under rule 6.20 (3). The jurisdiction under 6.20 (3) is particularly exorbitant because it enables a foreigner to be impleaded when the dispute has no connection with this country at all. Hence the need for even greater caution.

(b) It is not suggested that these defendants are necessary parties to the Part 20 claim. I am not persuaded that they are proper parties to the Part 20 claim.

The alleged joint venture agreement was with Rusal (not with any of the other Rusal defendants). Ansol contends that CDH was and remains owned or controlled by Rusal (or another Rusal entity) and is a front for Rusal.

As to Rusal Management Company in the course of the hearing Mr Doctor said "[the court] may take the view, and I will not spend much time on it, that it has fallen away, and that it is not important." I do not consider that any of the individual defendants are proper defendants. In view of the changes in Ansol's case referred to above, I am not persuaded that in all the circumstances Orienbank is a proper party.

(c) Ansol have been afforded every opportunity (some would say more opportunities than should have been afforded) to reformulate its case against these defendants. I refer to the revised draft amended Particulars of Part 20 claim served 23 June. I do not consider that CPR 16 PD.8.2 (matters which must be specifically set out in the Particulars of Claim if relied on) has been complied with in the case of these defendants in relation to notice or knowledge of a fact. I consider that the latest version of the revised draft amended Particulars of Claim against these defendants is inadequately particularised in a number of other respects. Further it is unclear why it is alleged the individuals are liable in their personal capacities.

(d) Any principle of foreign law or foreign legislative provision upon which a party's case is based must be clearly identified and the basis of its application explained (Admiralty & Commercial Courts Guide, C 1.2 (f)). Ansol only attempted to do this separately in relation to each Part 20 defendant at an extremely late stage. I am not persuaded that C 1.2 (f) has been complied with in the case of these defendants.

(e) There was a failure to disclose material matters at the time of the application to serve out to the extent identified above.

If following disclosure there is a material change in position, it would in theory be open to Ansol to make a further application for permission to serve out against a particular defendant.

(4) As to the application by the sixth and eighth defendants dated 31 October 2005 for an order under CPR 13.2 that the default judgment entered against them on 5 September 2005 be set aside (because it is said that the Part 20 claim was not properly served on the sixth and/or eighth defendants in accordance with the requirements of CPR 6), the judgments will be set aside in the light of my conclusions at (3) above. In addition the judgment against CDH will be set aside as a condition of maintaining the order granting permission to serve out against CDH.

185. Given my conclusions as set out above, it is not necessary to consider whether the Part 20 claim was properly served on the sixth and eighth Part 20 defendants. (The judgment against CDH would in any event have to be set

aside because the English law claims are no longer pursued against CDH and the judgment is by reference to the English law claims.)

(5) As to Ansol's application dated 20 January 2006 for an order that the court do remedy any error that may have occurred in the service of the Part 20 claim on the sixth and/or eighth Part 20 defendants, this does not arise in the light of my conclusions at (3) above.

(6) Ansol's application dated 7 March 2006 for an order that Ansol be permitted to amend the Part 20 Particulars of Claim was withdrawn in the course of the hearing and is accordingly dismissed.

(7) As to Ansol's application notice dated 23 June for permission to amend the Part 20 claim and related pleadings in accordance with the drafts served on 23 June, I will grant permission to amend the claim form and related pleadings on terms that the claims for relief against all Part 20 defendants other than TadAZ, Rusal, CDH and Hamer are deleted.

(8) As to Ansol's application dated 23 June for permission to serve out of the jurisdiction and for alternative service, this does not arise in relation to Rusal and CDH and is dismissed in relation to the other Rusal and Orienbank defendants.

186. In the light of these conclusions it is unnecessary to consider Ansol's contention that (in particular) Rusal has submitted to the jurisdiction.

Generally

187. Far too much time and money has been spent on interlocutory battles in this litigation. This is not in accordance with the overriding objective. I propose to give directions to ensure that the issues in the main action and the Part 20 proceedings against TadAZ, Rusal and CDH are resolved without further delay.

Brian Doctor QC, Paul Sinclair and Rosalind Phelps (instructed by Clyde & Co) for the Part 20 Claimant/Second Defendant.
Murray Rosen QC, Neil Kitchener and Henry Forbes Smith (instructed by Herbert Smith) for the First Part 20 Defendant.
Tom Beazley QC, Adrian Briggs, Shaheed Fatima and Nick Cherryman (instructed by Bryan Cave) for the Second to Fifth Part 20 Defendants.
Andrew Popplewell QC and Richard Gillis (instructed by Osborne Clarke) for the Sixth to Eighth Part 20 Defendants.